COMMONWEALTH OF MASSACHUSETTS SUPREME JUDICIAL COURT

S.J.C. No. 10558

COMMONWEALTH OF MASSACHUSETTS, Plaintiff-Appellee

v.

NATHANIAL DEPINA, Defendant-Appellant

ON DIRECT APPELLATE REVIEW FROM
THE BRISTOL COUNTY SUPERIOR COURT

AMICI CURIAE BRIEF OF BRADY CENTER TO PREVENT GUN VIOLENCE, INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LEGAL COMMUNITY AGAINST VIOLENCE, MASSACHUSETTS CHIEFS OF POLICE, MASSACHUSETTS MILLION MOM MARCH CHAPTER OF THE BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, AND STOP HANDGUN VIOLENCE IN SUPPORT OF APPELLEE

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Brady Center to Prevent Gun Violence

The Brady Center to Prevent Gun Violence is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that gun laws are properly interpreted to allow strong government action to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous *amicus curiae* briefs in cases relating to gun violence prevention and firearms laws, including in the Massachusetts Supreme Judicial Court gun cases *Jupin v. Kask* and *Commonwealth v. Runyan* and the U.S. Supreme Court Second Amendment case *District of Columbia v. Heller*.

International Brotherhood of Police Officers

The International Brotherhood of Police Officers ("IBPO") is one of the largest police unions in the country, representing more than 50,000 members. While the IBPO fully supports and defends the Second Amendment right to keep and bear arms, it strongly supports Massachusetts' common sense licensing and carrying requirements, which protect the public and

law enforcement officers by helping to keep dangerous weapons out of the wrong hands.

Legal Community Against Violence

Legal Community Against Violence ("LCAV") is a national law center dedicated to preventing gun violence. Founded by lawyers after an assault weapon massacre at a San Francisco law firm in 1993, LCAV is the country's only organization devoted exclusively to providing legal assistance in support of gun violence prevention. LCAV tracks and analyzes federal, state and local firearms legislation, as well as legal challenges to firearms laws. As an *amicus*, LCAV has provided informed analysis in a variety of firearm-related cases, including those brought on the basis of the Second Amendment.

Massachusetts Chiefs Of Police

The Massachusetts Chiefs of Police Association, Inc. is a non-profit corporation composed primarily of the police chiefs of cities and towns of the Commonwealth, and also includes federal law enforcement agencies, campus police chiefs, and other law enforcement and homeland security agencies. It is the largest law enforcement executive membership organization in Massachusetts. Established in 1887,

the Association provides traditional membership services, including meetings, member support, legislative advocacy, training and legal assistance. Through its affiliate, the Municipal Police Institute, Inc., a private non-profit charitable research and training organization, sample Policies & Procedures, Rules & Regulations, Legal Updates, training manuals and both classroom and on-line training are provided to police officers of all ranks across the state.

Massachusetts Million Mom March Chapter of the Brady Campaign to Prevent Gun Violence

The Massachusetts Million Mom March Chapter of the Brady Campaign to Prevent Gun Violence is part of a nationwide network of local volunteer activists of the Brady Campaign to Prevent Gun Violence, the country's largest, non-partisan, grassroots organization leading the fight to prevent gun violence. The Massachusetts chapter works locally on federal and state legislation and elections, education and awareness campaigns, linking with victims, and coalition building and community outreach. It is devoted to creating an America free from gun violence, where all Americans are safe at home, at school, at work, and in their communities.

Stop Handgun Violence

Stop Handgun Violence ("SHV") is a non-profit organization founded in 1995 by a group of businesspeople, including gun owners and victims of gun violence, concerned about the increasing number of gun deaths and injuries in America. SHV works to prevent firearm violence through education, public awareness and sensible legislation, without banning guns. SHV was a lead advocate of the Massachusetts Gun Control Act of 1998, which included safe storage mandates and has been successful in keeping guns out of the hands of children and criminals. Since the law was passed, SHV has seen significantly reduced numbers of accidental injuries and deaths among 0-19 year olds and Massachusetts currently has the second lowest firearm fatality rate in the nation, second only to Hawaii.

STATEMENT OF THE ISSUE

In a prosecution for unlawful carrying of a firearm, unlawful carrying of a loaded firearm, and possession of ammunition without a firearm identification card, did the motion judge correctly deny the defendant's motion to dismiss, which challenged the constitutionality of MASS GEN. LAWS ch.

140, § 131, and MASS. GEN. LAWS ch. 269, § 10, in light of *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).[1]

ARGUMENT

I. INTRODUCTION

A. Summary of the Gun Violence Problem.

Massachusetts has a strong public interest in preventing firearm deaths and injuries. This Court noted in *Jupin v. Kask* the "societal concern with weapons reaching the hands of unauthorized users." *Jupin v. Kask*, 447 Mass. 141, 154 (2006). As the Director of the Harvard Injury Research Center and the Youth Violence Prevention Center stated, "gun violence is a modern-day public health epidemic." DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH, 9 (Mich. Univ. Press 2004). In 2006, firearms killed 30,896 people across the

[1] Appellant was convicted of carrying a firearm without a license, in violation of MASS. GEN. LAWS ch. 269, § 10(a) (2009), and carrying a loaded firearm without a license, in violation of MASS. GEN. LAWS ch. 269, § 10(n) (2009). The violations of ch. 269 § 10(a), § 10(n) implicate Massachusetts' licensing statute, MASS. GEN. LAWS ch. 140, § 131 (2009). Appellant was also convicted of possessing ammunition without a firearm identification card, in violation of MASS. GEN. LAWS ch. 269 § 10(h) (2009), which implicates Massachusetts' firearm identification card statute, MASS. GEN. LAWS ch. 140, §§ 129B, 129C (2009). The trial judge dismissed the charge of illegally carrying ammunition as duplicative of the charge of unlawfully carrying a loaded firearm. The charge is addressed in this brief, as requested by the Court.

country and more than 200 in Massachusetts.[2] Between 1999 and 2006, guns killed 1,614 people in the Commonwealth.[3]

The Commonwealth's interest in protecting the public from gun violence requires and demands that the legislature act to regulate firearms in public and keep firearms from the wrong hands. Indeed, while gun violence is a serious problem in Massachusetts and throughout the nation, the gun violence problem is particularly acute in jurisdictions with lax gun laws.[4] The licensing and carrying statutes at issue here help respond to this public health epidemic without violating the narrow Second Amendment right to bear arms established by the Supreme Court in *Heller*.[5]

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[2] Ctrs. For Disease Control and Prevention, Nat'l Ctr. For Injury Prevention and Control, WISQARS Fatal Injuries: Mortality Reports, available at http://webappa.cdc.gov/sasweb/ncipc/mortrate.html (last visited October 10, 2009) [hereinafter Mortality Reports].

[3] *Id.*

[4] For example, in states and regions with a high prevalence of gun ownership, a disproportionately high number of five to fourteen year olds died from suicide, homicide, and accidental firearm related incidents. Matthew Miller, M.D. et al., *Availability and Unintentional Firearm Deaths, Suicides, and Homicides Among 5-14 Year Olds*, 52 J. TRAUMA 267 (2002).

[5] The *amici curiae* particularly wish to thank Patrick M. Murphy (J.D. 2010) for his extensive assistance in researching and analyzing the issues discussed herein.

B. Summary of Argument.

Massachusetts' firearm identification card statute, MASS. GEN. LAWS ch. 140, §§ 129B, 129C (2009), the statute requiring a license to carry a handgun in public, MASS. GEN. LAWS ch. 140, § 131 (2009), are reasonable gun violence prevention laws that protect the public without unduly interfering with the ability of "law-abiding, responsible citizens" to use firearms for self-defense in their home. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008). Aided by these and other laws, Massachusetts has achieved the lowest gun death rate in the continental United States.[6] *Amici* gun violence prevention and law enforcement organizations have a strong interest in ensuring that the Massachusetts Legislature's enactments are upheld to protect public safety.

The U.S. Supreme Court's recent Second Amendment decision does not place these laws in jeopardy. In *District of Columbia v. Heller*, the Court struck down the District of Columbia's broad restrictions on handgun possession and use in the home because they did not allow for self-defense use. 128 S. Ct. at 2783. While the Court's 5-4 decision was

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[6] Mortality Reports, *supra* note 2.

controversial,[7] it was also narrow; the Court made clear that it was only recognizing a right against the federal government for "law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 2821. Thus, the Court recognized only a limited right for citizens who were both "law-abiding" and "responsible," and then only for gun use in the home for self-defense.

The Court went further to clarify that this right is "not unlimited," does not prevent a wide range of reasonable and "presumptively lawful" gun laws, and is certainly not a right to keep a gun "in any manner whatsoever." *Id.* at 2816, 2817 n.26. The Court did not view a licensing regime or restrictions on carrying firearms outside the home as unconstitutional, as its holding countenanced both

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[7] *See, e.g.*, Richard Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 33 (criticizing the "faux originalism" of Justice Scalia's majority opinion); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 266-67 (2009) (arguing that historical evidence on both sides was equally strong and the majority should have deferred to the legislature rather than interject its own values on the text); Douglas Kmiec, *Guns and the Supreme Court: Dead Wrong*, TIDINGS ONLINE, July 11, 2008, available at http://www.the-tidings.com/2008/071108/kmiec.htm (arguing that a true originalist undertaking in *Heller* would have led to the exact opposite result).

limitations. *Id.* at 2822 ("Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home"). Thus, the Court's narrow holding was that Mr. Heller had a right only to register his gun and obtain a license to carry it in his home if he was both "law abiding" and "responsible." The Massachusetts statutes at issue here clearly fit within this permissible scheme described in *Heller*, as the Commonwealth allows "law abiding, responsible" citizens to obtain a firearm identification card, and does not even require a license to carry a firearm within one's home. *See* MASS. GEN. LAWS ch. 140, §§ 129B, 129C; MASS. GEN. LAWS ch. 269, § 10(a)(1).

Additionally, while the Court applied the Second Amendment to an enclave of the federal government, the District of Columbia, it expressly did not overturn precedent holding that the Second Amendment is not incorporated against the states and is not a limitation upon the states. *See Heller* at 2813, n. 23 ("Our later decisions in *Presser v. Illinois*, 116 U.S. 252, 265, 6 S. Ct. 580, 29 L. Ed. 615 (1886) and *Miller v. Texas*, 153 U.S. 535, 538, 14 S. Ct. 874, 38

L. Ed. 812 (1894), reaffirmed that the Second Amendment applies only to the Federal Government"). The Court has since granted certiorari to decide whether the Second Amendment is incorporated. *McDonald v. City of Chicago*, Docket No. 08-1521. Even if the Court holds that the Second Amendment is incorporated, the Massachusetts statutes at issue here are constitutional under *Heller*.

The motion judge was correct in denying defendant's motion to dismiss. The requirements that a person obtain a firearm identification card before possessing a firearm, and obtain a license before carrying a handgun outside the home, are both reasonable measures that do not violate the narrow Second Amendment right laid out in *Heller*. These laws are not only reasonable, but also a continuation of the long history of restrictions on possessing and carrying guns outside the home described below.

II. THE *HELLER* COURT RECOGNIZED ONLY A NARROW RIGHT TO POSSESS ARMS IN THE HOME FOR SELF-DEFENSE

Assuming, *arguendo,* that the Second Amendment is or will be incorporated,[8] the laws at issue are

[8] *Amici* believe this Court should defer to the U.S. Supreme Court's forthcoming decision on that issue. However, the remainder of this brief will assume, for

constitutional. In *Heller*, the Supreme Court held that the District of Columbia's "ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any *lawful* firearm *in the home* operable *for the purpose of immediate self-defense*." *Heller*, 128 S. Ct. at 2821-22 (emphasis omitted and added). The Court made clear that its holding was narrow and stressed that it did not jeopardize other firearms laws, noting that the Second Amendment leaves government "a variety of tools for combating that problem . . . the problem of handgun violence in this country." *Id.* at 2822.

By holding that the right was limited to "citizens" who are both "law-abiding" and "responsible," the Court implicitly recognized the risks posed by firearms in the wrong hands, and recognized the appropriateness of reasonable measures to ensure that only law-abiding and responsible citizens obtain arms. As the *Heller* Court also only recognized the use of arms in defense of "hearth and home," it did not recognize a right to carry firearms outside the home. *Id.* at 2821. The Court repeatedly

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purposes of argument, that the Second Amendment does apply to state laws.

stressed in its opinion that it was only recognizing the right to keep "any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 2822; *see also, id.* at 2817-8.

The *Heller* Court cautioned that its holding should not "cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 2816-7. The Court noted that the cited legitimate firearm limitations were merely "examples; our list does not purport to be exhaustive." *Id.* at 2817 n.26. The Court also pointed out 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." *Id.* at 2816 (emphasis added).

The Court went on to explicitly state that "the right secured by the Second Amendment is not unlimited . . . [it is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* (emphasis omitted). Just as the

freedom of speech will not protect a man who shouts fire in a crowded theater, the right to bear arms may be outweighed by the state's interest in public safety. *See* Saul Cornell, *Symposium: The Second Amendment and the Future of Gun Regulation: Historical, Legal, Policy, and Cultural Perspectives: Panel I: Historical Perspective: A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 507 (2004) [hereinafter *A Well Regulated Right*]. The *Heller* Court specifically did "not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose." *Heller*, 128 S. Ct. at 2799 (emphasis omitted).

This unambiguous text clearly limits the *Heller* opinion to laws that (1) forbid the possession of (2) legally owned firearms (3) within the home (4) by responsible and law-abiding people (5) for the purpose of immediate self-defense. Thus, even if the Second Amendment is incorporated to apply to state and local laws, it allows for reasonable firearms laws of the sort at issue here. To argue that the Second Amendment as construed by the Supreme Court in *Heller*

supports a right to carry firearms on the streets and that this right cannot be restricted by law enforcement, Petitioners must disregard *Heller*'s holding and the Court's repeated and emphatic language that the Second Amendment right it recognized is a narrow one.

Massachusetts' gun laws at issue here are both constitutional and reasonable. The firearm identification card statute directly furthers the goal of limiting gun possession to "law-abiding, responsible citizens." *Id.* at 2821. While Massachusetts law permits carrying a weapon - a broader privilege than the defense of "hearth and home" - it reasonably curtails this breadth with a requirement that a person obtain a license if they wish to carry a handgun in public. Neither of these laws infringes on the Second Amendment right, nor conflict with the Supreme Court's reasoning in *Heller*.

III. REASONABLE GUN LAWS ARE PERMISSIBLE UNDER *HELLER*

The *Heller* Court did not decide what standard of review should be applied in reviewing a Second Amendment challenge to a firearms law. However, the Court stated a broad, non-exhaustive list of firearms restrictions that it deemed "presumptively lawful,"

Heller, at 2816-7 n.26, implicitly rejecting a "strict scrutiny" standard of review:

> [T]he majority implicitly, and appropriately, rejects . . . [strict scrutiny] by broadly approving a set of laws--prohibitions on concealed weapons, forfeiture by criminals of the Second Amendment right, prohibitions on firearms in certain locales, and governmental regulation of commercial firearm sales—whose constitutionality under a strict scrutiny standard would be far from clear. . . . Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible.

Id. at 2851 (Breyer, J., dissenting)

To the extent the laws at issue here may implicate the narrow right defined in *Heller*, this court should apply the "reasonable regulation" standard used by the state and federal courts that have previously recognized an individual right to bear arms.

A. Pre-*Heller* State Cases Have Consistently Construed Similar State Right to Keep and Bear Arms Provisions as Allowing for Strong, Reasonable Gun Laws.

State courts have not applied strict scrutiny in

deciding gun restriction cases, even where the right to keep and bear arms was found to be fundamental. *See, e.g., Mosby v. Devine*, 851 A.2d 1031, 1044 (R.I. 2004) ("Even in jurisdictions that have declared the right to keep and bear arms to be a fundamental constitutional right, a strict scrutiny analysis has been rejected in favor of a reasonableness test . . . "); *State v. Cole*, 665 N.W.2d 328, 337 (Wis. 2003) ("If this court were to utilize a strict scrutiny standard, Wisconsin would be the only state to do so...the proper question is whether the statute is a reasonable exercise of police power"); *Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1222 (N.H. 2007) ("We agree with every other state court that has considered the issue: strict scrutiny is not the proper test to apply"). It does not seem that any state's courts apply strict scrutiny or another other type of heightened review when assessing gun laws. Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 686-87, 686-87 n.13 (2007).

Rather than applying strict or even intermediate scrutiny in challenges to firearms laws under state

RKBA[9] provisions, state courts have opted in favor of a "reasonable regulation test," which is akin to the rational basis test. "[S]tate courts universally reject strict scrutiny or any heightened level of review in favor of a standard that requires weapons laws to be only 'reasonable regulations' on the [right to bear arms]." Adam Winkler, *Gun Control: Old Problems, New Paradigms: The Reasonable Right to Bear Arms*, 17 STAN. L. & POL'Y REV. 597, 599 (2006). While rational basis review looks at whether the law is a rational means of furthering a legitimate governmental interest, the reasonable regulation test asks "whether the challenged law is a reasonable method of regulating the right to bear arms." Winkler, 105 MICH. L. REV., *supra*, at 717.

The Second Amendment was not, prior to *Heller*, construed as providing individuals with a right to firearms outside of participation in the "well-regulated militia" referenced in the Amendment's militia clause. *See United States v. Miller*, 307 U.S. 174 (1939). However, for many years state courts have construed state constitutional provisions that

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[9] Right to Keep and Bear Arms ("RKBA").

recognize a private right to arms, and those courts have consistently held that right to keep and bear arms ("RKBA") provisions in their state constitutions do not prevent or prohibit reasonable gun laws. *See, e.g.*, *State v. Smith*, 571 A.2d 279, 280 (N.H. 1990) (upholding ban on possession of firearms by felons); *Ford v. State*, 868 S.W.2d 875, 878 (Tex. Crim. App. 1993) (noting that the "legislature may regulate the possession of arms to prevent crime" and upholding a ban on short-barreled shotguns); *Rinzler v. Carson*, 262 So. 2d 661, 666-67 (Fla. 1972) (held statute making it unlawful for any person to possess any short-barreled rifle, short-barreled shotgun or machine gun did not infringe owner's right to keep and bear arms); *People v. Smelter*, 437 N.W.2d 341, 342 (Mich. Ct. App. 1989) (the "right to regulate weapons extends not only to the establishment of conditions under which weapons may be possessed, but allows the state to prohibit weapons whose customary employment by individuals is to violate the law"); *State v. Lake*, 918 P.2d 380, 382 (N.M. Ct. App. 1996) (statute prohibiting carrying a firearm where alcohol is sold did not violate state constitutional right to bear arms).

State courts, often relying on state police powers, have consistently ruled in favor of broad deference to the need for strong gun regulation. *See, e.g., City of Cincinnati v. Langan*, 640 N.E.2d 200, 206 (Ohio Ct. App. 1994) (prohibition on possession of semiautomatic weapons "is a reasonable exercise of the city's police power" and therefore does not violate Ohio Constitution); *Klein v. Leis*, 795 N.E.2d 633, 638 (Ohio 2003) (prohibition on carrying concealed weapons upheld as a regulation of the manner in which weapons can be carried authorized by the state's police power); *Robertson v. City & County of Denver*, 874 P.2d 325, 331 (Colo. 1994) (en banc) ("The right to bear arms may be regulated by the state under its police power in a reasonable manner."); *McIntosh v. Washington*, 395 A.2d 744, 755-57 (D.C. 1978) ("The Supreme Court has indicated that dangerous or deleterious devices or products are the proper subject of regulatory measures adopted in the exercise of a state's 'police power'").

While state courts have recognized that states and local governments retain broad police powers to regulate the possession of firearms, even in the face of constitutional protections for a private right to

keep and bear arms, these courts have drawn the line on laws that completely dispose of the right to bear arms. See, e.g. *State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2003) (state's police power is not absolute when it "eviscerates" the right to bear arms); *Trinen v. City & County of Denver*, 53 P.3d 754, 757 (Colo. App. 2002) (state may reasonably regulate the right to bear arms under its police power, but state may not render constitutional provisions "nugatory"); *State v. Dawson*, 159 S.E.2d 1, 11 (N.C. 1968) (any statute or construction of a common-law rule, which would amount to a destruction of the right to bear arms would be unconstitutional). In this case, Massachusetts law does not eviscerate, render nugatory or otherwise destroy the right to keep and bear arms. Rather, Massachusetts has properly applied its police power to create reasonable, commonsense regulations on the manner of firearms possession.

B. Post-*Heller* Federal Cases Have Consistently Construed *Heller* as Allowing for Strong, Reasonable Gun Laws.

Since *Heller*, federal courts construing the Second Amendment have recognized the limited scope of the right recognized by the Court. In the less than sixteen months since the decision was announced, there

have been well over 150 challenges to criminal prosecutions and gun laws on Second Amendment grounds, and all have been rejected. *See, e.g., United States v. Prince*, No. 09-10008-JTM, 2009 WL 1875709 (D. Kan. June 26, 2009); *United States v. Bumm*, No. 2:08-cr-00158, 2009 WL 1073659 (S.D. W.Va. Apr. 17, 2009); *Piscitello v. Bragg*, No. EP-08-CA-266-KC, 2009 WL 536898 (W.D. Tex., Feb. 18, 2009); *United States v. Fincher*, 538 F.3d 868 (8th Cir. 2008); *United States v. Holbrook*, 613 F. Supp. 2d 745 (W.D. Va. 2009); *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008).[10]

In *United States v. Masciandaro*, the court noted that "Heller's narrow holding is explicitly limited to vindicating the Second Amendment 'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *United States v. Masciandaro*, ___ F. Supp. 2d ___, 2009 WL 2750958, * 5 (E.D. Va. Aug. 26, 2009) (citing *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008)(emphasis added by citing court). In *Justice v. Town of Cicero*, the United

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[10] *See generally* Adam Winkler, *The New Second Amendment: A Bark Worse Than Its Right*, HUFFINTON POST, January 2, 2009, available at http://www.huffingtonpost.com/adam-winkler/the-new-second-amendment_b_154783.html (writing in January 2009 that courts had rejected sixty Second Amendment challenges they had considered).

States Court of Appeals for the Seventh Circuit upheld Cicero, Illinois' ordinance requiring that firearms be registered, pointing out the "critical distinction" between prohibiting gun possession and merely regulating gun possession, and finding that even if the Second Amendment were incorporated, "the Cicero ordinance, which leaves law-abiding citizens free to possess guns, appears to be consistent with the ruling in *Heller*." *Justice v. Town of Cicero*, 577 F.3d 768, 774 (7th Cir. 2009).

IV. MASSACHUSETTS' FIREARM IDENTIFICATION CARD REQUIREMENT AND PUBLIC CARRYING RESTRICTIONS DO NOT VIOLATE THE NARROW SECOND AMENDMENT RIGHT DEFINED IN HELLER

The two Massachusetts laws at issue here are the firearm identification card statute, which requires that a person obtain an identification card before possessing a firearm, and the firearm licensing statute, which requires that a person obtain a license in order to carry a handgun in public. *See* MASS. GEN. LAWS ch. 140 §§ 129B, 129C; MASS. GEN. LAWS ch. 140 § 131. The Supreme Court's ruling in *Heller* does not support Appellant's claim that these Massachusetts laws infringe on his Second Amendment right to keep and bear arms.

A. *Heller* does not affect Massachusetts' possession or license to carry laws

The Massachusetts statutes at issue here fall entirely outside the scope of the limited right recognized in *Heller*. They do not prevent the possession of firearms in the home by law-abiding, responsible persons for the purpose of self-defense, and therefore do not infringe on the right recognized in *Heller*. Chapter 140, section 129B describes the reasonable qualifications needed to obtain a firearm identification card to possess a gun. Furthermore, chapter 269, section 10 allows the carrying of rifles and shotguns in public in certain circumstances by persons who have a firearm identification card, and reasonably requires a license to carry a handgun in public. MASS. GEN. LAWS ch. 140, §§ 129B, 129C; MASS. GEN. LAWS ch. 269, § 10 (reasonably restricting firearm identification cards from those statutorily precluded based on past convictions, immigration status, restraining orders, mental illness, substance abuse or age).

As the *Heller* Court restricted its holding to citizens who were "responsible" as well as "law-abiding," the Court clearly recognized that the Second

Amendment does not prevent governmental authorities from restricting firearms to those who can possess firearms responsibly. The Supreme Court certainly did not deem licensing regimes unconstitutional, as it specifically conditioned Mr. Heller's permitted possession of a firearm on his first obtaining a license from the District of Columbia, "assuming that [he] is not disqualified from the exercise of Second Amendment rights." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2822 (2008) (emphasis omitted). Clearly, the Supreme Court had no intention of invalidating - and specifically did not invalidate - licensing requirements such as those enacted and implemented here in Massachusetts, but which are challenged in this case.

B. Restrictions on carrying guns outside the home are long-standing and reasonable.

As noted, the *Heller* Court did not recognize a Second Amendment right to carry firearms outside the home. Indeed, the Court rejected any contention that a right to "bear" arms is synonymous with a right to "carry" firearms outside the home, as the Court limited Mr. Heller's right to "carry [his firearm] in the home." *Id.* 2822.

Additionally, the *Heller* Court recognized a non-exhaustive list of "longstanding" firearms restrictions that it deemed "presumptively lawful."[11] Restrictions on carrying firearms in public are equally "longstanding," if not more so. As early as 1328, the Statute of Northampton declared that no person was allowed to "come before the King's Justices, or other of the King's Ministers . . . with Force and Arms," or to "ride armed by Night nor by Day, in Fairs, Markets." Winkler, 105 MICH. L. REV., *supra* at 709 (2007) (citing Statute of Northampton, 2 Edw. 3, ch. 3 (1328)). Blackstone's Commentaries on the Laws of England, written in 1765, noted that the people had a right to bear arms "suitable to their condition and degree, and such as are allowed by law," and went on to say that the right was subject to "due restrictions." Winkler, 105 MICH. L. REV., *supra*, at

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[11] *Id.* at 2816-17 n.26

> "Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Id. at 2816-17.

709 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 139 (Univ. of Chicago Press, 1979) (1765)).

Historically in the United States, the right to bear arms was not unlimited. "As long as there have been guns in America, there have been regulations." Saul Cornell, *The Ironic Second Amendment*, 1 ALB. GOV'T L. REV. 292, 301 (2008). For example, "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." *District of Columbia v. Heller*, 128 S. Ct. at 2816. Militia laws were state laws requiring the government to keep detailed records of which individuals possessed arms. *See, e.g.*, § 9, 1776 Mass. Acts at 18 (requiring "an exact List of [each man in the] Company, and of each Man's Equipments."); Saul Cornell & Nathan DeDino, *A Well-Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 505 (2004); *see also* SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (Oxford University Press 2006) (noting early efforts to regulate guns). Some states also required loyalty oaths, upon which gun possession was contingent. *See, e.g.*, §5, 1778 Pa. Laws at 126 (any person who would

"refuse or neglect to take the oath or affirmation" was required to turn in his arms and was barred from keeping any firearms or ammunition in his "house or elsewhere").

After adoption of the Second Amendment in 1791, several states prohibited or restricted the carrying of concealed weapons. *See, e.g.*, Act of Mar. 18, 1859, 1859 Ohio Laws 56 (prohibiting the carrying of concealed weapons); Act of Feb. 2, 1838, ch. 101, 1838 Va. Acts at 76 (same); Act of Oct. 19, 1821, ch. 13, 1821 Tenn. Pub. Acts 15 (same). Both Georgia and Tennessee criminalized the sale of certain weapons that could be easily concealed. *See*, Act of Dec. 25, 1837, 1837 Ga. Laws 90; Act of Jan. 27, 1838, ch. 137, 1838 Tenn. Pub. Acts 200. According to Professors Cornell and DeDino, "if one simply looks at the gun laws adopted in the Founding Era and early Republic, the evidence for robust regulation is extensive." Cornell & DeDino, *supra*, at 505.

Massachusetts' long history of gun regulation has consistently shown an "unwavering legislative intent" to regulate the safe use of firearms. *Commonwealth v. Lindsey*, 396 Mass. 840, 842 (1986). "The goal of firearms control legislation in Massachusetts is to

limit access to deadly weapons by irresponsible persons." *Ruggiero v. Police Comm'r of Boston*, 18 Mass. App. Ct. 256, 258 (1984). Recognizing that firearms are a "highly dangerous instrumentality," the Commonwealth has long sought to protect its citizens through controlling the availability of firearms. *Sojka v. Dlugosz*, 293 Mass. 419, 423 (1936). This preemptive approach is "often preferable to meting out punishment after an unfortunate event." *Ruggiero*, 18 Mass. App. Ct. at 259. As a result of its successful history of firearm regulation, Massachusetts boasts the lowest gun death rate of any state in the continental United States.[12]

Over the course of centuries, the Commonwealth has enacted many gun violence prevention laws. For example, a 1919 Massachusetts law (1919 Mass. Acts 180) prohibited individuals from providing firearms, air guns or other dangerous weapons, or ammunition to minors under the age of fifteen. A 1925 law forbade the issuance of a firearms license to an unnaturalized person, a person convicted of a felony or the unlawful use or sale of drugs, or a minor under fifteen. 1925 Mass. Acts 284 § 4. Massachusetts also passed laws

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[12] Mortality Reports, *supra* note 2.

that disarmed those "disaffected to the Cause of America," who refused to take an oath of loyalty. Act of Mar. 14, 1776, c. VII, 1775-1776 Mass. Acts 31. The Commonwealth disarmed those who had been pardoned for their participation in Shays' Rebellion and required an inventory of all weapons possessed by members of the militia. Act of Feb. 16, 1787, ch. VI, 1787 Mass. Acts 555; Act of Mar. 1 1783, ch. XIII, 1783 Mass. Acts p. 218; Act of July 19, 1776, ch. I, 1775-1776 Mass. Acts 15. Indeed, *Heller* cited to several Massachusetts gun restrictions, including one prohibiting "discharg[ing] any Gun or Pistol charged with Shot or Ball in the Town of Boston," and the other the possession of loaded firearms in "any Dwelling House, Stable, Barn, Out-house, Ware-house, Store, Shop or other Building." *Heller*, 128 S. Ct. at 2819-20 (citing Act of Mar. 1. 1783, ch. 13, 1783 Mass. Acts p. 218; Act of May 28, 1746, ch. X).

V. THE LICENSING AND CARRYING LAWS CHALLENGED HERE ARE KEY COMPONENTS OF A COMPREHENSIVE REGULATORY SCHEME

A. The Legislature has determined that the potential for danger associated with carrying weapons in public requires a significant penalty.

This Court has stated, "we are not unmindful of the dangers relating to unlicensed possession of firearms." *Commonwealth v. Young*, 453 Mass. 707, 717 (2009). The simple fact is that a gun carried in public exposes others on the streets or in other public places to risk. As a result, the Commonwealth reasonably requires a license to carry a handgun in public. To deter unlicensed carrying, a violation of MASS. GEN. LAWS ch. 269, § 10(a) carries a mandatory jail sentence. As this Court asserted, mandatory minimums, especially in gun cases, must be "inflexible and exceptionally harsh so as to be effective." *Commonwealth v. Jackson*, 369 Mass. 904, 915 (1976). But as the Court also noted, the statute "is harsh, yet clear." *Commonwealth v. Cowan*, 422 Mass. 546, 549 (1996).

In *Commonwealth v. Jackson*, this court upheld the constitutionality of that mandatory sentence (one of the first in the Commonwealth), noting that when "we

face a frightening rise in crime, our Legislature must be able to experiment in finding solutions." *Jackson*, 369 Mass. at 911-12 ("we cannot say that a one-year mandatory minimum is so disproportionate to the magnitude of the crime as to render the statute unconstitutional"). In the case of gun violence, this Court concluded, the Legislature could have reasonably relied on data that indicated a direct correlation between increased gun ownership and increased use of guns in violent crime, in particular among non-licensed owners. *Id.*

B. The Legislature made a reasonable, common sense determination in assigning responsibility for reviewing gun license applications to local law enforcement chiefs.

While a firearms identification card allows a person to possess firearms and carry rifles or shotguns in public under certain circumstances, MASS. GEN. LAWS ch. 140, § 131 establishes a separate process for obtaining a license that may be used to purchase, rent, lease, borrow, possess or carry a firearm. The Legislature made a reasonable and common sense determination that law enforcement officials responsible for the under public safety should have the authority to approve or deny license applications.

As noted in *City of Boston v. Boston Police Patrolmen's Ass'n*, "the decision as to who shall carry a firearm and under what conditions, be it a public official or a private citizen, is one which our Legislature has seen fit to leave with the heads of law enforcement agencies." *City of Boston v. Boston Police Patrolmen's Ass'n*, 8 Mass. App. Ct. 220, 225 (1979).

Unlike the firearm identification card application process, the licensing authority has discretion to determine whether or not an applicant is "suitable" for gun ownership. MASS. GEN. LAWS. ch. 140, §§ 121, 131 (the "licensing authority" is defined as the "chief of police or the board or officer having control of the police in a city or town, or persons authorized by them"). Like the limiting term "responsible" used by the *Heller* Court, "suitable" is a term that may not be absolute or subject to precise quantification, but implies some discretion in assessing risk. It is certainly reasonable and appropriate for the Massachusetts Legislature to permit discretion in licensing by those charged with protecting the public -- the commissioners and chiefs of police of Massachusetts. As noted in *Ruggiero*,

MASS. GEN. LAWS ch. 140 § 131 was created in order "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." *Ruggiero*, 18 Mass. App. Ct. 256, 259 (quoting Rep. A.G., Pub. Doc. No. 12, at 233-234 (1964)).

Over the last several decades, Massachusetts courts have repeatedly upheld the validity of the licensing scheme, and have given licensing authorities broad discretion in approving and denying applicants. *See, e.g. DeLuca v. Chief of Police of Newton*, 415 Mass. 155, 158-60 (1993) (chief of police allowed to consider applicant's pardoned offenses in determining suitability for a firearms license); *Commonwealth v. Lindsey*, 396 Mass. 840, 842-43 (1986); *Commonwealth v. Wood*, 398 Mass. 135, 136 (1986) (holding that to lawfully carry a firearm one must either possess a valid license or qualify for an exemption); *Commonwealth v. Seay*, 376 Mass. 735, 738-39 (1978); *Rzeznik v. Chief of Police of Southampton*, 374 Mass. 475, 479-82, 181 n.5 (1978) (chief of police allowed to view sealed convictions in determining whether to grant a license); *Howard v. Chief of Police of*

Wakefield, 59 Mass. App. Ct. 901 (2003) (commissioner acted within discretion in denying renewal to applicant recently subject to a domestic relations order to surrender firearms); *Godfrey v. Chief of Police of Wellesley*, 35 Mass. App. Ct. 42 (1993) (police chief acted within his discretion to revoke a license when licensee would not cooperate with an investigation into random shootings in the area); *MacNutt v. Police Comm'r of Boston*, 30 Mass. App. Ct. 632 (1991) (commissioner had discretion to require a shooting test for license renewal); *Ruggiero v. Police Comm'r of Boston*, 18 Mass. App. Ct. 256 (1984) (commissioner could require both a test of suitability and a purpose for license). Heads of police departments, as experts in the field of firearms and public safety, make ideal licensing authorities. Not only are they responsible for public safety, they possess specialized expertise in firearm safety. They have experience with both the upstanding and criminal elements of the population, making them excellent judges of "suitable" character. They are therefore entirely appropriate judges of what constitutes an acceptable licensee as well as what constitutes an undesirable or unsafe licensee.

Further, as a precaution against arbitrary or inconsistent licensing, aggrieved applicants may file for a judicial review or appeal of adverse decisions made by licensing authorities. MASS. GEN. LAWS ch. 140, § 131(f). After a hearing, the justice may direct that the license be issued or reinstated to the applicant if there were no reasonable grounds for denying the application. Understandably, courts can reverse a licensing authority's decision if it is "arbitrary, capricious, or an abuse of discretion." *Chief of Police of Shelburne v. Moyer*, 16 Mass. App. Ct. 543, 546 (1983). Thus, the Massachusetts statutes provide multiple levels of review to ensure a citizen's fair opportunity to obtain a firearm license.

VI. MASSACHUSETTS' LICENSING AND CARRY RESTRICTIONS SAVE LIVES

A. Massachusetts' Licensing Law Saves Lives.

In Massachusetts, a person wishing to possess firearms must obtain either a firearm identification card or a Class A or Class B license. MASS. GEN. LAWS ch. 140, §§ 129B, 129C, 131. Licensing laws such as Massachusetts', which prevent irresponsible persons from obtaining or carrying firearms reduce the

availability of firearms to high-risk individuals and decrease the number of firearm-related injuries and fatalities. In the United States, there are approximately 100,000 shootings every year.[13] In 2007, there were 11,512 murders with firearms, 190,514 robberies with firearms, and 183,153 aggravated assaults with firearms.[14] In 2006, the national per capita gun death rate was 10.36 per 100,000.[15] Nevada, Mississippi, Alaska, Alabama, and Louisiana had the highest per capita gun death rates, which ranged from 16.30 to 19.58 gun deaths per 100,000.[16] All of these states have weaker gun laws than Massachusetts, all have a higher percentage of gun ownership, and all but one of these states do not employ a licensing regime such as Massachusetts, in which law enforcement may prevent persons whose possession could pose a risk to the public from carrying firearms. Massachusetts, on the other hand, had one of the lowest per capita gun

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[13] Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 1 (2009).
[14] Bureau of Justice Statistics. Key Facts at a Glance: Crimes Committed with Firearms, 1973-2007. Available at http://www.ojp.usdoj.gov/bjs/glance/tables/guncrimetab.htm.
[15] Mortality Reports, *supra* note 2.
[16] *Id.*

death rates in the country; only Hawaii - which also has strong firearms laws - had a lower per capita gun death rate than Massachusetts.[17] According to researchers at Harvard School of Public Health, "U.S. states with fewer guns had lower rates of firearm-related suicide, homicide, and unintentional deaths after adjusting for other socio-demographic differences. The states with the lowest prevalence of gun ownership were generally those with the most restrictive handgun licensing laws."[18] Massachusetts' licensing laws play a major role in the state's low per capita gun death rate.

B. Restrictions on carrying concealed weapons save lives.

While many states have "shall-issue" laws that prohibit the licensing authority from denying carrying concealed weapons permits to individuals who are not statutorily prohibited from owning a firearm, Massachusetts has chosen a "may-issue" regime that gives the licensing authority discretion in granting

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[17] *Id.*

[18] Jon S. Vernick, James G. Hodge, Jr., and Daniel W. Webster. *The Ethics of Restrictive Licensing for Handguns: Comparing the United States and Canadian Approaches to Handgun Regulation*, 35 J.L. MED. & ETHICS 668, 672 (2007).

individuals a permit to carry concealed weapons.[19] MASS. GEN. LAWS ch. 140, § 131. Nothing in *Heller* suggests that the Second Amendment bars states from allowing law enforcement or other appropriate authorities to restrict who may carry guns in public, concealed or otherwise.

Furthermore, restrictive carrying laws, such as Massachusetts', decrease the risk that high-risk individuals will carry concealed weapons in public and cause firearm-related injuries or fatalities. Studies have shown that shall-issue states, such as Florida and Texas, have issued concealed handgun permits to individuals with prior criminal convictions or a history of mental illness. In 2000, the Los Angeles Times reported that since Texas became a "shall-issue" state, more than 400 individuals with prior criminal convictions have been issued concealed handgun licenses.[20] Moreover, the Violence Policy Center found that "Texas concealed handgun license holders were

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[19] Legal Community Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* (2008), available at http://www.lcav.org/content/carrying_concealed_weapons.pdf.

[20] Richard A. Serrano, *Texas' Concealed Gun License Law*, L.A. TIMES, Oct. 3, 2000.

arrested for a total of 5,314 crimes from January 1, 1996 to August 31, 2001."[21] These licensees were arrested for crimes, such as murder, kidnapping, sexual assault, and theft.

In Florida, another "shall-issue" state, during the first half of 2006 alone, concealed-weapons licenses were given to more than 1,400 individuals who had previously pleaded guilty or no contest to felonies, 216 individuals with outstanding warrants, 28 individuals with active domestic-violence injunctions against them, and 6 registered sex offenders.[22] Restrictive gun carrying laws, such as Massachusetts', save lives by giving law enforcement the discretion to deny concealed carrying weapons permits to high-risk individuals who pose a danger to society by carrying firearms in public.

VII. CONCLUSION

Massachusetts' firearm identification card and licensing statutes are crucial laws designed to protect the public from gun violence, while

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[21] Violence Policy Center, *License to Kill IV: More Guns, More Crime*, 2 (June 2002), available at http://www.vpc.org/graphics/ltk4.pdf.

[22] Megan O'Matz and John Maines, *In Florida, It's Easy to Get License to Carry Gun*, SOUTH FLORIDA SUN-SENTINEL, Jan. 28, 2007, at 1A.

safeguarding the Second Amendment. The *Heller* Court recognized the important role of the government in combating the problem of gun violence. Although this Court must defer to Supreme Court precedent on the issue of whether the Second Amendment is incorporated, it is clear that the laws at issue here are constitutional even if the Supreme Court ultimately holds that the Second Amendment applies to the states. As the firearm identification card and licensing statutes are entirely consistent with *Heller*, the motion judge was correct in denying defendant's motion to dismiss.

Respectfully Submitted,
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CERTIFICATION PURSUANT TO MASS. R. A. P. 16

Now comes Scott Harshbarger, counsel for the *Amici Curiae*, who hereby certifies that the brief submitted for the *Amici Curiae* herein complies with the rules of this court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to the briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

I further attest that this brief is being filed under Mass. R. A. P. 17 and in compliance with Mass. R. A. P. 13(a), and that the day of mailing is within the time fixed for filing by this court.

Scott Harshbarger

CERTIFICATE OF SERVICE

I, Scott Harshbarger, hereby certify that, on this day, I have caused to be served by first class mail, postage prepaid, a true and correct copy of the foregoing ***AMICI CURIAE BRIEF*** on the following counsel of record:

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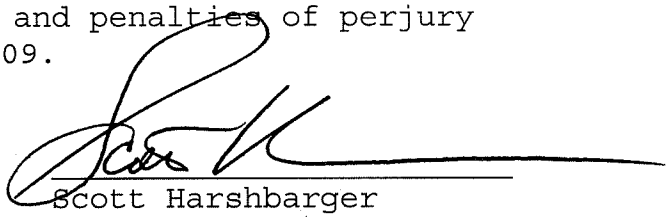

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