No. 17-2998

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEVIN W. CULP; et al.,
Plaintiffs-Appellants,

v.

LISA MADIGAN, in her Official Capacity as Attorney General of the State of Illinois; LEO P. SCHMITZ, in his Official Capacity as Director of the Illinois State Police; and JESSICA TRAME, as Bureau Chief of the Illinois State Police Firearms Services Bureau,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of Illinois, No. 3:14-cv-3320 (Myerscough, J.)

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

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Appellate Court No: 17-2998

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Giffords Law Center to Prevent Gun Violence ("Giffords Law Center"), formerly the Law Center to Prevent Gun Violence, is a national, nonprofit organization dedicated to reducing gun violence and gun deaths in America. The organization was founded in 1993 after a gun massacre at a downtown San Francisco law firm, and was renamed Giffords Law Center in October 2017 after partnering with former Congresswoman Gabrielle Giffords. Giffords Law Center tracks and analyzes federal, state, and local firearms legislation, participates in Second Amendment litigation nationwide, and supports jurisdictions facing legal challenges to their gun laws. Giffords Law Center has provided informed analysis and expertise as an *amicus* in dozens of important firearm-related cases nationwide, including *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010); *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406 (7th Cir. 2015); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), and numerous other cases.[1]

[1] All parties have consented to the filing of this brief. No counsel of a party in this action authored this 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 ARGUMENT

This Court's prior decision in this case correctly recognized that Illinois may enforce "significant limitations" on the carrying of concealed weapons in public to protect its residents from gun violence. *Culp v. Madigan (Culp I)*, 840 F.3d 400, 401 (7th Cir. 2016). These limitations include restricting concealed carry licenses (CCLs) to those who are "qualified, law-abiding, and mentally healthy." *Id.* (internal quotation marks omitted). Yet, Appellants now seek to hamstring Illinois from actually enforcing the sensible limitations this Court—and every court to have considered similar laws—has recognized are both consistent with the Second Amendment and essential for protecting people from armed violence. The Court should reject Appellants' challenge and uphold the Firearm Concealed Carry Act, 430 ILCS 66/1 *et seq*., which bars nonresidents from states without substantially similar laws from applying for an Illinois CCL.

At its core, Appellants' Second Amendment claim is that nonresidents have a right to prove their entitlement to an Illinois CCL solely based on information their home state has chosen to collect. But the uncontroverted evidence shows that the Illinois State Police lacks reliable access to information needed to verify the qualifications of applicants from states whose concealed carry laws are not "substantially similar" to the laws of Illinois—and which Illinois deems necessary to protect the public. Firsthand access to this information is crucial, as many states

have implemented defective licensing and recordkeeping systems that have allowed people who are unqualified by any definition—and under Illinois law—to obtain CCLs.

The evident flaws in dissimilar states' CCL regimes have and will continue to endanger the public. Appellants' assertion that there is only speculative evidence of harm is demonstrably false. Many states, including those in which Appellants reside, have issued concealed carry licenses to hundreds of people with criminal histories or other disqualifying factors. Investigations have revealed countless examples of these unqualified license holders committing violent crimes.

In terms of the legal standard, Illinois' restrictions on nonresident CCL applications are at most subject to intermediate scrutiny, as they only modestly burden plaintiffs' Second Amendment rights. The nonresident application restrictions readily survive intermediate scrutiny because they substantially further Illinois' important interest in verifying that licensees are "qualified," "law-abiding," and "mentally healthy." Likewise, the restrictions accord with core principles of federalism, which recognize that states may experiment with designing better gun laws and need not eliminate "local differences … in a search for national uniformity." *Friedman v. City of Highland Park, Ill.*, 784 F.3d 406, 412 (7th Cir. 2015). States with the weakest CCL regimes should not be able to

influence who can carry concealed weapons in Illinois. Consequently, Illinois' nonresident application restrictions should be upheld.

ARGUMENT

I. At Most, This Court Should Apply Intermediate Scrutiny to Appellants' Second Amendment Challenge.

The district court correctly found that it was bound by this panel's application of intermediate scrutiny to Appellants' Second Amendment challenge. *See Culp v. Madigan (Culp II)*, 270 F. Supp. 3d 1038, 1054 (C.D. Ill. 2017) (citing *Culp I*, 840 F.3d at 403). That application of intermediate scrutiny is binding here as the law of the case because the panel did not make a plain error of law. *See Sierra Club v. Khanjee Holding (US) Inc.*, 655 F.3d 699, 704 (7th Cir. 2011) ("Matters decided on appeal become the law of a case to be followed on a second appeal, unless there is plain error of law in the original decision.") (citation omitted). In any event, intermediate scrutiny is the appropriate standard in this case.

The Seventh Circuit, like others, applies a two-step framework to Second Amendment challenges. *See Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684, 703 (7th Cir. 2011). First, the court must determine whether the regulated activity falls within the scope of the Second Amendment right, and second, if it does, the court must "evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve." *Id.* The rigor of judicial review in this evaluation

depends on "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Id.* (citation omitted). Accordingly, a severe burden or near-total ban on the exercise of the core right must satisfy strict scrutiny, whereas "modest burdens on the right" and "laws that merely regulate rather than restrict" are more easily justified. *Id.* at 708.

The Supreme Court instructed in *Heller* that the "core" of the Second Amendment right is the right to possess firearms for self-defense in one's home. *District of Columbia v. Heller*, 554 U.S. 570, 629–32 (2008); *see also Ezell I*, 651 F.3d at 689 ("*Heller* held that the [Second] Amendment secures an individual right to keep and bear arms . . . for self-defense, most notably in the home."). This Court has further interpreted the core right as including corresponding rights—such as the right to acquire and maintain proficiency in firearm use—after concluding that the core right "'wouldn't mean much without the training and practice that make it effective.'" *Ezell v. City of Chicago (Ezell III)*, 846 F.3d 888, 892 (7th Cir. 2017) (quoting *Ezell I*, 651 F.3d at 704).

Because Appellants reside in states other than Illinois, by definition any restrictions Illinois imposes on gun possession or use do not affect Appellants' core right of self-defense in their homes. But more broadly, as articulated in *Heller*, the "core" Second Amendment right does not extend to carrying hidden guns in public. Historical precedent and common sense compel the conclusion

that, to the extent that the Second Amendment protects a right to concealed carry at all,[2] that right lies closer to the margins of the Second Amendment than the core, and therefore warrants at most intermediate scrutiny. *See Ezell I*, 651 F.3d at 702 ("'[T]he scope of the Second Amendment right' is determined by textual and historical inquiry.") (quoting *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 785–86 (2010)). As the Supreme Court and other courts have noted, a historical review reveals that strict restrictions and even outright prohibitions on carrying concealed weapons were consistently found to be constitutional. *See Heller*, 554 U.S. at 626 (noting 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"); *see also, e.g.*, *Peruta*, 824 F.3d at 933–39 (reviewing history of concealed carry regulations in the United States).

[2] In *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), this Court determined that the Second Amendment offers some protection of the right to carry firearms outside of the home. But courts have come to different conclusions as to whether the Second Amendment protects a right to carry *concealed* firearms. *See Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (concluding that the Second Amendment right "does not include, in any degree, the right of a member of the general public to carry concealed firearms in public."), *cert. denied*, 137 S. Ct. 1995 (2017); *Peterson v. Martinez*, 707 F.3d 1197, 1209–10 (10th Cir. 2013) (concluding that Second Amendment does not provide the right to carry a concealed firearm); *but cf. Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (striking down D.C.'s "good reason" law limiting issuance of CCLs to those with special need for self-defense under Second Amendment).

Additionally, *Moore* addressed a law that prohibited Illinois residents from carrying guns in public under all circumstances, and did not offer any guidance as to which level of scrutiny should apply to laws that regulate but do not ban concealed carry. No court reviewing a challenge to a "shall issue" concealed carry law like Illinois' current law has applied strict scrutiny.

This historical inquiry produces persuasive evidence that concealed carry of firearms in public is not within the core of the Second Amendment right, that concealed carry can be regulated to a significant degree, and that concealed carry laws should be reviewed under intermediate scrutiny.

Additionally, concealed carry laws warrant no more than intermediate scrutiny because of the inherent risk of carrying concealed firearms in public. As this Court and other federal courts have acknowledged, concealed carry, even by law-abiding and responsible people, necessarily poses a greater risk to the public than possession of firearms within one's home, and is therefore traditionally subject to greater regulation. *See Moore*, 702 F.3d at 937 ("A gun is a potential danger to more people if carried in public than just kept in the home."); *see also Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (noting that the "right to carry weapons in public for self-defense poses inherent risks to others" and recognizing the government's "considerable flexibility to regulate gun safety"); *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."). Intermediate scrutiny is therefore the appropriate standard for concealed carry regulations because it accounts for the heightened risk of carrying firearms in

public and provides lawmakers with the appropriate leeway to institute measures to address that risk.

Moreover, to the extent the Second Amendment encompasses some right to carry a concealed firearm in public, that is not the right Appellants seek to vindicate. Despite Appellants' frequent attempts to characterize Illinois' law as a "ban" on concealed carry affecting the rights of "millions of people," Opening Br. at 26, Illinois law clearly allows for concealed carry in public, and nonresidents can carry concealed firearms in Illinois as long as they are residents of states with substantially similar laws to Illinois. The challenged law thus burdens only the ability of people from a state with dissimilar laws from Illinois to carry concealed guns while visiting Illinois. *See Peterson*, 707 F.3d at 1219 (Lucero, *J.*, concurring) (noting that similar Colorado law was not a ban and only "burden[ed] a relatively small proportion of individuals present in the state at any time").

This modest burden allows Illinois to ensure that nonresidents who seek to carry concealed weapons *while on public streets in Illinois* are qualified to do so. Yet, Appellants seek to disable Illinois from making this public safety determination. Unlike the right vindicated by this Court in *Moore*, Appellants seek a ruling that armed interstate travel is constitutionally immune from regulation—a ruling that would divest Illinois of its ability to impose its own gun regulations and force it to make public safety determinations without information it has already

deemed necessary. *Cf. Moore*, 702 F.3d at 938–42 (discussing right of Illinois residents of high-crime areas to carry firearms in public for self-defense). Appellants' desire to carry hidden guns when vacationing or otherwise present in Illinois cannot outweigh the state's legitimate need to protect its citizens. Whatever burden this may impose on Appellants' Second Amendment rights, it is a far cry from a prohibition on armed self-defense in their homes. No more than intermediate scrutiny is warranted.

II. Illinois' Nonresident Restrictions for Concealed Carry Licenses Satisfy Intermediate Scrutiny.

Intermediate scrutiny requires the state to show that the challenged law is "substantially related to an important governmental objective." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). Appellants do not contest that restricting CCLs to those who are "qualified," "law-abiding," and "mentally healthy" is an important objective—and *Culp I* makes clear this interest is significant. *See* 840 F.3d at 401. Nor do Appellants object to the district court's conclusion that Illinois has "a substantial interest in restricting concealed carry licenses to those persons whose qualifications can be verified and monitored." *Culp II*, 270 F. Supp. 3d at 1058. Instead, Appellants contend that Illinois offers only "speculation and fear," not evidence linking the nonresident application restrictions to the state's aims. Opening Br. at 4. This is not so.

As Appellees explain in their answering brief, Appellants' argument is contravened by the factual record in this case, which Appellants failed to dispute or develop when given the opportunity to do so. Appellee Br. at 20-21. But additionally, and contrary to Appellants' claim that only "speculation and fear" supports Illinois' CCL licensing regime, there is abundant, concrete evidence that Illinois' nonresident application restrictions are reasonably tailored to ensure that CCLs are issued only to verifiably qualified people regardless of their place of residence. Specifically, Illinois' CCL restrictions satisfy intermediate scrutiny because evidence shows that (1) states with dissimilar laws to Illinois have implemented flawed licensing and recordkeeping systems, which have endangered the public by allowing unqualified people to obtain CCLs; (2) states with lax concealed carry laws have higher violent crime and homicide rates; and (3) Illinois' nonresident application restrictions are reasonably tailored so Illinois can actually enforce them, thereby ensuring that CCLs are only granted and monitored based on reliable, complete records.

A. Many Unqualified People Obtain Concealed Carry Licenses Due to Poor State Recordkeeping and Dangerously Lax Licensing Laws.

States employ vastly different concealed-carry licensing standards, which makes it difficult for Illinois to verify many nonresidents' qualifications and ongoing eligibility for a CCL. For example, twelve states do not require a license

to carry concealed firearms.[3] Fifteen states have "shall issue" laws with lax requirements under which the licensing body must grant a CCL to anyone who meets basic, minimal qualifications.[4] At least one state, California, has rigorous standards for issuing licenses, but relies on an in-state database to determine and monitor its citizens' eligibility—precluding other states from accessing up-to-date information regarding its residents' qualifications.[5] Illinois is not an outlier in having concluded that these disparities make it necessary to restrict the concealed carry of firearms by nonresidents whose home states have meaningfully different CCL laws. In addition to Illinois, five states effectively prohibit concealed carry by nonresidents whose home states have dissimilar CCL laws[6]—and four more

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[3] *See Summary of State Law*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/#state (last visited Jan. 25, 2018). One of the states that does not require a license to carry a concealed weapon is Missouri, where plaintiff Paul Heslin resides.

[4] *Id.*

[5] *See Concealed Weapons Permitting in California*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/concealed-weapons-permitting-in-california/ (last updated Oct. 31, 2017). Notably, California does not allow nonresidents to obtain a California concealed carry permit. *See* Cal. Penal Code § 26150.

[6] Delaware, Nebraska, New Mexico, Ohio, and South Dakota only issue CCLs to people who reside or have a place of business in the state, and recognize CCLs issued by another state only if that state has comparable CCL requirements. *See* Del. Code Ann. tit. 11, § 1441(a) (CCL applicants must reside in Delaware); *Id.* § 1441(j) (Delaware recognizes out-of-state licenses if the licensure laws afford a "reasonably similar degree of protection" as Delaware's); N.M. Stat. Ann. § 29-19-4(A) (CCL applicants must reside in New Mexico); *Id.* § 29-19-12 (state police may recognize CCLs issued by states with laws "at least as stringent as or substantially similar to" New Mexico's); Ohio Rev. Code Ann. § 2923.125(D)(1) (CCL applicants must be Ohio residents or be employed in Ohio); *Id.* § 109.69(A) (continued…)

states go beyond Illinois with laws that generally prohibit concealed carry by all nonresidents.[7]

Many states with no CCL standards or lax "shall issue" standards have poor recordkeeping and record-sharing systems, which have allowed thousands of criminals to slip through the cracks and obtain or retain CCLs.[8] These mistakes most often occur due to poor information sharing among state agencies, unreported criminal convictions, or poor administration.[9] Most of the individual plaintiffs reside in states plagued by these problems.

For example, in Wisconsin—where plaintiffs Davis and Reed-Davis reside—poor recordkeeping and sharing have created a "domestic violence

(Ohio recognizes CCLs from states with "substantially comparable" eligibility requirements to Ohio's); S.D. Codified Laws §§ 23-7-7, 23-7-7.1 (applicants must reside in South Dakota); *Id.* § 23-7-7.3 (the attorney general may recognize out-of-state permits only if the CCL laws of the other state meet or exceed South Dakota's).

[7] California, Massachusetts, New York, and Oregon generally require CCL applicants to have a residence or business within the state, and either have *no* "reciprocity" laws recognizing out-of-state CCLs, or confer reciprocity narrowly. *See* Cal. Penal Code § 26150; Mass. Gen. Laws ch. 140, § 131(d); *see also id.* ch. 140, § 131G (nonresidents with a CCL from another state may only carry concealed firearms in Massachusetts in order to participate in a firearm competition, attend a firearm collectors meeting, or hunt); N.Y. Penal Law § 400.00(3); Or. Rev. Stat. § 166.291(1); *see also id*. § 166.291(8) (Oregon sheriffs may waive residency requirement only for residents of a contiguous state who show a compelling business interest or legitimate need for an Oregon CCL).

[8] *See Federally Mandated Concealed Carry Reciprocity: How Congress Could Undercut State Laws on Guns in Public*, EVERYTOWN FOR GUN SAFETY, 12–13 (Jan. 2015), https://everytownresearch.org/documents/2015/01/federally-mandated-concealed-carry-reciprocity-3.pdf.

[9] *Id.*

loophole" to the state's concealed carry regime.[10] This loophole allows people who have committed vicious domestic assaults to obtain CCLs if they pled to a charge of disorderly conduct even if the underlying behavior constituted violent conduct. These offenders remain "qualified" for a CCL in Wisconsin because in most cases, disorderly conduct plea transcripts are not available to the licensor.[11] Absent the plea transcript, the Wisconsin Department of Justice cannot determine whether the facts underlying the offense disqualify the applicant from obtaining a CCL, and a judge has ruled that Wisconsin cannot deny a CCL to someone who has a misdemeanor domestic violence conviction if the original plea transcript does not exist.[12]

This loophole is not the only evidence that Wisconsin is both issuing and failing to revoke CCLs from residents with criminal records. However, despite anecdotal proof of shootings involving likely unqualified Wisconsin CCL holders,[13] the Wisconsin CCL law prohibits even the police from accessing

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[10] *See* Gilman Halsted, *Judge Says Man with Domestic Violence Record Can Carry Concealed Weapon*, WIS. PUB. RADIO (July 15, 2014, 1:00 PM), https://www.wpr.org/judge-says-man-domestic-violence-record-can-carry-concealed-weapon.

[11] *Id.*

[12] *Id.*

[13] *See* Eric Litke, *5 Years of Concealed Carry: Law Obscures Impact*, POST CRESCENT (Nov. 23, 2016), https://www.postcrescent.com/story/news/investigations/2016/11/23/law-obscures-impact-wisconsin-concealed-carry/94344080/.

information regarding vehicle stops, investigations, civil or criminal offenses or other activities based on a person's permit status.[14] Five years after Wisconsin implemented its CCL law, Milwaukee Police Chief Ed Flynn expressed his frustration with the law's impact on crime and its lack of transparency: "I can tell you anecdotally we're seeing a number of shootings involving concealed carry permit holders—many of whom have extensive criminal records—but I'm not allowed to tell you how many or whom, because the law has been carefully written to prevent analysis of that information."[15] Notwithstanding Wisconsin's deliberate opacity, journalists have documented many instances of violent crimes committed by Wisconsin CCL holders.[16]

Furthermore, independent investigations in Indiana and Colorado—states in which three of the individual plaintiffs reside—revealed that many violent criminals or other unqualified people in those states have been issued CCLs due largely to poor maintenance of criminal records, which leaves CCL issuers without

[14] *See* Wis. Stat. Ann. § 175.60 (West)

[15] Litke, *supra* note 13.

[16] *See id.*; *see also* Ashley Luthern, *Milwaukee Man Charged in Killing of MATC Student-Athlete*, MILWAUKEE J. SENTINEL (Jan. 31, 2017), https://www.jsonline.com/story/news/crime/2017/01/31/milwaukee-man-charged-killing-matc-student-athlete/97283190/ ("A 28-year-old Milwaukee man with a concealed-carry license who had displayed 'erratic' behavior for several years has been charged with the unprovoked shooting of his longtime friend.").

vital information.[17] A 2009 Indianapolis Star investigation revealed egregious flaws in Indiana's permitting system.[18] The investigation, which focused on two counties, identified approximately 450 permit holders "with dubious backgrounds."[19] It revealed many cases where Indiana issued a permit to someone with an extensive criminal record, who then used a legal, concealed firearm to commit a crime. For example, one person held his wife and her four kids at gunpoint in their home for four days.[20] Another reached for his gun and threatened to kill police officers during a domestic dispute.[21]

The investigation faulted both Indiana's lax permitting system and poor record-sharing system for the lapses that allowed convicted criminals to receive CCLs.[22] In many cases, the CCLs were granted because state police overrode local police objections or disregarded a legal obligation to deny the permit.[23] In other cases, however, criminal histories were simply missed because Indiana has no

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[17] *See* Mark Alesia, Heather Gillers, Tim Evans, & Mark Nichols, *Should these Hoosiers Have Been Allowed to Carry a Gun in Public?*, INDIANAPOLIS STAR (Oct. 11, 2009), at A1; Colo. Off. of the St. Auditor, Concealed Handgun Permit Database, Colo. Bureau of Investigation, Dep't of Pub. Safety: Performance Audit (2010), http://www.leg.state.co.us/OSA/coauditor1.nsf/UID/ECCC3BC021B740EA872577F3007F36E5/$file/2104ConcealedHandgunsPerfNov2010.pdf.

[18] *See* Alesia et al., *supra* note 17, at A1.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

system to ensure that state and local police receive the details of applicants' criminal histories."[24]

In Colorado, a 2010 audit of the statewide database of concealed carry permit records found that 63 percent of the records contained inaccuracies or inconsistencies.[25] The audit also revealed that the database did not even contain records for "about 45 percent of [concealed carry] permits issued in the state."[26] In light of these findings, the audit concluded that the information in the database was so flawed that the database "was not reliable for law enforcement to use in determining the validity of a permit."[27] In 2011, the Colorado legislature decided not to reauthorize the database. It was deleted, leaving Colorado with no statewide database for CCL-holders.[28]

Comparable investigations in other states such as Florida, Michigan, Tennessee, and North Carolina, whose concealed carry laws are not "substantially similar" to that of Illinois, have revealed that concealed carry permits were issued

[24] *Id.* at A16.

[25] Colo. Off. of the St. Auditor, *supra* note 17, at 5.

[26] *Id.*

[27] *Id.*

[28] *See Concealed Weapons Permitting in Colorado*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, http://lawcenter.giffords.org/concealed-weapons-permitting-in-colorado/ (last updated Nov. 7, 2017).

to thousands of people with alarming criminal histories.[29] For example, North Carolina failed to revoke CCLs from approximately 1,200 people convicted of crimes over a five year period, and Florida issued CCLs to roughly 1,700 people who had either pled guilty to felonies, had outstanding warrants, or were subject to domestic violence restraining orders.[30]

The dangers posed by these failing licensing schemes are not merely theoretical: their costs are measured in violence and lives. For instance, authorities recently charged Taylor Wilson, a Missouri resident with white supremacist ties, with terrorism offenses related to his October 22, 2017 armed attempt to wreck an Amtrak train.[31] At the time of the offense, Wilson possessed a Missouri CCL[32] despite pending state charges stemming from his involvement in a 2016 road rage incident in which he allegedly pointed a handgun at a black female driver.[33] Wilson turned himself into the police after the 2016 incident, but his CCL was not

[29] *See* EVERYTOWN, *supra* note 8, at 12–14 (from 2006 to 2010 officials took no action to revoke nearly 700 permits from CCL holders in Michigan who were convicted of crimes; an investigation of two Tennessee counties revealed that breakdowns in communication and record sharing resulted in dozens of people with violent criminal histories receiving CCLs).

[30] *See id.* at 13.

[31] *See* Carla Herreia, *White Supremacist Charged with Terrorism After Alleged Attempt to Derail Train*, HUFFINGTON POST (Jan. 5, 2018, 10:13 PM), https://www.huffingtonpost.com/entry/fbi-charges-white-supremacist-terrorism-derail-amtrak_us_5a4ffd9ae4b003133ec7d2cc.

[32] *Id.*

[33] *See* Criminal Complaint at 5–6, *United States v. Wilson*, No. 17-3157 (D. Neb. Dec. 22, 2017), ECF No. 1.

revoked.[34] On April 30, 2016, a Colorado concealed carry permit holder, who had been visited by the police five times in conjunction with domestic violence disturbances, shot and killed his ex-wife before shooting himself in the presence of his children.[35] He had previously threatened suicide and at least one of the prior domestic violence incidents involved a firearm.[36]

Unfortunately, such incidents are not outliers; any review of the daily news will reveal that gun violence involving concealed-carry licensees is all too common. For example, in January of 2018 alone, a Minnesota permit holder shot and killed his brother over a trivial dispute, another Minnesota permit holder shot and killed a seventeen-year-old after a minor vehicle collision, and a Kentucky permit holder shot and killed his ex-girlfriend and then himself in Illinois. [37]

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[34] *See id.*

[35] *See* Brittany Freeman, *String of Domestic Violence Murder-Suicides Orphan Children, Stun Communities*, DENVER ABC 7 (Sept. 18, 2016, 9:30 PM), https://www.thedenverchannel.com/news/domestic-violence/string-of-domestic-violence-murder-suicides-orphan-children-stun-communities.

[36] *Id.*

[37] *See* Chao Xiong, *Feuding Brothers Led to St. Paul Murder, Charges Say*, STAR TRIBUNE (Feb. 2, 2018, 10:04 PM), http://www.startribune.com/feuding-brothers-led-to-st-paul-murder-charges-say/472382503/; Paul Walsh, *Witness to a Killing: Rochester Teen Said 'I Dare You,' and Fellow Motorist Pulled Trigger*, STAR TRIBUNE (Jan. 20, 2018, 8:06 PM), http://www.startribune.com/witness-to-a-killing-rochester-teen-said-i-dare-you-and-fellow-motorist-pulled-trigger/469386443/; Tom Schuba, *Police: Man Killed Self After Fatally Shooting Ex-Girlfriend in Lake Forest*, CHICAGO SUN TIMES (Jan. 17, 2018, 10:26 AM), https://chicago.suntimes.com/news/police-man-killed-self-after-fatally-shooting-ex-girlfriend-in-lake-forest/.

These examples refute Appellants' contention that the 45 states with firearm laws that are dissimilar to Illinois' experience no violence connected to those states' CCL application procedures. Opening Br. at 28. On the contrary, CCLs have been issued to many thousands of people with violent criminal histories or other disqualifying factors due to documented flaws in those states' procedures.[38] Investigations revealed that at least some of those people committed additional crimes, including with firearms they had been licensed to carry.[39] And those are just the cases journalists could identify—meaning the scope of the problem is likely far greater than these investigations suggest.

B. States with Lax Concealed Carry Licensing Laws Experience Increased Violent Crime and Homicide Rates.

Appellants' argument that states with lax CCL laws see lower crime rates, Opening Br. at 42–44, is based on flawed evidence and debunked research. Instead, reliable, recent research shows that lax right-to-carry laws are associated with increased violent crime and homicide rates.

In *Moore*, this Court noted that a few studies found that states with liberal concealed carry laws "experienced increases in assault rates," but that the studies did not show "that those increases persist." 702 F.3d at 938. However, two studies based on newer data show persistent increases in violent crime rates and homicide

[38] *See e.g.*, EVERYTOWN, *supra* note 8, at 12–14; Alesia et al., *supra* note 17, at A1.
[39] *See e.g.*, EVERYTOWN, *supra* note 8, at 12–14; Alesia et al., *supra* note 17, at A1.

rates associated with lax, "shall-issue" gun laws. The first, an updated version of the study by Stanford professor John Donohue that was cited in *Moore*, shows persistent increases in violent crime rates in shall-issue states.[40] The second, a study performed by researchers at the Boston University School of Public Health, concludes that states with permissive concealed-carry gun laws experience increased homicide rates.[41]

Professor Donohue's updated assessment on the relationship between right-to-carry (RTC) laws and violent crime concluded that violent crime in RTC states was an estimated 13 to 15 percent higher over the 10-year period after the RTC law became effective than it would have been had the state not adopted the RTC law.[42] Donohue used a synthetic control approach, which incorporated 14 years of additional state data, "to generate state-specific estimates of the impact of RTC laws on crime."[43] The results "uniformly undermine [Lott's] 'More Guns, Less Crime' hypothesis" relied on by Appellants.[44] Opening Br. 43–45.

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[40] John Donohue, Abhay Aneja, & Kyle D. Weber, *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 OF ECON. RES. (Issued June 2017, Revised Jan. 2018), http://www.nber.org/papers/w23510.

[41] Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, AM. J. PUB. HEALTH, Dec. 2017, at 1.

[42] Donohue et al., *supra* note 40, at 3.

[43] *Id.* at 2.

[44] *Id.* at 36 ("There is not even the slightest hint in the data that RTC laws reduce violent crime."). To further demonstrate the impact of the additional data, Donohue ran it through competing statistical models, including Lott and Mustard's (continued…)

The December 2017 Boston University study compared homicide rates in shall-issue and may-issue concealed carry states from 1991–2015.[45] The study found that shall-issue laws were associated with considerably higher homicide rates. Specifically, shall-issue laws "were significantly associated with 6.5% higher total homicide rates, 8.6% higher firearm homicide rates, and 10.6% higher handgun homicide rates."[46] The higher handgun homicide rate is especially important because it contradicts Appellants' contention that liberal concealed carry laws result in "much lower rates of murder and violent crime." Opening Br. at 45.

In contrast to the reliable, recent evidence that demonstrates the connection between lax concealed carry laws and higher crime rates, Appellants rely on long discredited research by John Lott to argue that loose concealed carry regulations reduce violent crime. *Id.* Lott's research is infamous because its core conclusion has been debunked by researchers who were either unable to replicate his findings,[47] reached opposite conclusions,[48] or who believe Lott's model—which

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widely-discredited model. With the benefit of additional data, even Lott and Mustard's model indicates that RTC laws have increased murder crimes. *Id.* at 11–12.

[45] Siegel et al., *supra* note 41, at 1.

[46] *Id.*

[47] The National Research Council disagreed with Lott's central claim and noted that in fact, "it is at least possible that errors" in the crime data Lott used may account for his results. Firearms and Violence—A Critical Review 137 (Charles F. Wellford et al. eds., 2004), https://www.nap.edu/read/10881/chapter/8#137.

[48] Abhay Aneja et al., *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy* (Stanford L. and (continued…)

relies on probabilistic statistical assumptions—is unreliable and may be used to achieve almost any desired outcome.[49] Separately, Lott himself was found to have committed academic fraud.[50] Gun policy experts now consider Lott's research to be "completely discredited,"[51] and, as discussed above, Professor Donohue's recent research shows the very opposite of Lott's hypothesis is true.[52]

C. Illinois' Nonresident Application Restrictions Are Necessary to Enforce Its Concealed Carry Licensing Standards, and Sufficiently Tailored to Ensure that Licensing Decisions Are Based on Reliable Records.

The state has presented competent evidence in the form of a detailed affidavit and other exhibits confirming that Illinois can only assure compliance with its laws if a nonresident CCL applicant resides in a state with firearm laws substantially similar to those of Illinois. The Trame affidavit explains that it would be unreasonably burdensome and expensive for the state police to verify other

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Econ. Olin Working Paper No. 461, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443681; *see also* Donohue et al., *supra* note 40.

[49] *See* Ian Ayres & John Donohue, *Shooting Down the 'More Guns, Less Crime' Hypothesis*, 55 STAN. L. REV. 1193, 1230 (2003).

[50] 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#.ozzlddzgx.

[51] 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=.83289066f760. Even though Lott's scholarship has been "completely discredited," gun lobby and gun-rights groups continue to cite it in amicus briefs, and some of the discredited research has made its way into congressional and legislative reports. *Id*.

[52] *See* Donohue et al., *supra* note 40, at 11–12.

nonresidents' qualifications and continued eligibility for an Illinois CCL. App. 198–201, ¶ 9–25. And the above evidence demonstrates that states with dissimilar firearms laws often do not keep the updated, reliable records vital to making a CCL determination. By excluding only nonresidents from states that do not share the information required to make reliable licensing decisions, Illinois has sufficiently tailored its CCL regime to the important public safety interest in restricting CCLs to those persons whose qualifications can be verified and monitored.

1. The Evidence Demonstrates that the Firearm Concealed Carry Act Meets an Important Public Safety Interest.

Illinois' limitations on nonresident CCL applications are supported by ample evidence that states with dissimilar firearm laws do not keep reliable or sufficient records. Consequently, Illinois cannot dependably determine whether a prospective licensee from one of these states is "qualified," "law-abiding," and "mentally healthy." As previously discussed, recordkeeping deficiencies in a number of states—including many of Appellants' home states—pose real threats and have allowed thousands of unqualified people to acquire or retain concealed carry licenses.[53]

The Firearm Concealed Carry Act therefore meets the important public safety interest of keeping concealed carry licenses out of unqualified hands by

[53] *See* EVERYTOWN, *supra* note 8, at 12–14.

maintaining high licensing standards. The state's brief, the uncontroverted Trame affidavit, and the district court's decision sufficiently explain why Illinois' nonresident application restrictions facilitate effective enforcement of Illinois' CCL standards. *Accord Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016) ("If the state may set substantive requirements for [firearm] ownership, which *Heller* says it may, then it may use a licensing system to enforce them."). Simply put, if another state's firearm laws are not substantially similar to Illinois' firearm laws, "Illinois cannot confirm that nonresidents from that state are qualified to hold and maintain an Illinois concealed carry license." *Culp II*, 270 F. Supp. 3d at 1058; *see also* Memorandum and Order at 14, *Samuel v. Trame*, No. 15-780 (S.D. Ill. Mar. 21, 2016), ECF No. 35 (granting summary judgment to Illinois in identical challenge because the evidence showed that its nonresident CCL restrictions were sufficiently tailored to its substantial public safety interest in limiting CCLs to those "whose qualifications can be aptly monitored and confirmed").

2. The Evidence Demonstrates a Reasonable Fit Between the Act's Nonresident Requirements and an Important Public Safety Interest.

Intermediate scrutiny requires that the challenged statute be substantially related to advancement of an important governmental objective, but it need not provide a perfect fit. *See Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981)

(plurality opinion). The Firearm Concealed Carry Act is sufficiently tailored to the public safety goal of "restricting concealed carry licenses to those persons whose qualifications can be verified and monitored." *Culp II*, 270 F. Supp. 3d at 1058. Illinois meets this goal by limiting nonresident applications to residents of states with substantially similar firearm laws as Illinois' firearm laws. States are deemed to have substantially similar firearm laws based on their responses to an annual survey conducted by the state police. App. 201–02, ¶¶ 26–30. As demonstrated during this litigation, those determinations are not permanent—they can change if a state adjusts its firearm laws—and they affect far fewer people than Appellants claim. *Culp II*, 270 F. Supp. 3d at 1046.

Appellants ignore these facts and instead suggest that Illinois' nonresident restrictions constitute an insufficiently tailored "ban." Opening Br. at 4. This characterization is unfounded. Residents of states whose firearm laws are substantially similar may obtain an Illinois concealed carry license. Though nonresidents from other states cannot apply for a CCL, this prohibition does not run afoul of intermediate scrutiny's fit requirement because it actually burdens only a comparatively small number of nonresident individuals present in Illinois at any one time. *See Peterson*, 707 F.3d at 1219 (Lucero, *J*., concurring) ("Although the residency requirement at issue governs the vast majority of individuals in the United States (all those who do not live in Colorado), it burdens a relatively small

proportion of individuals present in the state at any time."); *see also* Memorandum and Order at 10, *Samuel*, No. 15-780.

Finally, Appellants' remaining arguments about the law's "fit" fail because they conflict with Supreme Court precedent. Appellants argue that Illinois should have to show that a nonresident committed a crime "as a result of being able to submit a CCL application in Illinois" before Illinois can limit the CCL applications of other nonresidents from that state. Opening Br. at 40–41. Requiring this sort of evidence would demand an airtight fit between the challenged law and Illinois' ultimate aim of reducing firearm violence by reliably determining whether a concealed carry license applicant is qualified. Indeed, Appellants' argument would require that the very conduct the law sought to prevent must *occur* before the law could be applied. If the Court adopted Appellants' reasoning, Illinois would lose all ability to pass prophylactic gun laws.

The Supreme Court has recognized that this type of "fit," which forecloses preventive lawmaking, is not required. For example, the Court has permitted litigants to justify restrictions under intermediate scrutiny by reference to studies and anecdotes pertaining to different locales altogether. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001). And the Court has found that a law can satisfy strict scrutiny based solely on history, consensus, and "simple common sense." *Burson v. Freeman*, 504 U. S. 191, 211 (1992) (plurality opinion). The use of such

evidence is proper because a jurisdiction "considering an innovative solution" to a local problem "may not have data that could demonstrate the efficacy of its proposal because the solution would, by definition, not have been implemented previously." *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 439–40 (2002).

This Court has previously held that Illinois must only reasonably show that the law furthers its important interest, not that the law would have averted some specific crime. *Friedman*, 784 F.3d at 412 (holding assault weapons ban consistent with the Second Amendment because even though it "won't eliminate gun violence . . . it may reduce the overall dangerousness of crime that does occur"); *Skoien*, 614 F.3d at 642 (upholding firearm restriction when "[b]oth logic and data establish a substantial relation between [the law] and [its] objective"). Abundant evidence proves that the Firearm Concealed Carry Act fits the public safety goal of restricting concealed carry licenses to confirmed "qualified," "law abiding," and "mentally healthy" persons. It follows that Illinois' showing satisfies intermediate scrutiny.

III. Forcing Illinois to Allow Applications from Residents of States that Do Not Collect and Share Sufficient Records Conflicts with Core Principles of Federalism.

There is another, independent reason why Appellants' challenge should fail: their legal theory is irreconcilable with basic principles of federalism. Our "Constitution establishes a federal republic where local differences are cherished

as elements of liberty, rather than eliminated in a search for national uniformity." *Friedman*, 784 F.3d at 412. The Supreme Court has "long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). This role is particularly important in the context of firearms regulations, as these laws implicate the States' core role of protecting their citizens. Regional differences in geography, population density, and rates of violence make it all the more imperative for states to retain the flexibility to pursue effective, tailored firearm laws even if such laws are more restrictive than those of other states.[54] Indeed, there is a longstanding American tradition of different localities regulating the possession, carrying, and storage of firearms differently.[55]

While the Second Amendment may circumscribe the scope of permissible experimentation by state and local governments, the Supreme Court has noted that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *McDonald*, 561 U.S. at 785. The Seventh Circuit has similarly recognized that the Second Amendment "does not foreclose *all* possibility of experimentation." *Friedman*, 784 F.3d at 412 (citing *McDonald*); *accord Hamilton v. Pallozzi*, 848 F.3d 614, 628 (4th Cir. 2017)

[54] *See generally* Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013).
[55] *Id.* at 113–21.

(applying principles of federalism to Second Amendment challenge, noting that "Virginia may have opted to restore [the plaintiff]'s gun ownership rights within its borders, but Maryland need not do so within its own borders").

Accordingly, within constitutional limits, Illinois may "experiment" by setting more rigorous standards than other states for determining who is qualified to carry a concealed weapon in public in Illinois. It would be antithetical to these principles of federalism to compel Illinois to lower its standards for residents of other states or to require Illinois to accept nonresident permit applicants' assertions that they are law abiding and responsible at face value. Doing so would endanger Illinois' residents by potentially authorizing people with dangerous criminal records or mental health histories to carry loaded, concealed weapons on Illinois' streets. The Constitution does not require state governments to endorse a "take our word for it" approach to the safety of their citizens. Instead, it affords Illinois the right to make its own decisions about protecting its citizens, including the right to decide who is qualified to carry concealed weapons on the public streets of Illinois.

CONCLUSION

Through its concealed carry laws, Illinois has sought to protect the public by assuring that licensees are "'qualified,' 'law-abiding,' and 'mentally healthy.'" This goal is consistent with the Second Amendment and the limits recognized in

Culp I. Illinois must be empowered to enforce common-sense concealed carry licensing standards, and the District Court's decision should be affirmed.

Dated: April 16, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on April 16, 2018.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,984 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

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