

No. 18-2377

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BRIAN KIRK MALPASSO, et al.,

Plaintiffs-Appellants,

v.

WILLIAM M. PALLOZZI,

Defendant-Appellee.

On Appeal From the United States District Court for the District of Maryland
(1:18-cv-1064-ELH)

**BRIEF OF *AMICUS CURIAE*, GIFFORDS LAW CENTER
TO PREVENT GUN VIOLENCE, SUPPORTING DEFENDANT-
APPELLEE AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A), Fed. R. App. P. 26.1, and Local Rule 26.1, Giffords Law Center to Prevent Gun Violence states that it has no parent corporations, it has no stock, and it is unaware of any publicly held corporation that has a direct financial interest in the outcome of the litigation.

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CERTIFICATION PURSUANT TO FED. R. APP. P. 29(A)(4)(E)

Giffords Law Center to Prevent Gun Violence affirms that no counsel for a party authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the preparation or submission of the brief; and no person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) is a non-profit organization dedicated to researching, writing, enacting, and defending laws and programs proven to reduce gun violence and save lives. The organization was founded in 1993 after a gun massacre at a San Francisco law firm and was renamed Giffords Law Center to Prevent Gun Violence in October 2017 after partnering with the gun-safety organization founded by former Congresswoman Gabrielle Giffords.

Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizens who seek to make their communities safer from gun violence. Its attorneys track and analyze firearm legislation, evaluate gun violence prevention research and policy proposals, and participate in Second Amendment litigation nationwide. Giffords Law Center has provided informed analysis as an *amicus curiae* in numerous important firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc), and *Malpasso v. Pallozzi*, No. 18-1064 (D. Md. Oct. 15, 2018).

Both parties have consented to Giffords Law Center filing this submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Firearms cause hundreds of deaths and injuries in Maryland every year, and the ripple effect of each gunshot leaves many more people grieving and in fear for their safety.¹ In recent years, Maryland experienced an annual average of 377 gun homicides, 260 gun suicides, and hundreds of non-fatal shootings.² These frequent incidents harm communities and leave survivors traumatized. They also impose enormous economic consequences, costing Maryland taxpayers an estimated \$294 million per year.³

This lawsuit challenges Maryland's settled authority to address devastating firearm violence within the State's borders through enforcement of meaningful licensing standards for the open or concealed carrying of handguns in public. Appellants recycle the same challenge to Maryland's "good and substantial reason" requirement for obtaining a handgun carry permit that this Court rejected in

¹ E.g., Kevin Rector, *These Baltimore Students Aren't Afraid of Mass Shootings. They're Facing Gun Violence In Their Everyday Lives.*, BALTIMORE SUN, Mar. 1, 2018, <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-excel-students-on-guns-20180219-story.html>.

² Fatal firearm injury data is from the Centers for Disease Control and Prevention's WISQARS Fatal Injury Reports. CENTERS FOR DISEASE CONTROL AND PREVENTION, WEB-BASED INJURY STATISTICS QUERY AND REPORTING SYSTEM (WISQARS), FATAL INJURY REPORTS, <https://www.cdc.gov/injury/wisqars/fatal.html>. Non-fatal firearm injury data is from the Agency for Healthcare Research and Quality's HCUPnet Query System. AGENCY FOR HEALTHCARE RESEARCH AND QUALITY, HEALTHCARE COST AND UTILIZATION PROJECT (HCUP) QUERY SYSTEM, NON-FATAL FIREARM INJURIES, <https://hcupnet.ahrq.gov/#setup>.

³ Giffords Law Center to Prevent Gun Violence, *The Economic Cost of Gun Violence in Maryland*, Feb. 2018, <http://lawcenter.giffords.org/wp-content/uploads/2018/02/Cost-of-Gun-Violence-in-Maryland.pdf>.

Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013). See also MD. CODE ANN., PUB. SAFETY § 5-306(a). Indeed, Appellants concede their appeal must fail because *Woollard* controls. Appellants' Br. at 2.

Even if this Court were not bound by *Woollard*, nothing has changed in the last six years that would justify departing from this Court's well-reasoned conclusion that Maryland's laws satisfy intermediate scrutiny. *Woollard*, 712 F.3d at 879. Appellants claim this binding precedent should be jettisoned, Appellants' Br. at 2, because a divided panel of the D.C. Circuit reached a different conclusion in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). But *Wrenn* is contrary to this Court's binding precedent and persuasive decisions from the First, Second, Third, Ninth, and Tenth Circuits. See *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013).

As the State's brief correctly explains, Appellants' arguments are contrary to *stare decisis* and contradict every major Second Amendment decision this Court has issued. Appellee's Br. at 7. Even before *Woollard*, this Court had rejected each analytical step the D.C. Circuit's two-judge majority employed in *Wrenn*, including *Wrenn*'s conclusion that carrying guns in public is "on par" with home possession, *Wrenn*, 864 F.3d at 664, and its error in failing to apply a form of means-end

scrutiny. *See United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (the “longstanding out-of-the-home/in-the-home distinction bears directly on the level of scrutiny applicable”); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (under *District of Columbia v. Heller*, 554 U.S. 570 (2008), courts must “select between strict scrutiny and intermediate scrutiny”).

This *amicus* brief presents an additional reason why Appellants’ attempt to re-litigate *Woollard* fails: Since *Woollard* was decided in 2013, compelling new empirical evidence has confirmed the challenged law’s constitutionality under intermediate scrutiny. In light of the data catalogued in *Woollard* and this additional new evidence, Maryland’s handgun carry regulations plainly do more than strike an “appropriate balance” between granting necessary handgun permits and reducing the risk of armed violence. *Woollard*, 712 F.3d at 881. Recent and reliable social science research confirms that Maryland’s regulations are not only constitutional, but also the most informed policy choice the state could make to protect its citizens from violent crimes.

ARGUMENT

I. **Compelling New Empirical Evidence Confirms the Constitutionality of the Good Reason Requirement Under Intermediate Scrutiny.**

Masciandaro and *Woollard* held that regulations affecting the public carry of firearms are reviewable under intermediate scrutiny. This level of means-end scrutiny requires Maryland to demonstrate that its good-and-substantial-reason

requirement (hereinafter, “good reason requirement”) is “reasonably adapted to a substantial governmental interest.” *Masciandaro*, 638 F.3d at 471. There is no doubt that “protecting public safety and preventing crime—particularly violent crime committed with handguns,” *Woollard*, 712 F.3d at 876—remains as substantial a state interest today as it was when this Court decided *Woollard*.

A. New Evidence Bolsters *Woollard*’s Holding that Maryland’s Regulations Are Reasonably Adapted to Substantial State Interests.

New and compelling evidence demonstrates that states that allow public concealed carry without imposing meaningful standards suffer increased rates of violent crime and homicide.⁴ This growing body of evidence further justifies Maryland’s regulatory regime.

1. Lax Concealed Carry Laws Are Associated with Higher Levels of Violent Crime.

Empirical evidence confirms the common sense idea that carrying firearms in public increases the risk of injury for the carrier and others. Persuasive new social science evidence shows that lax “shall-issue” concealed carry laws fuel violent crime

⁴ Evidence illustrating the link between lax concealed carry regimes and increased levels of crime is directly relevant even though Maryland’s regulations govern both concealed and open carry. Two-thirds of handgun owners who carry a loaded handgun in public always conceal their weapon, while only ten percent always carry openly. Ali Rowhandi-Rahbar et al., *Loaded Handgun Carrying Among US Adults, 2015*, 107 AM. J. PUB. HEALTH 1930, 1932 (Dec. 2017), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304072>. And handgun owners who report more frequently carrying in public also are more likely to always conceal their gun. *Id.*

and homicide.⁵ With the benefit of the latest and most robust evidence, it is more clear than ever that Maryland's good reason requirement is substantially related to reducing armed violence.

A June 2017 study (revised in November 2018) by Stanford professor John Donohue and colleagues shows persistent increases in rates of violent assaults and other violent crimes in states with more lenient "shall-issue" concealed carry permitting systems (referred to as "right-to-carry" or "RTC" laws by the study's authors).⁶ The study examines 33 states that adopted RTC laws between 1981 and 2007 and concludes that "the net effect of state adoption of RTC laws is a substantial increase in violent crime."⁷ In particular, the study finds that passage of lax concealed carry laws increased violent crime rates in RTC states by 13 to 15 percent compared to what the rates otherwise would have been, and that this pernicious effect increased over time: "the longer the RTC law is in effect," the study notes, "the greater the cost in terms of increased violent crime."⁸ Conversely, "[t]here is

⁵ "Shall-issue" states require officials to grant handgun carry permits if applicants satisfy basic criteria (*e.g.*, no felony convictions). In contrast, "may-issue" regimes, like the one at issue here, afford officials greater discretion. Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 AM. J. PUB. HEALTH 1923, 1923 (Dec. 2017), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304057>.

⁶ John J. Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis* (Nat'l Bureau of Econ. Research, Working Paper No. 23510, revised Nov. 2018), <http://www.nber.org/papers/w23510>.

⁷ *Id.* at 43.

⁸ *Id.* at 36.

not even the slightest hint in the data that RTC laws reduce violent crime,” the study finds.⁹ Researchers at Duke University and the University of Pennsylvania similarly concluded, in a 2017 analysis, that violent crime rates would be about one-third lower if states that implemented permissive “shall-issue” concealed carry laws had not done so.¹⁰

In December 2017, researchers at Boston University and Duke University released the first-ever analysis of the impact of concealed carry laws on handgun and long-gun homicide rates.¹¹ It concluded that shall-issue concealed carry laws were significantly associated with higher crime rates—in particular, 6.5 percent higher total homicide rates, 8.6 percent higher firearm-related homicide rates, and 10.6 percent higher handgun-specific homicide rates, compared to states with stronger regulations.¹² In addition to supporting the Stanford study—which similarly concludes that lax permitting laws are associated with more crime—the Boston-Duke University analysis debunks the notion (raised by Appellants here, *see* Appellants’ Br. at 41–44) that more permissive concealed carry regimes deter

⁹ *Id.* at 42.

¹⁰ Marjorie B. McElroy & Peichun Wang, *Seemingly Inextricable Dynamic Differences: The Case of Concealed Gun Permit, Violent Crime and State Panel Data 1*, 32 (June 24, 2017), <https://ssrn.com/abstract=2992058>.

¹¹ *See* Siegel et al., *supra* note 5.

¹² *Id.* at 1927–28.

would-be criminals from engaging in crime.

These are only a handful of the most recent studies. In the years since the *Woollard* decision, other researchers also have found a strong connection between lax concealed carry licensing laws and increased gun violence.¹³ This increasingly robust body of empirical evidence confirms that Maryland's handgun carry licensing laws promote public safety by protecting Maryland citizens from violent crime and firearm homicide. The new evidence also underscores why this Court should confirm its determination in *Woollard* that Maryland's good reason requirement survives intermediate scrutiny.

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

While recent research confirms the link between lax concealed carry laws and increased crime, experts also increasingly agree that carrying a gun for self-defense produces no safety benefits for the gun carrier and likely even exposes such carriers to greater risk of harm.

As an initial matter, crime victims rarely use guns in self-defense. According

¹³ See, e.g., Rashna Ginwalla et al., *Repeal of the Concealed Weapons Law and Its Impact on Gun-Related Injuries and Deaths*, 76 J. TRAUMA ACUTE CARE SURG. 569, 569, 573 (2014) (lax concealed carry permitting laws are associated with increased gun fatalities); Daniel W. Webster et al., *Firearms on College Campuses: Research Evidence and Policy Implications* 8 (Oct. 15, 2016) (in the 41 states with RTC laws or no concealed carry regulations, the average death toll in high-fatality mass shootings increased following the implementation of an RTC law), https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/_pdfs/GunsOnCampus.pdf.

to a 2015 study, victims of violent crimes use firearms to threaten or attack the perpetrator in less than one percent of all criminal incidents.¹⁴ And in those rare instances when victims use a gun in self-defense, doing so does not make them safer. As the 2015 study notes, although some responses to criminal encounters—such as “[r]unning away and calling the police”—are associated with a reduced likelihood of injury, use of a gun in self-defense is not.¹⁵

In fact, carrying a firearm may *increase* a victim’s risk of injury during the commission of a crime. An influential study published in 2009 analyzed 677 shootings in Philadelphia over a two-and-a-half-year period. After adjusting for confounding factors, the researchers concluded that individuals carrying a gun were 4.46 times more likely to be shot in an assault than those not carrying a gun, and were 4.23 times more likely to be fatally shot.¹⁶ The figures were even higher for assaults where the victim had some opportunity to resist; in those cases, individuals carrying guns were 5.45 times more likely to be shot.¹⁷ The researchers posited several potential explanations, including that “[a] gun may falsely empower its

¹⁴ David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 PREVENTIVE MED. 22, 23 (2015).

¹⁵ *See id.* at 23–24.

¹⁶ *See* Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 2034, 2037 (2009), <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2008.143099>.

¹⁷ *Id.*

possessor to overreact, instigating and losing otherwise tractable conflicts with similarly armed persons.”¹⁸

Attempted use of a firearm in self-defense also threatens the safety of innocent bystanders. As a 2016 report from public health experts at Johns Hopkins University notes, most people do not have the tactical ability to successfully use a gun in self-defense, and tactical challenges may be exacerbated in public. After all, “[s]hooting accurately and making appropriate judgements about when and how to shoot in chaotic, high-stress situations requires a high level of familiarity with tactics and the ability to manage stress under intense pressure.”¹⁹ For that reason, gun owners with good intentions may end up “wounding or killing innocent victims.”²⁰ Even gun carriers with advanced training may injure innocent people after mistakenly perceiving a threat.²¹ The presence of a gun may also escalate everyday disputes into lethal confrontations. In 2017, “road rage” incidents involving gun carriers increased nationally; according to a Maryland State Police spokesperson, Maryland police officers “encounter this kind of behavior daily.”²²

¹⁸ *Id.*

¹⁹ *See* Webster et al., *supra* note 13, at 10.

²⁰ *See id.*

²¹ *See, e.g.*, Fox4News.com Staff, *Police: Man Arrested for Shooting Uber Driver Thought He Was Helping*, FOX 4 NEWS, May 16, 2017, <http://www.fox4news.com/news/man-spots-gun-inadvertently-shoots-uber-driver>; William Saletan, *Friendly Firearms*, SLATE, Jan. 11, 2011, http://www.slate.com/articles/health_and_science/human_nature/2011/01/friendly_firearms.html

²² Kimberly Eiten, *Alarming, Rising Trend: Weapons Used During Road Rage Incidents*, CBS

Especially in light of the new social science research, Appellants' claim that "there is no persuasive evidence" associating permissive gun carry regulations with increased crime rates, Appellants' Br. at 38, is simply incorrect.

3. Appellants Ignore Compelling New Evidence and Rely on Older, Inconclusive Studies.

Appellants' claim that Maryland's licensing regime fails intermediate scrutiny depends on their assertion that other, mostly older empirical studies fail to establish a causal link between more permissive gun carry regulations and increased crime. Appellants' Br. at 39–40. They suggest there is no reliable evidence either way; according to Appellants, although "laws that more freely grant permits have not been shown to decrease crime," "the most persuasive studies" also fail to find a significant causal link between more permissive gun carry laws and higher violent crime rates. *Id.* at 38–41.

This argument does not hold water. First, Appellants ignore the compelling new evidence. For instance, they rely on a 2005 National Academy of Sciences' National Research Council ("NRC") report concluding that, based on data through the year 2000, researchers could not establish a causal link between permissive gun

BALTIMORE, Apr. 10, 2017, <http://baltimore.cbslocal.com/2017/04/10/alarming-rising-trend-weapons-used-during-road-rage-incidents/>. Even law enforcement officials have drawn guns in road rage incidents, suggesting that the presence of a gun can dangerously escalate disputes no matter how well-trained the carrier is. *Federal Agent in Road Rage Pulls Gun on Civilian in Maryland*, ASSOCIATED PRESS, Apr. 11, 2018, <https://wtop.com/anne-arundel-county/2018/04/federal-agent-in-road-rage-pulls-gun-on-civilian-in-maryland/>.

laws and crime rates. To determine if such a link does, in fact, exist, the NRC report urged researchers to use “new analytical approaches and data sets.”²³ This is precisely what Stanford professor John Donohue and his colleagues undertook in their new study, using new data and a method—state-level synthetic control analysis—that is now recognized as the gold standard for assessing policy choices that cannot be evaluated in a randomized trial.²⁴ And, as discussed, Professor Donohue’s study concludes that permissive regulations lead to increased violent crime rates.²⁵

Second, Appellants’ suggestion that careful regulations like Maryland’s “may well harm” public safety—because permit holders are law-abiding, and depriving

²³ NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 151 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2005), <http://goo.gl/WO1ZLNZ>. Appellants also cite a 2003 report by a task force convened by the Centers for Disease Control and Prevention (“CDC”), which, like the NRC report, concluded that data then available was insufficient to establish a causal link between permissive gun carry regulations and violent crime. Appellants’ Br. at 39–40. Like the NRC report, the CDC report stressed that “[f]urther high-quality research is required to establish the relationship between firearms laws and violent outcomes.” CENTERS FOR DISEASE CONTROL AND PREVENTION, MORBIDITY & MORTALITY WEEKLY REPORT VOL. 52, FIRST REPORTS EVALUATING THE EFFECTIVENESS OF STRATEGIES FOR PREVENTING VIOLENCE: FIREARMS LAWS 11 (Oct. 3, 2003), <http://goo.gl/VqWAVM>.

²⁴ Donohue, *supra* note 6, at 2 (“This paper answers the call of the NRC report for more and better data and new statistical techniques....”); see Susan Athey & Guido W. Imbens, *The State of Applied Econometrics: Causality and Policy Evaluation*, 31 J. ECON. PERSPECTIVES 3, 9 (2017), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.31.2.3> (synthetic control method “is arguably the most important innovation in the policy evaluation literature in the last 15 years”).

²⁵ Appellants cite one study finding that “rates of homicide and violent crime were not significantly increased” after states implemented lax concealed carry laws, see Appellants’ Br. at 40, but that study does not employ the field-leading synthetic control analysis.

them of the right to carry “may embolden criminals to commit additional crimes,” Appellants’ Br. at 41–44—is not convincing. Guns are rarely used defensively to thwart crime; although Appellants contend that there are upwards of 2.5 million defensive gun uses each year, that figure has been widely discredited.²⁶ And analyses from states that keep comprehensive records of crimes committed by concealed license holders indicate that licensees are arrested for weapons-related offenses at *higher* rates than the general public—refuting Appellants’ assertion that licensees pose little threat to society.²⁷

B. Maryland’s Firearm Policy Choices Are Entitled to Deference.

At most, Appellants’ brief suggests there is some room for debate regarding the extent to which lax licensing laws are associated with increased crime. Even accepting that as true, Maryland’s strong licensing regime survives intermediate scrutiny because it is reasonably adapted to the state’s significant interest in protecting public safety and preventing crime.

In the face of conflicting evidence, “it is the legislature’s job ... to weigh conflicting evidence and make policy judgments.” *Woollard*, 712 F.3d at 881 (quoting *Kachalsky*, 701 F.3d at 99); *see Gould*, 907 F.3d at 673 (under intermediate

²⁶ *See, e.g.*, David Hemenway, *Survey Research and Self-Defense Gun Use: An Explanation of Extreme Overestimates*, 87 J. CRIM. L. & CRIMINOLOGY 1430, 1430–31 (1997), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6936&context=jclc>.

²⁷ *See, e.g.*, Karen Brock et al., VIOLENCE POLICY CENTER, LICENSE TO KILL IV—MORE GUNS, MORE CRIME 5–6 (2002), <http://www.vpc.org/graphics/ltk4.pdf>.

scrutiny, “we start with the premise that courts ought to give ‘substantial deference to the predictive judgments’ of a state legislature” (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997))). The Second Amendment allows for “state and local experimentation with reasonable firearms regulations,” *McDonald v. City of Chicago*, 561 U.S. 742, 784–85 (2010), and intermediate scrutiny asks only whether a “reasonable fit” exists between “the legislative policy choice and the governmental objective.” *Woollard*, 712 F.3d at 881–82.

Deference to legislative judgment is an established principle of constitutional jurisprudence not limited to the Second Amendment. The Supreme Court repeatedly has explained that heightened means-end scrutiny, including intermediate scrutiny, does not require legislatures to provide exact empirical justifications for regulations. For example, the Court has “permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and ‘simple common sense.’” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)); *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) (“We do not demand of legislatures ‘scientifically certain criteria of legislation.’” (internal citation and quotation omitted)). And, in a First Amendment case involving a crime-reduction measure that targeted secondary effects of protected speech, the Court credited city

officials' evidence-informed judgment, even where the city did not furnish specific "empirical data" showing "that its ordinance will successfully lower crime." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 439 (2002) (plurality opinion).

In sum, *Woollard* continues to stand on empirically firm ground. It is more apparent than ever that Maryland's licensing regime is substantially related to the state's crucial interest in protecting the public from firearm violence—especially in light of the deference due to Maryland's legislature to make reasoned policy choices in the face of conflicting evidence.²⁸

II. Appellants' First Amendment Analogy Cannot Sustain Their Complaint.

Faced with binding precedent that forecloses their claims and a growing body of empirical evidence concluding that lenient concealed carry laws endanger the public, Appellants turn to First Amendment law and grasp for support by analogy. They suggest that Maryland's good reason requirement for handgun carry permits is an "ask-permission first" regime akin to "prior restraints" that impinge upon First

²⁸ Appellants' claim that circuit courts' use of intermediate scrutiny relegates the Second Amendment to a "second-class right," Appellants' Br. at 34, is incorrect. As various commentators have noted, the Supreme Court often employs intermediate scrutiny when examining core constitutional rights. *E.g.*, Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENTARY 227, 227–29 (2006); Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 301–02 (1998). To support their claim that intermediate scrutiny is inappropriate, Appellants also repeatedly claim that the Maryland law is akin to a "ban." Appellants' Br. at 8, 10, 29, 30, 33, 38. That too is incorrect. As this Court already has explained, Maryland residents may carry a gun in public in a variety of different circumstances. *See Woollard*, 712 F.3d at 869.

Amendment free speech rights. Appellants' Br. at 31–33.

The substantive differences between the First and Second Amendments render this analogy inapposite. Under *Heller*, governments have significant leeway to limit the public carrying of guns. *See* 554 U.S. at 626 (noting 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”). Governments have less leeway to restrict speech. Because the rights differ in important ways, it makes little sense to apply substantive First Amendment doctrines in Second Amendment cases. *See Teixeira v. County of Alameda*, 873 F.3d 670, 688–90 (9th Cir. 2017) (cataloging salient differences between the First and Second Amendments); *Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016) (“[E]veryone is entitled to speak and write, but not everyone is entitled to carry a concealed firearm in public.”); *see also Woollard*, 712 F.3d at 883 n.11 (“[W]e are hesitant to import substantive First Amendment principles wholesale into Second Amendment jurisprudence.” (internal citation omitted)); *Hightower v. City of Boston*, 693 F.3d 61, 80–81 (1st Cir. 2012) (declining to extend First Amendment prior restraint doctrine to Second Amendment claim).

Appellants' effort to import First Amendment principles wholesale into this Second Amendment case is illogical for the additional reason that, unlike First Amendment-protected expressive content, firearms can physically injure and kill

people; indeed, this is their express purpose. *See, e.g., Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (“The risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights” that “can be exercised without creating a direct risk to others”). This distinction further underscores that governments may regulate the lethal effects of firearms in ways that might be impermissible in the context of purely expressive activity.

CONCLUSION

Appellants offer no sound basis for why Maryland’s good reason requirement violates the Second Amendment and offer no reason to depart from sound, binding precedent. The growing empirical consensus that laws like Maryland’s save lives confirms the good reason requirement is constitutional. This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This *amicus* brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7) because it contains 4071 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because the brief was prepared using Microsoft Word 2016 in 14-point Times New Roman font, a proportionally spaced typeface.

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CERTIFICATE OF FILING AND SERVICE

I, James O. Strawbridge, certify that on February 1, 2019, pursuant to Local Rule 31(d)(1), I caused the foregoing *amicus* brief to be filed with the Clerk of Court for the U.S. Court of Appeals for the Fourth Circuit by using the Court's CM/ECF system, which will cause a copy of the foregoing to be served on all counsel who have entered an appearance in this action, in satisfaction of Local Rule 31(d)(2).

I further certify that on February 1, 2019, pursuant to Local Rule 31(d)(1), I caused a paper copy of the foregoing document to be delivered to the Clerk of Court at the Lewis F. Powell Jr. Courthouse & Annex, 1100 East Main Street, Suite 501, Richmond, VA 23219 via Federal Express, next-business-day service.

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