

No. SJC-13561

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff-Appellant,

v.

DEAN F. DONNELL, JR.,

Defendant-Appellee.

On Direct Appellate Review from a Judgment of the
Lowell District Court

BRIEF OF AMICI CURIAE CALIFORNIA RIFLE & PISTOL ASSOCIATION,
INCORPORATED, SECOND AMENDMENT LAW CENTER, INC., GUN
OWNERS OF AMERICA, INC., GUN OWNERS OF CALIFORNIA, INC., GUN
OWNERS FOUNDATION, OPERATION BLAZING SWORD-PINK PISTOLS,
SECOND AMENDMENT DEFENSE AND EDUCATION COALITION, LTD.,
AND FEDERAL FIREARMS LICENSEES OF ILLINOIS, INC. IN SUPPORT
OF DEFENDANT-APPELLEE AND AFFIRMANCE

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July 30, 2024

CORPORATE DISCLOSURE STATEMENT

Under Supreme Judicial Court Rule 1:21, counsel for Amici Curiae certifies that California Rifle & Pistol Association, Incorporated, Second Amendment Law Center, Inc., Gun Owners of America, Inc., Gun Owners of California, Inc., Gun Owners Foundation, Operation Blazing Sword, Inc., Second Amendment Defense and Education Coalition, Ltd., and Federal Firearms Licensees of Illinois, Inc. are nonprofit organizations and thus have no parent corporations and no stock. Pink Pistols, Inc. is a nonprofit organization that recently merged with Operation Blazing Sword, Inc.

Date: July 30, 2024

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Founded in 1875, the California Rifle and Pistol Association, Incorporated, is a nonprofit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA works to preserve the rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, and members of the public.

Second Amendment Law Center, Inc. is a nonprofit corporation in Henderson, Nevada. The Center defends the individual rights to keep and bear arms as envisioned by the Founders. 2ALC also educates the public about the social utility of firearm ownership and provides accurate historical, criminological, and technical information to policymakers, judges, and the public.

Gun Owners of America, Inc. is a nonprofit organization formed in 1976 by the late Sen. H.L. (Bill) Richardson to preserve and defend gun owners' Second Amendment rights. GOA sees firearms ownership as an issue of freedom and works to defend that freedom through lobbying, litigation, and outreach. GOA has served as a party or amicus in Second Amendment challenges in almost every state in the nation to protect gun owner rights.

Gun Owners of California, Inc. is a 501(c)(4) not-for-profit entity founded in 1975 to oppose infringements on Second Amendment rights. GOC is dedicated to the unequivocal defense of the Second Amendment and America's extraordinary heritage of firearm ownership. Its advocacy efforts regularly include participation

in Second Amendment litigation, having filed amicus briefs in many cases, including cases before the U.S. Supreme Court.

Gun Owners Foundation exists to educate the public about the importance of the Second Amendment and to provide legal, expert, and support assistance for law-abiding individuals involved in firearms-related cases. GOF is a 501(c)(3) charitable organization incorporated in the Commonwealth of Virginia.

Operation Blazing Sword–Pink Pistols comprises two organizations, Operation Blazing Sword, Inc. and Pink Pistols, which together advocate on behalf of lesbian, gay, bisexual, transgender, and queer firearm owners, with specific emphasis on self-defense issues. Operation Blazing Sword maintains a network of over 1,600 volunteer firearm instructors in nearly a thousand locations across all fifty states. Pink Pistols, Inc., which merged with Operation Blazing Sword, Inc. in 2018, is a shooting society that honors gender and sexual diversity and advocates for the responsible use of firearms for self-defense. Membership is open to anyone, regardless of sexual orientation or gender identity, who supports the rights of LGBTQ firearm owners.

Second Amendment Defense and Education Coalition, Ltd., is an Illinois not-for-profit corporation dedicated to defending human and civil rights secured by law, including the right to bear arms. SADEC’s activities are furthered by complementary litigation and education programs.

Federal Firearms Licensees of Illinois, Inc., is an Illinois not-for-profit corporation that represents federally licensed gun dealers throughout Illinois.

As organizations dedicated to advancing the right to keep and bear arms, the question of nonresident carry is vital to Amici. Some of them, including CRPA, GOA, GOC, and GOF, are involved in federal litigation seeking to vindicate the rights of nonresidents to carry for self-defense in California. *Cal. Rifle & Pistol Ass’n, Inc. v. L.A. Cnty. Sheriff’s Dep’t*, No. 23-cv-10169 (C.D. Cal. Dec. 4, 2023). Amici believe this brief will provide the Court with additional perspective and aid in the resolution of this case.¹

SUMMARY OF ARGUMENT

This case is simple. There is no historical tradition supporting a requirement that peaceable nonresidents already permitted to carry in their home states submit to a burdensome process to obtain a Massachusetts license to carry (“CCW”) if they wish to exercise their Second Amendment rights while visiting or passing through Massachusetts.² On the contrary, laws historically *exempted* travelers from such local restrictions. Americans of earlier eras knew that requiring citizens visiting another state to give up the right to bear arms was untenable.

¹ Per Rule 17(c)(5), amici and their counsel declare that: (1) no party or party’s counsel authored this brief in whole or in part; (2) no party or party’s counsel, or any other person or entity, other than the amicus curiae, contributed money intended to fund the preparation or submission of this brief; and (3) none of the amici has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

² If someone visiting Massachusetts wants to obtain a nonresident permit, “processing may take up to 90 days.” See *Apply for a Firearms License*, Mass.gov, <https://www.mass.gov/how-to/apply-for-a-firearms-license> (last visited July 8, 2024). Getting a nonresident carry permit is thus not a reasonable expectation for someone on a last-minute trip to or through Massachusetts.

This brief will explain the relevant standards under *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. ___, 144 S. Ct. 1889 (2024), and how the Commonwealth fails to meet them. It will also counter the “parade of horrors” Massachusetts and its amici trot out by presenting data from several states showing that Americans who legally carry are overwhelmingly law-abiding. No harm will result from allowing Americans who can (and do) carry in their home state to also carry in Massachusetts. Chapter 269, Section 10(a) of the General Laws of Massachusetts is unconstitutional as applied to nonresidents like Mr. Donnell and Mr. Marquis.

ARGUMENT

I. HISTORICAL ANALYSIS UNDER THE SECOND AMENDMENT

In 2022, the Supreme Court reaffirmed the “original public meaning test” for analyzing Second Amendment challenges embraced in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Applying that test, the *Bruen* Court held that the Second Amendment protects the right to armed self-defense in public. 597 U.S. at 19, 31-33. *Bruen* also reiterated that courts may not engage in any form of interest balancing in Second Amendment cases. *Id.* at 23. Instead, the Court made clear that:

When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”

Id. at 24. The Second Amendment thus requires that “the *government must demonstrate* that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *Id.* at 17 (emphasis added); *see also id.* at 19, 24, 58 n.25, 59 & 70.

To meet that burden, the government cannot rely on just any historical law referencing firearms. Rather, when challenged laws regulate conduct or circumstances that existed at the time of the Founding, the absence of widespread historical laws addressing the same conduct or circumstances evidences that the Founders understood the Second Amendment to preclude such regulation. *Id.* at 27. In contrast, modern circumstances that did not exist at the time of the Founding call for an analogical analysis of the government’s proffered historical record, still grounded in the Founding. *Id.* at 28-29.

What’s more, to be a proper historical analogue, the law must be “well-established and representative.” *Id.* at 30. Courts may not uphold a modern law just because a few similar laws existed in the past. *Id.* Doing so “risk[s] endorsing outliers that our ancestors would never have accepted.” *Id.* (quoting *Drummond v. Robinson Twp.*, 9 F.4th 217, 226 (3d Cir. 2021)). In *Bruen*, for example, New York presented three laws from the Colonial Era, three turn-of-the-18th-century laws, three 19th-century laws, and five late-19th-century regulations from the Western Territories. 597 U.S. at 37-70. The Court dismissed them as mere outliers and emphasized, as it had in *Heller*, that it would not stake its interpretation of the Second Amendment on historical aberrations that contradict the overwhelming

weight of other evidence about the right to bear arms in public for self-defense. *Id.* at 65.

Further, Reconstruction-era evidence is relevant only as *confirmation* that a Founding-era tradition persisted; otherwise, “postratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text.” *Bruen*, 597 U.S. at 36 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)); see also *Espinoza v. Mont. Dep’t of Revenue*, 591 U.S. 464, 482 (2020) (noting that even “more than 30 States” adopting laws “in the second half of the 19th century ... cannot by itself establish an early American tradition” because “such evidence may reinforce an early practice but cannot create one”).³ Twentieth-century evidence is even less persuasive. *Bruen*, 597 U.S. at 66 n.28.

With this year’s *Rahimi* decision, the Supreme Court reaffirmed the one-step historical test that *Bruen* demands: “In *Bruen*, we explained that when a firearm regulation is challenged under the Second Amendment, the Government must show that the restriction ‘is consistent with the Nation’s historical tradition of firearm regulation.’” *Rahimi*, 144 S. Ct. at 1896 (citing *Bruen*, 597 U.S. at 24). While the government need not hunt for identical historical laws, “why and how

³ See also Mark W. Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, 24 Harvard J.L. & Pub. Pol’y Per Curiam 31 (2022) (“No Supreme Court case has ever looked to 1868 as the principal period for determining the meaning of an individual right in the Bill of Rights. If periods after 1791 are consulted at all, it is only to confirm that subsequent authorities remained consistent with the public understanding in 1791.”).

the [challenged] regulation burdens the right are central to this inquiry.” *Id.* at 1898.

Finally, when assessing historical enactments to determine whether they substantiate a historical tradition, courts must be vigilant to avoid giving the government the blank check *Bruen* forbade. “Green trucks” and “green hats” are analogous only when the relevant metric is “things that are green.” *Bruen*, 597 U.S. at 29. As Justice Gorsuch put it, “[c]ourts must proceed with care in making comparisons to historic firearms regulations, or else they risk gaming away an individual right the people expressly preserved for themselves in the Constitution’s text.” *Rahimi*, 144 S. Ct. at 1908 (Gorsuch, J., concurring).

II. A PROPER *BRUEN* ANALYSIS, AS ELABORATED BY *RAHIMI*, DOOMS THE COMMONWEALTH’S ARGUMENTS

Rahimi poses several significant problems for the Commonwealth, in that the Supreme Court: (1) required historical analogues anchored in the Founding Era; (2) demanded a degree of fit the Commonwealth cannot meet; (3) demanded numerosity of laws that comprise the underlying historical tradition; and (4) justified disarmament only on the grounds of proven individualized dangerousness. *See Rahimi*, 144 S. Ct. 1889. All these leave the Commonwealth’s arguments in shambles, and each is discussed in turn here.

A. Any claimed historical tradition must be rooted in the Founding Era, but the Commonwealth presents no relevantly similar laws from that period.

In *Rahimi*, the Court explicitly declined to settle the “ongoing scholarly debate” over whether post-Founding historical laws—particularly from the

Reconstruction Era—were relevant to the historical analysis. 144 S. Ct. at 1898 n.1 (citing *Bruen*, 597 U.S. at 37). Even so, the majority’s analysis, citing and relying on Founding-era laws and later regulations mirroring Founding-era laws, effectively settled the debate. The Court relied on two types of Founding-era laws: sureties and prohibitions on “going armed in terror of the people.” *See id.* at 1900-01 (citing a 1795 Massachusetts surety law, laws from four states and colonies prohibiting “going armed” and affrays (in 1741, 1761, 1786, and 1795), the common law, and Blackstone).

Pre-Founding and post-Founding history of similar laws can only confirm a historical tradition that existed in the Founding Era. As the Court noted in *Rahimi*, this additional history resembled Founding-era tradition. *See id.* (noting that, besides the 1795 Massachusetts surety law, nine other jurisdictions enacted the same, including several in the 19th century). But that anchoring to Founding-era laws was critical, as the Court and several concurrences repeatedly suggest:

- “Since *the founding*, our Nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms.” *Id.* at 1926 (emphasis added).
- “[I]f laws *at the founding* regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations.” *Id.* at 1898 (emphasis added).
- “[W]e seek to honor the fact that the Second Amendment ‘codified a *pre-existing* right’ belonging to the American people, one that carries the

- same ‘scope’ today that it was ‘understood to have *when the people adopted’ it.*” *Id.* at 1907 (Gorsuch, J., concurring) (emphasis added) (quoting *Heller*, 554 U.S. at 592).
- “[P]re-ratification English law and practices may supply background for some constitutional provisions. But the Constitution, including the Bill of Rights, did not purport to take English law or history wholesale and silently download it into the U.S. Constitution.” *Id.* at 1915 n.3 (Kavanaugh, J., concurring).
 - “[T]he history that matters most is the *history surrounding the ratification of the text*; that backdrop illuminates the meaning of the enacted law. History (or tradition) that long postdates ratification does not serve that function ... evidence of ‘tradition’ *unmoored from original meaning* is not binding law.” *Id.* at 1925 (Barrett, J., concurring) (emphasis added).

Contrary to *Rahimi*’s reliance on Founding-era laws,⁴ the Commonwealth has not presented a single law from the Founding Era requiring residents of other states to obtain permission from the state or local government before carrying a firearm. Thus, this case is not a matter of disagreement over degrees of similarity of analogues; the Commonwealth has not presented even vaguely similar laws about the carry rights of members of the political community. It cites only several

⁴ In a decision decided on the same day as *Rahimi*, the Supreme Court rejected the argument that procedures employed by a few states “in the early 19th century” could inform the original meaning of the Fifth and Sixth Amendments. *See Erlinger v. United States*, ___ U.S. ___, 144 S. Ct. 1840, 1857 (2024).

“in terror of the people” laws. RAI/133. Amici do not dispute the historical tradition of criminalizing the use of arms to unjustifiably threaten other people—*i.e.*, the historical precursor to Massachusetts’ modern prohibition on *brandishing* under the assault statute. *See, e.g., Rahimi*, 144 S. Ct. at 1901; Mass. Gen. Laws ch. 265, § 13A. But that is not at issue here. Neither Mr. Donnell nor Mr. Marquis have threatened anyone. And the challenged ban on nonresident carry is not limited to only those who go “in terror of the people.”

The Commonwealth also cites several historically racist restrictions that disarmed various disfavored groups such as Native Americans, Catholics,⁵ loyalists, and enslaved people. *See Commonwealth of Massachusetts Br.* (“MA.Br.”) at 36 n.11. At times, these restrictions were justified as applying to people who were not considered Americans subject to the Bill of Rights. At the Founding and thereafter, Native Americans were seen as aborigines and conquered peoples, the rights of whom were subject to agreements with the federal government in the form of treaties ratified by the Senate—the same as foreign nations—and to whom constitutional protections such as the Fifth Amendment’s Takings Clause were deemed to not apply with the same force and effect as the general citizenry. *See, e.g., Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823).

⁵ Laws restricting Catholics from bearing arms did not even survive ratification. According to James Madison’s notes for his speech introducing the Bill of Rights in the House of Representatives, the English Bill of Rights had numerous defects, including the limitation of “arms to Protestts.” *See James Madison, Notes for Speech in Congress*, [ca. 8 June] 1789,” *Founders Online*, National Archives, <https://founders.archives.gov/documents/Madison/01-12-02-0125> (last visited July 16, 2024). Restrictions on Catholics bearing arms were invalidated by the Bill of Rights and quickly vanished from our history.

But see Hodel v. Irving, 481 U.S. 704 (1987) (later allowing Takings Clause challenge by tribal members).

Similarly, during the Revolutionary War, the “Loyalists” rejected being “the people of the United States” and fought to remain subjects of the King of Great Britain. The Second Amendment was not considered to be implicated by the wartime disarmament of individuals who chose to exclude themselves from “the people,” in the same way restrictions on gun possession by non-citizens are modernly viewed as not violative of the Second Amendment. *See generally* 18 U.S.C. § 922(g)(5)(B).

Even assuming laws treating Native Americans or Loyalists as less than citizens were still good law, Mr. Donnell and Mr. Marquis have no such special status—actual or analogous—excluding themselves from the general citizenry entitled to full constitutional protection. Laws that apply to American citizens today cannot find historical support in laws that applied only to *noncitizens* in the past. Indeed, the Thirteenth and Fourteenth Amendments invalidated race-based gun control laws such as those that disarmed Native Americans and Blacks, and on this basis, other courts have properly rejected reliance on such laws in the Second Amendment context. *See, e.g., Baird v. Bonta*, 81 F.4th 1036, 1047 (9th Cir. 2023) (citing *Range v. Att’y Gen.*, 69 F.4th 96, 105 (3d Cir. 2023), *cert. granted, vacated sub nom. Range v. Garland*, No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024)). This Court likewise should “give such discriminatory laws little or no weight.” *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1239 (S.D. Cal. 2023).

B. Modern regulations cannot deviate from the principles underlying historical precursors, and the historical laws the Commonwealth presents at best restricted only concealed carry.

1. *Rahimi* explains the necessary degree of fit between a modern law and proposed historical analogues.

In *Rahimi*, the U.S. Supreme Court explained the “level of generality” applicable to comparisons between modern laws and purported historical precursors. 144 S. Ct. at 1926 (Barrett, J., concurring). The Court noted that historical regulations often reflect an overarching “principle” with which modern regulations must comport. *Id.* at 1898. But the Court recognized that the guiding “principles that underpin our regulatory tradition,” *id.*, cannot be described so amorphously (*e.g.*, “preventing gun violence”) as to countenance disparate modern regulations. In other words, there must be a strong degree of fit between the historical analogues establishing a principle and the modern law implementing it.

For instance, in *Rahimi*, the Court examined the fit between 18 U.S.C. § 922(g)(8)(C)(i) and historical surety laws and restrictions on “going armed in terror of the people.” 144 S. Ct. at 1989-1901. Historical surety laws allowed anyone, including abused spouses, to appear before a judge or magistrate and demand the person threatening violence (or who committed violence) pay a bond and, if they were violent again, forfeit that bond. *Id.* If the accused failed to post the bond, they could be jailed for up to six months. *Id.* at 1899-1900. Meanwhile, the “going armed” and affray laws applied to those who carried arms in a way intentionally meant to terrify people, even if no actual violence came to pass. *Id.*

Section 922(g)(8)(C)(i) allows the disarmament of alleged domestic abusers,

after a hearing, if a court makes a finding of dangerousness. “Like the surety and going armed laws, [it] applies to individuals found to threaten the physical safety of another.” *Id.* at 1901. Also important was that neither § 922(g)(8)(C)(i) nor the historical analogues “broadly restrict arms use by the public generally.” *Id.* Instead, they applied to specific individuals, and even then, only when there had been a “judicial determination[] of whether a particular defendant likely would threaten or had threatened another with a weapon.” *Id.* The surety bonds were also of limited duration, just like the § 922(g)(8) restriction. *Id.* at 1902. “Finally, the penalty—another relevant aspect of the burden—also fits within the regulatory tradition. The going armed laws provided for imprisonment ... and if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is also permissible.” *Id.*

The surety, going armed, and affray laws cited in *Rahimi* were of the same “genre” of regulation aimed at dealing with armed people, on an individual basis, who have demonstrated their propensity for dangerousness. Indeed, the *Rahimi* majority ignored the government’s offer of laws regulating the “unsafe storage of guns or gunpowder” altogether. It declined to suggest that generally applicable regulations on the storage of firearms or powder (“how”) to prevent fires or injuries to the public (“why”) were analogous to § 922(g)(8) or other laws restricting carry by individuals found to be dangerous (“how”) to prevent those individuals from harming others (“why”). *See* Brief for Appellant at 23, *Rahimi*, 144 S. Ct. 1889 (2024) (No. 22-915). The fact that the laws commonly restrict the

exercise of the right (“how”) to promote a public safety purpose (“why”) is too general of a comparison to be sufficiently analogical. That would have been like comparing “things that are green” as the Court had warned against in *Bruen*, 597 U.S. at 29.

Rahimi’s rejection of such a level of generality wasn’t just implicit. “Courts must proceed with care in making comparisons to historic firearms regulations, or else they risk gaming away an individual right the people expressly preserved for themselves in the Constitution’s text.” 144 S. Ct. at 1908 (Gorsuch, J., concurring). Judges must not “let constitutional analysis morph into policy preferences under the guise of a balancing test that churns out the judge’s own policy beliefs.” *Id.* at 1923-24 (Kavanaugh, J., concurring). “To be sure, a court must be careful not to read a principle at such a high level of generality that it waters down the right.” *Id.* at 1926 (Barrett, J., concurring).

2. Massachusetts’s proposed analogues do not come close to the degree of fit necessary to justify Section 10(a), as the historical laws presented pertained only to concealed carry, and often contained exceptions for travelers.

Returning to the question of nonresident carry, even if this Court were to set aside the fact that the Commonwealth has no relevantly similar Founding-era analogues and instead opts to consider the 19th-century historical laws presented, the Commonwealth still cannot meet the *Bruen* and *Rahimi* standard. The Commonwealth presents dozens of 19th-century concealed carry laws from several states. RAI/133-147. A trend quickly emerges when examining these laws: Almost all of them strictly applied to *concealed* carry while not restricting the open carry

of firearms by anyone, whether a resident or nonresident. This is important because, when examining proposed historical analogues, “whether modern and historical regulations impose a comparable burden on the right of armed self-defense” is a central consideration. *Bruen*, 597 U.S. at 29. “Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding.” *Rahimi*, 144 S. Ct. at 1898.

For example, an 1859 Ohio law the Commonwealth cites provided that “[w]hoever shall carry a weapon or weapons, *concealed on or about his person*, such as a pistol, bowie knife, dirk, or any other dangerous weapon, shall be deemed guilty.” RAI/137 (emphasis added). This law, and nearly every other carry law in the Commonwealth’s appendix, did not apply to openly carried firearms or simple possession. The burdens imposed on the right to carry were thus remarkably less severe than the burden imposed by Section 10(a), which is not limited to restricting one form of carry while leaving the other available, but is instead a total ban on all forms of nonresident carry for self-defense.

And while a very small minority of the laws Massachusetts has submitted appear to ban *all* carry consistent with Section 10(a), this Court must be careful to look beyond the excerpts the Commonwealth has included, as its excerpts can be misleading. One example is an 1840 Maine law the Commonwealth cites. It includes the following excerpt in its record:

Maine: *The Revised Statutes of the State of Maine, passed October 22, 1840 at 709 (William R. Smith & Co., Augusta, 1841)*: “Any person, going armed with any dirk, dagger, sword, pistol, or other offensive

and dangerous weapon, without a reasonable cause to fear an assault on himself ... (shall be punished).” [RAI/134.]

That sounds like a general prohibition on all carry or other public possession of weapons, absent a good reason. The problem? The full excerpt reveals that the law was a surety law that only applied when another person had cause to fear an injury or breach of the peace. *It was not a general restriction on carry.* The full text reads:

Justices of the Peace, § 16. Any person, going armed with any dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without a reasonable cause to fear an assault on himself, or any of his family or property, *may, on the complaint of any person having cause to fear an injury or breach of the peace, be required to find sureties for keeping the peace for a term, not exceeding one year, with the right of appeal as before provided.*

(emphasis added).⁶

Another of the smattering of laws that prohibited all carry was an 1870 Tennessee law that applied to “publicly or privately” carried weapons. RAI/144-145. But this, too, is not what it seems because that law was struck down as unconstitutional. And the Commonwealth should know that, because that very law was discussed in *Bruen*. “[W]hen the Tennessee Supreme Court addressed the constitutionality of a substantively identical successor provision, *see* 1870 Tenn. Acts ch. 13, § 1, p. 28, the court read this language to permit the public carry of

⁶ The full text of the 1840 Maine law is reprinted at <https://firearmslaw.duke.edu/laws/the-revised-statutes-of-the-state-of-maine-passed-october-22-1840-to-which-are-prefixed-the-constitutions-of-the-united-states-and-of-the-state-of-maine-and-to-which-are-subjoined-the-other-public> (last visited July 16, 2024).

larger, military-style pistols because any categorical prohibition on their carry would ‘violat[e] the constitutional right to keep arms.’” *Bruen*, 597 U.S. at 54 (citing *Andrews v. State*, 50 Tenn. 165, 187 (1871)). The following year, the Tennessee legislature amended the law to specifically exempt larger army pistols that were openly carried. *See* RAI/145.

A complete examination of every law the Commonwealth has presented is beyond the scope of this brief. But, at bottom, the late-coming outliers the Commonwealth presents pertained to *concealed* carry, while generally allowing open carry. *See also Nunn v. State*, 1 Ga. 243, 251 (1846) (holding that a law prohibiting carrying arms “secretly” was acceptable, but insofar as it contained “a prohibition against bearing arms *openly*, is in conflict with the Constitution, and void”). But here, Section 10(a) prohibits not just any form of unlicensed carry, whether open or concealed, but also mere possession.

In its zeal to flood this Court with anachronistic and dissimilar historical laws, the Commonwealth made an error that further imperils its arguments: many of the laws it cites expressly exempted travelers, even from concealed carry restrictions. For example, an 1831 Indiana law the Commonwealth includes provided “[t]hat every person, *not being a traveler*, who shall wear or carry a dirk, pistol, sword in a cane, or other dangerous weapon concealed, shall upon conviction thereof, be fined in any sum not exceeding one hundred dollars.” RAI/135 (emphasis added).

These “traveler’s exceptions” to concealed carry restrictions were common in the 19th century (*see infra*, Part II.C.), revealing that, to the extent any tradition

existed regarding carry by nonresidents, it was a tradition that gave *more* leeway to visitors from other states like Mr. Donnell or Mr. Marquis. Which makes sense, as nonresidents are unlikely to be familiar with a state’s particular carry laws, nor is there usually enough time for the transient nonresident to obtain permission from local government to comply with those laws. As long as nonresidents are peaceable people not otherwise prohibited from possessing firearms, no historical tradition supports denying them the enumerated right to bear arms while they travel. *See also Suarez v. Paris*, 2024 U.S. Dist. LEXIS 130327, at *30-36 (M.D. Pa. July 24, 2024) (court embarking on its own historical traveler analysis to strike down Pennsylvania’s prohibition on unlicensed vehicular carry).

C. Numerosity of historical laws is necessary for an analogue to be valid, and there are exceedingly few relevantly similar historical laws.

Bruen instructed that the numerosity of historical laws is critical to proving “a well-established and representative historical *analogue*.” 597 U.S. at 65. In doing so, the *Bruen* Court rejected two state laws as insufficient outliers. *Id.* (“the Texas statute, and the rationales set forth in *English* and *Duke*, are outliers. In fact, only one other State, West Virginia, adopted a similar public-carry statute before 1900.”). *Rahimi* further entrenched this principle, as both categories of laws it cited, surety regimes and “going armed” laws, were well represented at the Founding.

For sureties, the Court cited a pre-colonial, Founding-era, and post-Founding tradition consisting of many laws. It referenced nine total state surety laws during or after the Founding Era in addition to extensive pre-Founding history. *Rahimi*,

144 S. Ct. at 1899-1901. For the “going armed” and “affrays” laws, the Court referenced a similarly long history consisting of Blackstone, four state or colonial 18th-century laws, and the common law extending into the 19th century in several states. *Id.* at 1901-02.

Even if post-Founding history were relevant, the Commonwealth has not established a representative tradition of barring nonresidents from the right to carry unless they seek permission from the government. To be sure, Massachusetts points to many 19th-century restrictions on *concealed* carry (which applied to residents and nonresidents alike), and restrictions on carrying with intent to commit a crime. *See* RAI/134-148. But as discussed above, those laws are not relevantly similar to Section 10(a) in that they only applied to concealed carry and thus imposed a far lesser burden than Section 10(a)’s total ban on mere possession. Exceedingly few laws barred carry completely, and those that did were struck down by 19th-century courts as unconstitutional, at least insofar as they restricted open carry.

On the contrary, what *did* seem to be well-represented in the 19th century were the traveler’s exceptions discussed above. The Commonwealth (unintentionally) cites several such laws, including the previously discussed 1831 Indiana law, an 1841 Alabama law, an 1820 Arkansas law, an 1813 Kentucky law, an 1878 Tennessee law, and an 1878 Mississippi law. RAI/134-135, 142. But more such laws exempting travelers existed besides those the Commonwealth identified, such as an 1867 Nevada law that barred concealed carry for everyone who was not a “peace officer or traveler.” *An Act to Prohibit Carrying of Concealed Weapons,*

ch. 30, §§ 1-2, 1867 Nev. Stat. (Joseph E. Eckley). An 1864 California law did the same. *See* Theodore Henry Hittell, *The General Laws of the State of California, from 1850 to 1864*, p. 261 (1868), available at *The Making of Modern Law: Primary Sources*.⁷

In short, Massachusetts has not even come close to meeting its burden of proving a representative tradition as *Bruen* requires. It has no numerosity of Founding-era laws backing restrictions on carry by nonresidents and, in fact, the very laws it presents show a 19th-century practice of exempting nonresidents from such restrictions.

D. The Commonwealth has not shown that Mr. Donnell or Mr. Marquis is dangerous, and their alleged “irresponsibility” is irrelevant.

In *Rahimi*, the U.S. Supreme Court explained that “our Nation’s tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not.” 144 S. Ct. at 1902. This is a significant blow to the Commonwealth’s arguments because, with Section 10(a), the Commonwealth disarms and punishes people like Mr. Donnell and Mr. Marquis by default—without any finding that they pose a credible threat to

⁷ Besides State laws, many localities provided such exceptions too. *See, e.g.*, Fred L. Button, ed., *General Municipal Ordinances of the City of Oakland, California* (Oakland, CA; Enquirer, 1895), p. 218, sec. 1, citing An Ordinance to Prohibit the Carrying of Concealed Weapons, No. 1141 (emphasis added) (“It shall be unlawful for any person in the City of Oakland, not being a public officer *or a traveler* actually engaged in making a journey, to wear or carry concealed about his person without a permit, as hereinafter provided, any pistol.”).

anyone.⁸ Indeed, Section 10(a) presumes every nonresident to be dangerous until the Commonwealth confirms otherwise. While such an inversion of history is not acceptable as to any American’s Second Amendment rights, at least residents of Massachusetts are generally aware of their laws and have time and an incentive to get a permit allowing carry in their home state. For those who are merely visiting, however, the burden is an extreme and ahistorical one.

The Commonwealth also apparently believes it can disarm people for being “irresponsible.” MA.Br. 27-28, 38-39. But the U.S. Supreme Court explicitly rejected this rationale for disarmament in *Rahimi*. “[W]e reject the Government’s contention that Rahimi may be disarmed simply because he is not ‘responsible.’ ... ‘Responsible’ is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law.” *Rahimi*, 144 S. Ct. at 1903.

In sum, the Commonwealth has no grounds under *Bruen* and *Rahimi* to require peaceable nonresidents to get a Massachusetts permit if they are otherwise permitted to carry in their own states.

⁸ The Commonwealth argues that “[t]he historical record reveals a long history of firearm regulation ... designed to prevent and disarm those deemed dangerous *or unfit* to carry a firearm by colonial governments” MA.Br. 35. Amici agree that people found to be dangerous may be disarmed. But *Rahimi* dealt only with proven dangerousness, and explicitly rejected the notion that someone could be disarmed merely by being declared “not ‘responsible’” (i.e., unfit). What is more, the record does not show that either Mr. Donnell or Mr. Marquis is dangerous, or that either is otherwise prohibited from possessing firearms. A tradition of disarming those found to be dangerous is thus irrelevant.

II. STATISTICS DEMONSTRATE THAT NO HARM WILL RESULT FROM ALLOWING PEACEABLE NONRESIDENTS TO CARRY IN MASSACHUSETTS

The arguments presented above suffice to decide this case in favor of Appellees. Still, the Commonwealth and its amici have also made a public policy argument that great danger will result if nonresidents need not obtain a permission slip before exercising their enumerated right to carry. That argument is not relevant here, as the U.S. Supreme Court has repeatedly banned interest-balancing analyses in Second Amendment cases. *Bruen*, 597 U.S. at 19-20. Amici nonetheless respond to the wildly incorrect assertions presented by the Commonwealth’s amici, Giffords Law Center and the Brady Center.⁹

A. **New Hampshire is safer than Massachusetts, and Giffords misleads this Court by including suicide data that it conflates with gun homicides.**

The Giffords brief argues that because New Hampshire has freer carry laws and allows anyone who can legally possess a firearm to carry one, the state has “a much higher firearm mortality rate” than Massachusetts. *See* Giffords-Brady Amicus Br. at 22-25. That claim is highly misleading, particularly in the context of nonresidents carrying for self-defense, as it uses statistics conflating homicides and

⁹ When reviewing the Giffords-Brady amicus brief, this Court should note that each urged the Supreme Court to rule against even the mere existence of the individual right to keep and bear arms in *Heller* and *Bruen* respectively. Br. for Giffords Law Center as Amicus Curiae, *Bruen*, 597 U.S. 1 (2022) (No. 20-843); Br. for Brady Center, et al., as Amicus Curiae, *D.C. v. Heller*, 554 U.S. 570 (2008) (No. 07-290). Their positions on the Second Amendment have been repeatedly rejected by the Supreme Court as incompatible with its text and history. Relying on their brief here would be akin to relying on a dissenting opinion for how to apply a rule. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) (“A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.”).

suicides.¹⁰ Nothing about New Hampshire’s firearm suicide rate indicates its citizens’ criminality with firearms when traveling to Massachusetts, and Giffords does not elaborate on the statistic by, e.g., illogically arguing that permitting nonresidents to carry in Massachusetts would embolden a rash of New Hampshire residents traveling into Massachusetts to commit suicide by firearm. Lacking context, the statistic is convenient to cite. But like the non-analogous historical laws the Commonwealth provides, a firearm homicide-suicide statistic of a neighboring state does not intelligently inform this Court about nonresidents carrying for self-defense while visiting, even if such a consideration were relevant to this Court’s analysis.

While Massachusetts is a relatively safe state, New Hampshire is even safer. According to the Centers for Disease Control, in 2022 (the most recent year with complete data) Massachusetts’s homicide rate was 2.5 per 100,000 people. In New Hampshire, the homicide rate was only 1.8 per 100,000 people—the best in the country.¹¹ Utah, another state that does not require a permit to carry, also beats Massachusetts’s homicide rate.¹² And several other constitutional carry states come close, including Maine, Idaho, and Iowa. *See id.*

¹⁰ The brief mentions “firearm mortality” three times, but does not clarify that this includes homicides and suicides. *See* Br. of Giffords Law Center and Brady Center as Amicus Curiae, at 24-25.

¹¹ *See* CDC National Center for Health Statistics, *Homicide Mortality by State*, Centers for Disease Control and Prevention, https://www.cdc.gov/nchs/pressroom/sosmap/homicide_mortality/homicide.htm (last visited July 10, 2024).

¹² Giffords claims, without citation, that states with “lax gun control laws” benefit from their proximity to states with strict laws. Giffords-Brady Amicus Br. at 25 n.4. But examples refuting this conclusory claim are as evident as those

When narrowing the examination to firearm-related homicide specifically, New Hampshire is still safer than Massachusetts. In 2022, Massachusetts had a firearm homicide rate of 1.52 per 100,000 people.¹³ But New Hampshire had a rate of 1.29 per 100,000 people. *See id.*; *see also* Fig. 1.

Residence Census Regions: Census Region 1: Northeast (CENS-R1) Data in this table is from time period:; Year/Month: 2022; UCD - Injury Intent: Homicide; UCD - Injury Mechanism & All Other Leading Causes: Firearm

Residence State ↓	➔ Deaths ↑↓	↕ Population ↑↓	↔ Crude Rate Per 100,000 ↑↓
Maine (23)	19	1,385,340	Unreliable
New Hampshire (33)	18	1,395,231	Unreliable
Rhode Island (44)	14	1,093,734	Unreliable
Vermont (50)	13	647,064	Unreliable
Massachusetts (25)	106	6,981,974	1.5
New Jersey (34)	235	9,261,699	2.5
New York (36)	528	19,677,151	2.7
Connecticut (09)	114	3,626,205	3.1
Total	1,881	57,040,406	3.3
Pennsylvania (42)	834	12,972,008	6.4

Fig. 1: Chart generated from data from the Centers for Disease Control and Prevention, National Center for Health Statistics by the CDC WONDER Online Database.

Suicides have absolutely nothing to do with the right of nonresidents to carry for self-defense and thus have no relevance here. Indeed, the overwhelming majority of those who die by suicide die in their own homes, not while traveling.¹⁴

supporting it. For example, Utah borders several states with similarly permissive gun laws, yet it has some of the lowest firearm death rates in the nation. *See* CDC National Center for Health Statistics, *Firearm Mortality by State*, Centers for Disease Control and Prevention, https://www.cdc.gov/nchs/pressroom/sosmap/firearm_mortality/firearm.htm (last visited July 17, 2024).

¹³ *See* CDC Wonder, *Provisional Mortality Statistics by Multiple Cause of Death and by Single Race, for 2018 through Present*. Centers for Disease Control and Prevention, <https://wonder.cdc.gov/controller/datarequest/D176> (last visited July 16, 2024).

¹⁴ “About three-quarters of suicide incidents occur at home.” *Basic Suicide Facts: Where Do Suicides Occur?*, Harvard Univ., T.H. Chan Sch. of Pub. Health, <https://www.hsph.harvard.edu/means-matter/basic-suicide-facts/where/> (last visited July 16, 2024).

B. Americans who legally carry are an extraordinarily law-abiding demographic.

The data overwhelmingly shows that Americans who legally carry firearms are extraordinarily law-abiding. For example, in 2020, Texas had 1,626,242 active carry permit holders.¹⁵ Carry permit holders thus made up about 5.6 percent of the state population of 29,145,505 in 2020.¹⁶ But permit holders made up just 114 of the state's 26,304 criminal convictions.¹⁷ That is just slightly more than four-tenths of one percent of the state's serious crimes. Even among those few convictions, most involved no gun. Of those that did, permit holders were responsible for an even smaller percentage. *See id.* For example, there were 1,441 convictions for aggravated assault with a deadly weapon in 2020, but people with a valid carry permit committed just four of those—less than three-tenths of one percent of the total. *See id.*

Other states evidence this trend. As of June 2024, Florida had issued 6,100,229 concealed weapon permits since October 1, 1987. Of those, 2,459,405 are active.¹⁸ In that 36-year period, only 20,348 permits have been revoked without

¹⁵ *See Active License/Certified Instructor Counts as of December 31, 2020*, Tex. Dep't of Pub. Safety, <https://www.dps.texas.gov/sites/default/files/documents/rsd/ltc/reports/actlicandinstr/activelicandinstr2020.pdf> (last visited July 17, 2024).

¹⁶ *See Texas: 2020 Census, Texas Added Almost 4 Million People in Last Decade*, U.S. Census Bureau (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/texas-population-change-between-census-decade.html>.

¹⁷ *See Conviction Rates for Handgun License Holders, Reporting Period: 01/01/2020 – 12/31/2020*, at 5, Tex. Dep't of Pub. Safety (Feb. 11, 2021), <https://www.dps.texas.gov/sites/default/files/documents/rsd/ltc/reports/convictionratesreport2020.pdf> (last visited July 17, 2024).

¹⁸ *See Concealed Weapon or Firearm License Summary Report Oct. 1, 1987- Jun. 30, 2023*, at 1, Fla. Dep't of Agric. & Consumer Servs., Div. of

being reinstated, or roughly three-tenths of one percent of the total issued. *See id.* Florida statistics are notable because it is the state where the modern right-to-carry movement gathered steam. The state’s enactment of “shall-issue” permitting was met with predictions of wild-west style violence and “blood in the streets,” but none of that happened. At least one prominent opponent of the law admitted his error: Representative Ronald A. Silver stated in 1990 that “[t]here are lots of people, including myself, who thought things would be a lot worse as far as that particular situation [carry reform] is concerned. I’m happy to say they’re not.” Clayton E. Cramer & David B. Kopel, “*Shall Issue*”: *The New Wave of Concealed Handgun Permit Laws*, 62 *Tenn. L. Rev.* 679, 692-93 (1995).

The trend of law-abiding CCW holders is not limited to “red states.” The Chicago Tribune reported in 2020 on all known uses of a gun (shootings or threats) by the 315,000 people in Illinois with CCW permits.¹⁹ The Tribune found just 71 incidents between 2014 and 2020. *See id.* And many incidents listed were not crimes, but legitimate self-defense uses. For instance:

Elvis Garcia, 39, was talking outside with neighbors ages 20 and 27. Two men drove up and started shooting at them; all three were hit. Garcia, a CCL holder, returned fire, killing Michael Portis, 17. Both Garcia and Portis died from their wounds. The second man who fired at the three neighbors later was arrested. [*Id.*]

Licensing (June 30, 2023), https://ccmedia.fdacs.gov/content/download/7499/file/cw_monthly.pdf (last visited July 17, 2024).

¹⁹ *See* Katherine Rosenberg-Douglas, *Explore: Shootings by CCL Holders in Illinois Since Concealed Carry Law Went Into Effect in 2014*, *Chic. Trib.* (Mar. 1, 2020), <https://www.chicagotribune.com/news/breaking/ct-viz-illinois-ccl-shootings-tracker-20200227-ww4ldqwdjrd2ze63w3vzewioiy-htmlstory.html>.

But even if all 71 incidents were crimes, that would come out to CCW permit holders in Illinois having a two one-hundredths of a percent chance of committing a crime using a gun at any point in the six-year period the Tribune examined.

Similar data exist in Wisconsin,²⁰ Minnesota,²¹ and other states, and data to the contrary is nonexistent. As a result, several courts have recognized the lack of evidence supporting gun control groups' attempts to tie criminality to those lawfully carrying for self-defense. “[D]espite ample opportunity for an evidentiary hearing, the State has failed to offer any evidence that law-abiding responsible citizens who carry firearms in public for self-defense are responsible for an increase in gun violence.” *Koons v. Platkin*, 673 F. Supp. 3d 515, 577 (D.N.J. 2023). “Simply put, CCW permit holders are not the gun wielders legislators should fear.” *May v. Bonta*, No. 23-cv-01696, 2023 WL 8946212, at *19 (C.D. Cal. Dec. 20, 2023). “[T]he vast majority of conceal carry permit holders are law abiding.” *Wolford v. Lopez*, 686 F. Supp. 3d 1034, 1076 (D. Haw. 2023).

Massachusetts will not suffer harm from honoring the self-defense rights of law-abiding nonresidents who visit the Commonwealth.

²⁰ *Department of Justice Concealed Carry Annual Report—175.60(19)—January 1 – December 31, 2022*, at 1-2, Wisc. Dep’t of Just., <https://www.doj.state.wi.us/sites/default/files/dles/ccw/2022%20Annual%20CCW%20Statistical%20Report.pdf> (last visited July 17, 2024).

²¹ *BCA Releases 2021 Permit to Carry Annual Report, Data Provided to BCA by Minnesota Law Enforcement Agencies*, Minn. Dep’t of Pub. Safety (Mar. 1, 2022), <https://dps.mn.gov/divisions/ooc/news-releases/Pages/BCA-Releases-2021-Permit-to-Carry-Annual-Report.aspx>.

CONCLUSION

Constitutional rights do not end at state borders. A New Hampshire resident visiting Massachusetts is at liberty to speak freely, worship as he wishes, travel uninhibited, and much more – all without undergoing a time-consuming permit process. His right to bear arms is no exception, because the Second Amendment is not a “second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.” *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

The order of dismissal in both cases should be affirmed.

Date: July 30, 2024

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RULE 16(K) CERTIFICATE OF COMPLIANCE

I, Jason Guida, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R.A.P. 16(a)(13) (addendum);
Mass. R.A.P. 16(e) (references to the record);
Mass. R.A.P. 17 (amicus briefs);
Mass. R.A.P. 18 (appendix to the briefs);
Mass. R.A.P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R.A.P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R.A.P. 20 because it is produced in the proportional font of Times New Roman at size 14 and contains 7,456 total non-excluded words as counted using the word count feature of Microsoft Word Microsoft 365 MSO (Version 2406).

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CERTIFICATE OF SERVICE

I, Jason Guida, hereby certify, under the penalties of perjury that on July 30, 2024, I caused a true and accurate copy of the foregoing Brief of Amici Curiae California Rifle & Pistol Association, Incorporated, Second Amendment Law Center, Inc., Gun Owners of America, Inc., Gun Owners of California, Inc., Gun Owners Foundation, Operation Blazing Sword-Pink Pistols, Second Amendment Defense and Education Coalition, Ltd., and Federal Firearms Licensees of Illinois, Inc. to be filed with the Massachusetts Supreme Judicial Court through the Court's electronic filing service, which will automatically serve the same by electronic means upon:

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Respectfully submitted,

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**Pro Hac Vice Motions pending*

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