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 Illinois, ET. AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
CASE NO. 14-cv-3320 (THE HONORABLE SUE E. MYERSCOUGH)

BRIEF OF AMICUS CURIAE EVERYTOWN FOR GUN SAFETY IN SUPPORT OF APPELLEES AND AFFIRMANCE

DEEPAK GUPTA
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L Street NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

ERIC TIRSCHWELL
MARK ANTHONY FRASSETTO
WILLIAM J. TAYLOR JR.
AARON C. ESTY
EVERYTOWN FOR GUN SAFETY SUPPORT FUND
132 East 43rd Street, #657
New York, NY 10017
etirschwell@everytown.org

Counsel for Amicus Curiae Everytown for Gun Safety

April 16, 2018

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2998

Short Caption: Culp et al. v. Madigan et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Everytown for Gun Safety

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Gupta Wessler PLLC (admission of Deepak Gupta pending)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

No parent corporations

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Everytown for Gun Safety has no stock, and hence, no publicly held company owns 10% or more of its stock.

Attorney's Signature: s/ Deepak Gupta Date: 4/13/2018

Attorney's Printed Name: Deepak Gupta

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: 1900 L Street NW, Suite 312
Washington DC 20036

Phone Number: 202-888-1741 Fax Number: 202-888-7792

E-Mail Address: deepak@guptawessler.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-2998

Short Caption: Culp et al. v. Madigan et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Everytown for Gun Safety

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Gupta Wessler PLLC (admission of Deepak Gupta pending)

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

No parent corporations

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Everytown for Gun Safety has no stock, and hence, no publicly held company owns 10% or more of its stock.

Attorney's Signature: s/ Eric Tirschwell Date: 4/17/18

Attorney's Printed Name: Eric Tirschwell

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

Address: 132 East 43rd Street, #657
New York, NY 10017

Phone Number: 646-324-8222 Fax Number:

E-Mail Address: etirschwell@everytown.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Historical state statutes

Current statutes and regulations

Municipal ordinances

English statutes

Other authorities

INTEREST OF AMICUS CURIAE[1]

Everytown for Gun Safety is the nation's largest gun-violence-prevention organization, with supporters in every state, including tens of thousands of Illinois residents and the mayors of thirty-one Illinois cities. It was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after the murder of twenty children and six adults in an elementary school in Newtown, Connecticut. Everytown's mission includes defending gun laws through the filing of amicus briefs providing historical context, social science and public policy research, and doctrinal analysis that might otherwise be overlooked. Everytown has filed such briefs in several recent cases. *See, e.g.*, *Wrenn v. District of Columbia*, No. 16-7025, 2016 WL 3928913 (D.C. Cir. July 20, 2016); *Peruta v. Cty. of San Diego*, Nos. 10-56971, 11-16255, 2015 WL 2064206 (9th Cir. Apr. 30, 2015); *Silvester v. Harris*, No. 14-16840, 2015 WL 1606313 (9th Cir. Apr. 1, 2015).

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

This case is about the right of the people of Illinois to be free from gun violence and the state's power to pass laws to protect that freedom. The people of Illinois, and particularly the city of Chicago, have suffered levels of gun violence that are both horrific and tragically common in the United States.[2] Illinois's experience is also consistent with that of many states with strong gun laws in that a significant portion of the gun violence occurring in Illinois is attributable to guns trafficked from nearby states with weaker gun laws like Indiana, Wisconsin, and Missouri.[3] The challenged law—which limits the issuance of concealed-carry permits to non-residents—is one of the steps that Illinois has taken to protect its citizens against states with irresponsibly weak laws.

Everytown submits this amicus brief in support of the law to raise three important points. First, Illinois's limitations on the issuance of concealed-carry permits to non-residents are consistent with historical practice dating back to well before the founding, in which decisions about who could carry a firearm in public and when they could do so were exclusively a local concern based on local circumstances. This long and consistent line of analogous restrictions shows that carrying a firearm while travelling outside of one's home state does not fall within the core of the right protected by the Second Amendment.

---

[2] Although Chicago's total number of gun homicides is the highest in the nation, that is in part because of its size: its per capita gun homicide rate is roughly in line with other big cities in the Midwest and substantially less than cities like Gary and St. Louis. Federal Bureau of Investigation, *Crime in the United States 2016*, Table 6, *available at* http://bit.ly/2FkUVvi.

[3] City of Chicago, *Gun Trace Report 2017*, *available at* http://bit.ly/2yYMtjq.

Second, to the extent that this Court looks to whether a challenged law is an outlier, Illinois's limitations on the issuance of concealed-carry permits are consistent with the current practice of many other states that similarly limit the issuance of public-carry permits to non-residents. Looking at the nation as a whole, Illinois's limits on issuing permits to non-residents actually constitute a middle-of-the-road policy, with several states enforcing more stringent standards.

Finally, the failure of certain states, including the plaintiffs' home states, to input records into national background-check databases undermines the ability of Illinois to safely administer a permitting system that issues permits to residents of every state. These state failures, standing alone, constitute a sufficient justification to uphold the law under intermediate scrutiny.

I. Because Illinois's concealed-carry licensing regime is consistent with centuries of historical practice of administering public-carry regulation at the local level, it falls outside the core protection of the Second Amendment.

One way to determine whether a law burdens the Second Amendment right is to assess the law based on a "historical understanding of the scope of the right," *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008), and consider whether the law is within a tradition of "restrictions [] rooted in history" that "were left intact by the Second Amendment and by *Heller*." *United States v. Rene E.*, 583 F.3d 8, 12 (1st Cir. 2009). Such "longstanding" laws, the Supreme Court explained, are treated as tradition-based "exceptions" by virtue of their "historical justifications." *Heller*, 554 U.S. at 635; *see Ezell v. City of Chicago*, 651 F.3d 684, 702 (7th Cir. 2011) ("[S]ome federal gun laws will survive Second Amendment challenge because they regulate activity falling outside the terms of

the right as publicly understood when the Bill of Rights was ratified."); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("[L]ongstanding limitations are exceptions to the right to bear arms.").

Although neither the Supreme Court nor this Court has established a precise standard for what is required for a law to be deemed longstanding, most courts to consider the issue have found that it does not require the law to "mirror limits that were on the books in 1791." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). To the contrary, laws may qualify as longstanding even if they "cannot boast a precise founding-era analogue," *NRA v. BATF*, 700 F.3d 185, 196 (5th Cir. 2012)—as was the case with the "early twentieth century regulations" prohibiting firearm possession by felons and the mentally ill and regulating the commercial sale of arms deemed longstanding in *Heller*. *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).[4]

Illinois's limitations on the issuance of concealed-carry permits to residents of states with similar laws are consistent with the historical practices of state and local governments going back centuries. Regulation of who can carry a firearm in public has historically been an issue of local concern, reliant on local conditions and knowledge to determine when and where it is appropriate to carry and who can safely be allowed to carry.

[4] This Court has stated that, in challenges to state laws, the scope of the right should be assessed from the 14th Amendment's ratification in 1868 rather than Second Amendment's ratification in 1791. *Ezell*, 651 F.3d at 702 ("[T]he Second Amendment's scope as a limitation on the States depends on how the right was understood when the Fourteenth Amendment was ratified"). But even if that weren't the case, Illinois's law would still qualify as longstanding because, as discussed below, highly localized regulation of public carry was broadly accepted in 1791.

When states began issuing concealed-carry permits in the late 19th and early 20th centuries, permit issuance was administered by local authorities based, in many cases, on personal knowledge of the applicants and the circumstances leading to their application for a concealed-carry permit. Although many state laws allowed for out-of-state applications later in the 20th century, this allowance was based on the assumption that states would adopt a uniform code for regulating firearms, and it still required applicants to be sufficiently known to local law enforcement to comply with the discretionary licensing standards.

This long history of local discretion in regulating who can carry a firearm in public shows that the right of non-residents to receive public-carry permits, to the extent it exists at all, falls outside the core of the right protected by the Second Amendment. *See Ezell*, 651 F.3d at 703 ("[T]he rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right."). Laws regulating such peripheral Second Amendment activity should be subject to a lower level of scrutiny than those burdening the heart of the right. *Id.*

A. The regulation of public carry in the Founding Era and nineteenth century was highly localized.

The plaintiffs' efforts to nationalize concealed-carry licensing are inconsistent with centuries of highly localized regulation of who can carry firearms in public. *See generally* Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 84 (2013). During the founding period, public-carry regulation was based, whether through state common law or statute, on the English tradition and was administered by justices of the peace or other local officials based on their knowledge of the community and its culture. *See generally* Saul Cornell,

The Right to Keep and Carry Arms in Anglo American Law: Preserving Liberty and Keeping the Peace, 80 L. & Contemp. Probs. 11, 13-14 (2017) (discussing the central role of justices of the peace in enforcing public-carry laws); 1786 Va. Laws 33, ch. 21 (assigning local law enforcement to arrest and disarm those who "go nor ride armed by night nor by day, in fair or markets, or in other places, in terror of the Country").[5] An armed hunting party in rural Pennsylvania would have been treated differently by local authorities than an armed group of youngsters in Philadelphia and a pillar of the community carrying a firearm would have been treated differently than the local hothead. *See generally* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 501 (2004) (discussing how enforcement of founding era public-carry laws was "[a] complex, context-bound judgment.").

In the early nineteenth century many states formalized this local discretion by enacting statutes generally prohibiting the carrying of firearms in public, making an exception only when a person experienced "reasonable cause to fear an assault or other

[5] Going back at least as far as the 1328 Statute of Northampton, the carrying of weapons in public was regulated by justices of the peace, based on community norms and local knowledge. 2 Edw. 3, ch. 3 (1328) (prohibiting bringing "force in affray of the peace" and going armed "in Fairs, Markets" "in the presence of "the King's Justices" and "elsewhere"—a statutory prohibition enforced by local "Justices," "Sheriffs," "bailiffs" and constables"); *see also* 1686 N.J. Laws 189, ch. 9; 1694 Mass. Laws 12, no. 6; 1792 N.C. Laws 60, ch. 3; 1795 Mass. Laws 436, ch. 2; 1801 Tenn. Laws 710, § 6; 1821 Me. Laws 285, ch. 76, § 1. The Northampton tradition also remains in effect through common law in many states that did not enact their own statutes. *See, e.g.*, A Bill for the Office of Coroner and Constable (Mar. 1, 1682), *reprinted in* Grants, Concessions & Original Constitutions 251 (N.J. constable oath) ("I will endeavour to arrest all such persons, as in my presence, shall ride or go arm'd offensively."); John M. Niles, The Connecticut Civil Officer 154 (1833) (explaining that it was a crime to "go armed offensively," even without threatening conduct); John A. Dunlap, The New York Justice 8 (1815); Vermont Telegraph, Feb. 7, 1838 (discussing enforcement of local carry laws in New England).

injury, or violence to his person, or to his family or property." 1836 Mass. Laws 748, 750, ch. 143, § 16.[6] Like the earlier laws, these statutes were administered by local justices of the peace who made decisions based on local conditions and likely in many cases direct knowledge about the individuals involved. Patrick Charles, *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* 141-42 (2018) ("[I]t was common for individuals to carry arms for trade, repair, on travels, and for hunting. However, should an individual carry dangerous weapons into the public concourse. . . it was within the discretion of the justice of the peace, sheriff or constable to detain the offending individual, confiscate their weapons, or seek surety of the peace.").

B. When licensing public carry became common, it was handled at the local level and regulated based on local concerns.

Laws licensing public carry, as opposed to prohibiting it under most circumstances, did not become common until the late nineteenth and early-twentieth centuries. *See generally* Repository of Historical Gun Laws, Duke University Law School, *available at* https://law.duke.edu/gunlaws/. These early licensing laws were reliant on the discretion of local authorities to make decisions about permit issuance. *See* 1905 N.J. Laws 324-25 (providing for purely discretionary licensing); 1908 Va. Laws 381 (same);

[6] Similar laws were passed in many other statutes, including Wisconsin (1838 Wisc. Laws 381, § 16); Maine (1841 Me. Laws 709, ch. 169, § 16); Michigan (1846 Mich. Laws 690, ch. 162, § 16); Virginia (1847 Va. Laws 127, ch. 14, § 16); Minnesota (1851 Minn. Laws 526, ch. 112, § 18); Delaware (1852 Del. Laws 330, ch. 97, § 13); Oregon (1853 Or. Laws 218, ch. 16, § 17); Texas (1871 Tex. Laws 1322, art. 6512); West Virginia (1891 W. Va. Laws 915, ch. 148, § 7); Alabama (concealed carry only) (Wade Keyes, *The Code of Alabama, 1876* Page 882, Image 898 (1877) *available at* The Making of Modern Law: Primary Sources); and Mississippi (same) (1878 Miss. Laws 175); Nebraska (same) (Guy Ashton Brown, The Compiled Statutes of the State of Nebraska, 1881 Page 666, Image 674 (1881) *available at* The Making of Modern Law: Primary Sources.).

1911 N.Y. Laws 442-43 (same). These laws, often enacted at the municipal level, typically included a blanket prohibition on carrying firearms in public with the only exception being for those licensed by local authorities. *See* Ordinances of the City of St. Louis (1871) ("[I]t shall not be lawful for any person to wear . . . concealed about his person, any pistol . . . within the City of St. Louis, without written permission from the Mayor").[7] Later statutes provided more guidance for issuing authorities by requiring a showing that an applicant was of "good moral character" and had "proper cause" to carry a firearm. 27 Stat. 116 (1892) (congressionally created local law for D.C.); 1906 Mass. Acts 150; 1913 N.Y. Acts 1637.[8] Although they provided a more transparent standard, these laws were still reliant on the judgment and expertise of local government officials to administer the licensing system.

In the 1920s, in an effort to preempt stringent firearms laws that had passed in several states, gun-rights organizations drafted and backed model legislation regulating public carry based upon the principle that "[e]ntirely convincing evidence of necessity should be required" before the issuance of a concealed-carry permit. *34th Conference Handbook of the National Conference on Uniform State Laws* 714 (1924); Charles Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767 (1926). This model law required local law

[7] *See also* Ordinances of Jersey City, N.J. (1874); Ordinances of Hyde Park, Ill. (1876); Ordinances of Evanston, Ill. (1893); Ordinances of New York, N.Y. (1881); Ordinances of New Haven, Conn. (1890) Ordinances of Fresno, Cal. (1896); Ordinances of Spokane, Wash. (1896); Oregon City, Ore. (1898). All are available at the repository of historical gun laws at Duke University. *See* https://law.duke.edu/gunlaws/.

[8] *See also* 27 Stat. 116 (1892). New York's law also created a special process for issuance of licenses to non-residents, requiring approval by a judge, local character witnesses and a specific explanation of why the license is necessary. 1913 N.Y. Acts 1637.

enforcement to determine that an applicant "has a good reason to fear an injury to his person or property or any other proper purpose, and that he is a suitable person to be so licensed." 1923 N.D. Acts 379, ch. 266, § 8; *see also* 1925 Ind. Sess. Laws 495, ch. 207; 1925 Mich. Sess. Laws 473, no. 313.[9] Although non-residents could apply for concealed-carry permits under these model laws, they were still required to show that they were fit to receive a license and had a need to carry the weapon—a difficult obstacle for those without close local ties. *Id.* Applicants were also required to have been issued a license by their home state. *Id.*

In states that allowed public carry at all, discretionary licensing, based on local knowledge about applicants' temperaments and their need for self-defense, continued to be the norm for most of the 20th century. *See* Gun Law Navigator, at http://every.tw/2yxMrR6. This consensus in favor of discretionary licensing based on local knowledge and concerns broke down over the last thirty years, after a concerted effort by the National Rifle Association to advocate for weaker public-carry licensing laws based on minimum standards. But, as section II discusses, this weakening of public-carry licensing laws did not necessarily open the floodgates to out-of-state licensees.

C. Because Illinois's law is consistent with centuries of regulating the carrying of firearms in public at the local level, it falls outside of the core of the right protected by the Second Amendment.

Although this Court does not require that a challenged law "mirror limits that were on the books in 1791" to be found longstanding, here there is a record of analogous

[9] *See also* 1927 Mass. Acts 413; 1927 Mich. Acts 887, No. 372; Act of July 8, 1932, ch. 465, §§ 1, 8, 47 Stat. 650, 652;1923 Cal. Acts 701, ch. 339; 1923 N.H. Acts 138; 1931 Texas 447, ch. 321; 1935 S.D. Laws 355, ch. 208; 1935 Wash. Sess. Laws 599, ch. 172; 1936 Ala. Laws 51-54.

laws going back to the founding, and indeed centuries earlier. *Skoien*, 614 F.3d at 641. As the Supreme Court explained in *Heller*, such "longstanding" laws are treated as tradition based "exceptions" by virtue of their "historical justifications." 554 U.S. at 626-27. The long tradition of laws regulating the carrying of firearms at the local level shows that laws like Illinois's fall outside the "scope of the Second Amendment," or at minimum outside the "core of the right" requiring the application of intermediate rather than strict scrutiny. *See Ezell,* 651 F.3d at 702-03.

II. Illinois's concealed-carry licensing system is consistent with those of many other states.

In *Moore v. Madigan*, this Court has considered the outlier status of state gun laws in its Second Amendment analysis. 702 F.3d 933 (7th Cir. 2012) ("Illinois is the only state that maintains a flat ban on carrying ready-to-use guns outside the home"). Unlike in *Moore*, however, Illinois's non-resident licensing law is not at all unusual nationally. Rather, Illinois's law limiting issuance of public-carry permits to non-residents is consistent with, and indeed more permissive than, the present-day practice of many other states.

A. Illinois's concealed-carry licensing regime is less restrictive than those in twenty-three states.

In one respect Illinois's licensing laws are more permissive compared to many other states. While Illinois allows for the issuance of public-carry permits to residents of states that meet certain criteria, twenty-three states, ranging from Alabama and Nebraska to California and New York, do not issue concealed-carry licenses to non-residents at all

(or only with certain very limited exceptions).[10] Illinois is actually the most permissive of the states in the Seventh Circuit, with the laws of both Wisconsin and Indiana not allowing for the issuance of concealed-carry permits to non-residents. Ind. Code § 35-47-2-3; Wis. Stat. § 175.60.

B. Eight states, including Illinois, limit, or impose significant burdens on, non-resident public-carry permit applicants.

Illinois is also not alone in placing additional restrictions on non-residents seeking permits. Several other states put requirements of varying severity on non-resident applicants.[11] These states range from the traditionally well-regulated Massachusetts to the extremely pro-gun Utah.[12] Five states and the District of Columbia require applicants to have a permit from another state prior to applying for a carry permit.[13] Pennsylvania and Massachusetts require non-residents to have a license from their home state before

---

[10] *See* Alabama (Ala. Code § 13A-11-75); Arkansas (Ark. Code § 5-73-309); California (Cal. Penal Code § 26155; Cal. Penal Code § 26150); Colorado (Colo. Rev. Stat. § 18-12-203); Delaware (Del. Code tit. 11, § 1441); Georgia (Ga. Code § 16-11-129); Indiana (Ind. Code § 35-47-2-3); Iowa (Iowa Code § 724.11(1)); Kentucky (Ky. Rev. Stat. § 237.110); Louisiana (La. Rev. Stat. § 40:1379.3); Michigan (Mich. Comp. Laws § 28.425b(7)(b)); Montana (Mont. Ann. Code § 45-8-321(1); Nebraska (Neb. Rev. Stat. § 69-2433); New Mexico (N.M. Stat. § 29-19-4(A)); New York (N.Y. Penal Law § 400.00(3)(a)) (allows applicants who are "principally employed" in the state); North Carolina (N.C. Gen. Stat. § 14-415.12); Ohio (Ohio Rev. Code § 2923.125); Oklahoma (Okla. Stat. tit. 21 § 1290.9); Oregon (Or. Rev. Stat. § 166.291); South Carolina (S.C. Code § 23-31-215); South Dakota (S.D. Codified Laws § 23-7-7.1); Tennessee (Tenn. Code § 39-17-1351); Wisconsin (Wis. Stat. § 175.60).

[11] *See* Connecticut (Conn. Gen. Stat. § 29-28); Illinois (430 Ill. Comp. Stat 65/4; 430 Ill. Comp. Stat. 66/25); Massachusetts (G.L. ch. 140, § 131F); Pennsylvania (18 Pa. Cons. Stat. § 6109); Utah (Utah Code Ann. § 53-5-704).

[12] *Id*.

[13] Connecticut (Conn. Gen. Stat. § 29-28), North Dakota (N.D. Cent. Code, § 62.1-04-03(b)) (state must have reciprocity with North Dakota); Massachusetts, (G.L. ch. 140, §131F) (must be from applicants home state); Pennsylvania (18 Pa. Cons. Stat. § 6109)(same); Utah (Utah Code Ann. § 53-5-704)(if resident of state that recognizes Utah permit, then must have permit from state of residency), District of Columbia (D.C. Code § 22-4506).

applying for a license, a remnant from the model legislation discussed in the previous section. 18 Pa. Cons. Stat. § 6109(e)(iv); Mass. Dept. of Criminal Justice Information Services, Application for Non-Resident Temporary License to Carry Firearms 3, *available at* http://bit.ly/2o81rzl. (Massachusetts also requires applicants make a showing of need to be issued a permit). Maryland, New Jersey Rhode Island, and Hawaii all broadly allow non-resident applicants but require them to make a showing that they have a particular need to carry in the state, and that they do not pose a danger to public safety. Haw. Rev. Stat. § 134-9(a); Md. Public Safety Code § 5-306(a)(6); N.J. Stat. § 2C:58-4; N.J. Admin. Code § 13:54-2.4; R.I. Gen. Laws § 11-47-18, § 11-47-11. This means that, in these states, while in principle permits are available to non-residents, in practice it would prove difficult without strong local ties.

Putting these two categories together, thirty-one states and Washington D.C. either prohibit issuance of public-carry permits to non-residents or require additional or difficult-to-satisfy requirements for non-resident applicants.

C. Twenty states and the District of Columbia, accounting for 48% of the U.S. population, restrict both the issuance of licenses to non-residents and the interstate recognition of concealed-carry permits.

Relying solely on the issuance of concealed-carry permits to non-residents does not present the whole picture, as many states provide at least some degree of reciprocity to holders of out of state concealed-carry permits. Twenty-two states accept any other state's permit or do not require a permit at all, while twenty-eight states and the District of Columbia have limited or no reciprocity. *See generally* Everytown for Gun Safety, *Federally Mandated Concealed Carry Reciprocity*, at 16 n.12, *available at* http://every.tw/

2EnK98e. (Ten states and the District have no reciprocity and eighteen states offer only limited reciprocity. *Id.)*

Putting together concealed-carry-issuance limitations and reciprocity limitations, twenty states and the District of Columbia—accounting for roughly 48% of the United States population (149 million people per the 2010 Census)—both deny or limit interstate public-carry-permit reciprocity and deny or limit issuance of public-carry permits to non-residents.[14] The impact on non-residents across these states is certainly not uniform, with some states going much further than Illinois and others administering substantially more lenient policies. California and New York, for example, both prohibit issuing permits to non-residents (with a limited exception for non-resident local workers in New York) and grant reciprocity to zero out-of-state permits. Cal. Pen. Code §§ 26150, 26155; N.Y. Penal Law § 400.00. South Carolina is roughly on par with Illinois in denying non-resident permit applicants and granting reciprocity to the permits of only 18 other states. *See* South Carolina Reciprocity, South Carolina Law Enforcement Division, *available at* http://www.sled.sc.gov/Reciprocity1.aspx. On the more lax end, Pennsylvania grants reciprocity to all but two states and allows non-resident applicants if they are licensed in their home state and meet the same criteria as resident applicants. 18 Pa. Cons. Stat. § 6109.[15] While the stringency of these regulations may vary, they together show the

[14] California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, Nebraska, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Carolina, Wisconsin, and Washington, D.C. *See infra.*

[15] In some states with limited reciprocity, non-residents could also likely seek a permit in a third state that has reciprocity with the state in which they want to carry firearms.

Illinois's system is consistent with a clear national tradition of states calibrating their public-carry regulations to address state circumstances and concerns.

III. Illinois's ability to administer a concealed-carry licensing system that grants licenses to non-residents is undermined by inconsistencies in state reporting of criminal, mental health, and domestic violence records into the national database.

Illinois's policy of limiting licensing of non-residents is also supported by strong public policy considerations. Significant failures in record reporting by a number of states would impair the ability of Illinois to safely administer a public-carry system that allows for the issuance of public-carry permits to non-residents. These gaps undermine the ability of the State Police to be confident that non-resident applicants are actually law abiding and responsible at the time of their application and present significant challenges to the ability of state police monitoring permit holders' continued law-abiding status.

A. Inconsistencies in the record reporting processes of several states would undermine the public safety of a concealed-carry permitting system that grants interstate licenses.

The Concealed Carry Act requires the state police to conduct a background check on permit applicants using all available federal, state and local databases. 430 ILCS 66/35. Illinois maintains its own comprehensive criminal and mental-health records databases for use both in administering the state's firearms laws and for other law enforcement and administrative functions. See *generally* 20 ILCS 2635/1 *et seq*. But, if the state were ordered to grant public-carry licenses to non-residents, it would be compelled to rely on national databases to perform background checks at the time of issuance, and to monitor permit holders' continued law-abiding status. *Culp v. Madigan*, 270 F. Supp. 3d 1038, 1049–50

(C.D. Ill. 2017). The reliability of any such system would be undermined by inconsistent record reporting in several other states.

1. Criminal history records

Most importantly, there are significant state-level disparities in reporting criminal records to the national system, with some reporting nearly all records and others failing to report a significant portion of criminal convictions. The failures of certain states to do a thorough reporting job results in a substantial number of criminal records, which would disqualify an applicant from being issued a public-carry permit in Illinois, being excluded from the federal system. A 2013 report found that nationwide states fail to make available to the federal criminal-background-check system records of twenty-five percent of felony convictions, totaling more than seven million missing records. National Consortium for Justice Information and Statistics (SEARCH), *Improving the National Instant Background Screening System for Firearm Purchases* 19 (2013), *available at* http://bit.ly/2oat4Ha.[16] The most recent available statistics show that the criminal records of at least 30 million individuals contained in state repositories are not available through III. Bureau of Justice

[16] Most states hold criminal records in their state criminal record databases, which are also made available through an entry in the Interstate Identification Index ("III"), the national database for records of arrests, indictments, and dispositions for all 50 states (and which in turn is one of several databases that comprise the National Instant Criminal Background Check System ("NICS")). SEARCH, Challenges and Promising Practices for Disposition Reporting, 2, 3 (2017) *available at* https://bit.ly/2Gg1Pa4. Among other reasons, some records maintained at the state level are unavailable in a national check because some law enforcement agencies do not collect the fingerprints of offenders—and III will not accept the submission of records that do not contain fingerprints. SEARCH, State Progress in Record Reporting for Firearm-Related Background Checks: Misdemeanor Crimes of Domestic Violence, 6 (2016), available at https://bit.ly/2pMnDQd. When a criminal record lacks a fingerprint, the record is unavailable beyond the local or state level. As a result, many records of misdemeanor crimes of domestic violence are not available through III. *Id.*

Statistics, *Survey of State Criminal History Information Systems* 2016 (BJS Report), Tables 1, 20 (Feb. 2018), *available at* http://bit.ly/2fK8cD1.

Relatedly, backlogs in certain states' record reporting mean that there is a significant number of records that have never been entered into the state databases that populate III. Twenty states have a backlog of 1,000 or more records, ranging from 1,000 to over 520,000. BJS Report at Table 13.[17] While many states do an effective job of reporting criminal records, these failures of other states to report such records or report them timely would undermine any Illinois's public-carry licensing system granting licenses to non-residents. The state cannot confidently license non-residents, or monitor them after licensing, when they cannot be confident in the record reporting of a number of their fellow states.

Moreover, certain states make criminal records available through III only after significant delays. This flaw has two elements: (1) a delay between a felony adjudication and the receipt of a conviction record by the state record repository, and (2) a delay between the records being received by a repository and records being entered into a state database, which feeds into the national database.[18] Nine states take at least thirty days for

---

[17] Arizona (520,009 records); Connecticut (331,200); Pennsylvania (225,500); Virginia (172,700); Hawaii (148,000); Kansas (140,800); New Jersey (133,700); Idaho (129,800); Nevada (119,00); Alabama (100,000); Utah (73,500); Missouri (65,600); Oregon (55,000); West Virginia (50,200); Indiana (10,000); New Mexico (6,800); Montana (4,000); Ohio (4,000); North Dakota (2,400); Alaska (1,000).

[18] III, which supplies criminal history records for the federal background check system, relies on state criminal records databases to populate the system. When a state agency queries III, state databases with responsive records are identified which can then be searched. This means failure of states to enter records in their own databases also deprives the federal system of the records. *See* 28 C.F.R. 20.3(m); BJS Report at glossary v-vi.

felony records to be received by the state repository and an additional thirteen states take between eight and thirty days for their state repositories to receive records. BJS Report at Table 8b.[19] Once records are received, nine states take at least thirty days to then enter that felony adjudication into the state repository, and five states take between eight and thirty days to do so. BJS Report at Table 8b.[20] Together, in low performing states, these reporting delays can lead to long gaps between a felony conviction and the entry of records into a database accessible through the federal system—over two years in Kansas, over a year in Indiana and Mississippi, at least 212 days in New Mexico, 189 days West Virginia, 122 days in North Dakota and 62 days in Arizona, Nevada and Ohio—posing serious public safety threats. BJS Report at Table 8b.[21]

2. *Protective orders*

There are also significant failures in certain states to report protective orders into the national database. A number of states only report a fraction of the protective orders indexed in their state databases into the national system. BJS Report at Tables 4, 4a.[22]

---

[19] Indiana, Kansas, and Mississippi (more than one year); North Dakota (91-180 days); Arizona, Nevada, New Mexico, North Carolina, and Ohio (31-90 days); Arkansas, California, Florida, Georgia, Hawaii, Missouri, Montana, Oklahoma, South Dakota, Texas, Vermont, Virginia, and West Virginia (8-30 days). BJS Report at Table 8b.

[20] Kansas (more than one year); New Mexico and West Virginia (181-365 days); Arizona, Nevada, Ohio, California, Montana, and North Dakota (31-90); Georgia, Oklahoma, South Dakota, Vermont, and Virginia (8-30 days). BJS Report at Table 8b.

[21] Kansas (over two years); Indiana, Mississippi (over one year); New Mexico (212-455 days); West Virginia (189-395 days); North Dakota (122-270 days); Arizona, Nevada, Ohio (62-180 days); California and Montana (39-120 days); North Carolina (32-91 days); Georgia, Oklahoma, South Dakota, Vermont, and Virginia (16-60 days); Arkansas (10-37 days); Florida, Hawaii, Missouri, and Texas (9-31 days). BJS Report at Table 8b.

[22] Alabama (4,721 to 13,542); Colorado (112,156 to 230,678); Florida (194,803 to 319,218); Hawaii (5,272 to 13,747); Iowa (25,462 to 50,180); Massachusetts (19,785 to 35,605); Michigan

Nationally there is a disparity of approximately 164,000 protective orders between state databases and the federal background-check system. *Id.* Some of the disparity may be due to the regular entry and expiration of short-term orders, but the size of the disparity is concerning.[23] Additionally, some states cannot reliably report protective orders to the NCIC file because (1) courts cannot meet NCIC technical requirements, (2) some courts and law enforcement agencies lack adequate staff, and (3) some protective orders lack all of the data elements required for entry into NCIC.[24] Whatever the reason for this disparity, it denies important information to the Concealed Carry Review Board, which is tasked with making the determination that applicants can be safely licensed.

Several other states do not have notable disparities between records in the state and federal systems but report a suspiciously small number of records in both, suggesting that records of protective orders may not be reported to any centralized database. For example, Montana's state database contains 5,111 records while many substantially larger states have proportionately less. Georgia's, covering ten times the population, contains only 10,623 and Maryland's covers nearly six times the population, but contains only 9,331. BJS Report at Table 4. West Virginia and Wyoming also report at an extremely low rate with just respectively 2,265 and 753 reported records. Id. If compelled to

(16,076 to 30,421); Mississippi (826 to 17,441); Nebraska (2,094 to 5,027); Nevada (110 of 2,380); North Dakota (1,297 to 2,683); Rhode Island (15,567 to 50,980); South Dakota (3,010 to 4,371); Texas (17,743 to 44,610); Utah (10,446 to 38,450); Vermont (2,119 to 3,873). BJS Report at Tables 4, 4a.

[23] SEARCH, *State Progress in Record Reporting for Firearm-Related Background Checks: Protection Order Submissions*, 5 (2016), available at https://bit.ly/2GklRwa.

[24] Id.

administer a licensing system open to all non-residents, Illinois would be forced to adopt these failures of certain of its sister states.

3. Mental-health records

There are also failures in certain states in reporting prohibiting mental-health records.[25] At least five states—Alaska, Montana, New Hampshire, Rhode Island, Wyoming—and the U.S. territories functionally fail to report any prohibiting mental-health records. Results of a Freedom of Information Request to NICS (2017 Mental Health Report*), available at* https://every.tw/2qERr0T.[26] In states that do report records, a number do so at a per-capita rate that is aberrantly low compared to other states indicating either underreporting or differences in state law leading to the failure to include seriously ill individuals.[27] The median state, Ohio, reports prohibiting mental-health records at a rate of 483.6 per 100,000 (a total of 56,382 records for a state of

[25] Federal law prohibits the possession of firearms by anyone "who has been adjudicated as a mental defective or who has been committed to a mental institution." 18 U.S.C. 922(g)(4). Illinois law goes a bit further prohibiting the possession of firearms more broadly, covering by those admitted to mental-health facilities in the previous five years, or those admitted more than five years ago without proof of recovery and some people committed on a voluntary basis and those with intellectual and developmental disabilities (regardless of whether they qualify as committed on the long-term basis required under federal law), as well as limiting the issuance of a concealed-carry permit to an applicant who has been in court-ordered drug or alcohol rehabilitation in the preceding five years. 430 ILCS 65/4(2)(iv-v, xv-xvii); 430 ILCS 65/8(u); 430 ILCS 66/25(5).

[26] Wyoming (6 Records); Montana (29 Records); Alaska (240); Rhode Island (440) New Hampshire (513).

[27] States do not meaningfully differ in their underlying rates of mental illness. See David Hemenway & Matthew Miller, *Association of rates of household handgun ownership, lifetime major depression, and serious suicidal thoughts with rates of suicide across US census regions*, 8 Injury Prevention 313, 314 (2002).

11,658,609 people).[28] 2017 Mental Health Report. Seventeen states report prohibiting records at less than half the median rate and eleven states report a per capita rate four times lower.[29] Again, some of these disparities can likely be explained by policy differences, rather than reporting failures. Some states may provide less access to treatment to the severely mentally ill, or otherwise employ commitment procedures that do not require reporting committed individuals to NICS. But these differences in policy do not mitigate the need of Illinois to identify the dangerously ill when administering its public-carry licensing system.

B. Plaintiffs' home states share many of the same record reporting flaws as other states.

The state-level reporting problems identified above are also apparent in the plaintiffs' home states:

- In 2016, Colorado and Iowa each reported tens of thousands more protective orders to their respective state protective order databases compared to the NCIC national database: Colorado's database held 118,522 more records than were reported to NCIC; for Iowa the disparity was 24,718 records. BJS Report at Tables 4, 4a.

[28] Illinois reports mental-health records at a rate a bit below the median rate, 371.4 per 100,000 while many states report mental-health records at a substantially higher rate including Pennsylvania at 6,374 per 100,000, New Jersey (4,874), North Carolina (3,612), Virginia (3,333) and New York (2,569).

[29] Wyoming (1 per 100,000); Montana (2.8); Alaska (32.4); New Hampshire (38.2); Rhode Island (41.5); Oklahoma (71.8); Alabama (92.5); Louisiana (102); Georgia (103.2); South Dakota (106.7); Arkansas (118.9); Indiana (150.4); Hawaii (179.1); Vermont (185); Massachusetts (208.8); Nevada (225); Kansas (232.9).

- As of 2016, Pennsylvania and Missouri each had enormous backlogs of unprocessed felony dispositions not yet entered into their respective state criminal record repositories: Pennsylvania had a backlog of 225,500 records, and Missouri had a backlog of 65,600 records. BJS Report at Table 13.
- Indiana also had one of the longest gaps between felony adjudications and records being entered into the state database—an average of over a year. BJS Report at Table 8b.
- Indiana reported records of those who were involuntarily committed to a mental -health facility at a rate three times lower than the median state. 2017 Mental Health Report (Indiana reported only 10,024, records (150.4 per 100,000)).

C. Standing alone, these state-level record reporting failures provide a sufficient basis for Illinois to exclude most non-residents from public-carry licenses.

Together, these failures in record reporting—both in certain states across the country and in the plaintiffs' home states—more than justify Illinois's policy of limiting the issuance of non-resident public-carry permits.[30] When assessing categorical prohibitions on firearm possession, this Court has required the government to demonstrate that a law is "substantially related to an important governmental objective." *Skoien*, 614 F.3d at 641; see also *Ezell*, 651 F.3d at 703 (determining the constitutionality of

[30] Recently enacted federal legislation will (1) require states to form a plan to improve their record reporting, (2) incentivize states to comply with their improvement plans, and (3) provide funding to states to improve their record reporting systems. Consolidated Appropriations Act, 2018, Fix NICS Act of 2018, Pub. L. 115-141, §§ 601-605 (2018). But the results of this increased funding and attention are yet to be realized.

a statute "requires the court to evaluate the regulatory means the government has chosen and the public-benefits end it seeks to achieve"). Applying this standard to Illinois's licensing system, this Court has found "preventing crime . . . [is an] important public concern[]" *Ezell v. City of Chicago*, 846 F.3d 888, 895 (7th Cir. 2017). Additionally, because of the reporting failures discussed above, "[b]oth logic and data establish a substantial relation between" limiting the issuance of public-carry permits to non-residents and the state's objective of preventing crime by preventing criminals, the dangerously mentally ill and domestic abusers from carrying firearms in Illinois. *Skoien*, at 642. Illinois's restriction on non-resident permits is therefore "substantially related to an important government interest" and withstands intermediate scrutiny. *Id.* at 641.

CONCLUSION

The district court's judgment should be affirmed.

/s/ Deepak Gupta

ERIC TIRSCHWELL
MARK ANTHONY FRASSETTO
WILLIAM J. TAYLOR JR.
AARON C. ESTY
EVERYTOWN FOR GUN SAFETY SUPPORT FUND
132 East 43rd Street, #657
New York, NY 10017
etirschwell@everytown.org

DEEPAK GUPTA
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L Street NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,635 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Circuit Rule 32(b) because it has been prepared in proportionally spaced typeface in 12-point Book Antiqua font using Microsoft Word.

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2018, I electronically filed this brief with the Clerk of the Court for the U.S. Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta