COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-13561

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 THE NATIONAL RIFLE ASSOCIATION OF AMERICA AND SECOND AMENDMENT FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT–APPELLEE AND AFFIRMANCE

ERIN M. ERHARDT*
JOSEPH G.S. GREENLEE*
NATIONAL RIFLE ASSOCIATION
OF AMERICA – INSTITUTE FOR
LEGISLATIVE ACTION
11250 Waples Mill Road
Fairfax, VA 22030
(703) 267-1161
eerhardt@nrahq.org
**Pro Hac Vice Motions pending*

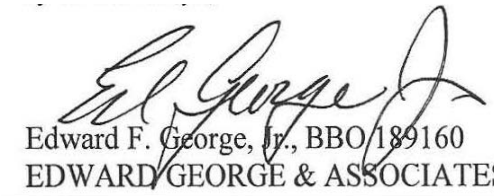
EDWARD F. GEORGE, JR.
BBO NO. 189160
EDWARD GEORGE & ASSOCIATES
P.O. Box 254
Arlington, MA 02476
(781) 281-7288
ed@egalawoffices.com

ADAM KRAUT*
SECOND AMENDMENT FOUNDATION
12500 N.E. 10th Place
Bellevue, WA 98005
(425) 454-7012
akraut@saf.org

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Mass. R. A. P. 17 (c)(1) and Supreme Judicial Court Rule 1:21, counsel for *amici curiae* National Rifle Association of America and Second Amendment Foundation certifies that they are nonprofit organizations and thus have no parent corporations and no stock.



Edward F. George, Jr., BBO 189160
EDWARD GEORGE & ASSOCIATES

Counsel for *Amici Curiae*

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STATEMENT OF *AMICI CURIAE*

The National Rifle Association of America (NRA) is America's oldest civil rights organization and America's foremost defender of Second Amendment rights. It was founded in 1871 by Union generals who, based on their Civil War experiences, sought to promote firearms marksmanship and expertise amongst the citizenry. Today, the NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA has approximately four million members, and its programs reach millions more.

The Second Amendment Foundation (SAF) is a nonprofit membership organization founded in 1974 with over 720,000 members and supporters in every state of the union. Its purposes include education, research, publishing, and legal action focusing on the constitutional right to keep and bear arms.

Amici are interested in this case because their members wish to travel with firearms across state lines to use them for lawful purposes.

RULE 17(c)(5) DECLARATION

Pursuant to Mass. R. A. P. 17(c)(5), *amici* and their counsel declare that: (A) no party or party's counsel authored this brief in any part; (B) no party or party's counsel, or any person or entity other than *amici* and its counsel, contributed money intended to fund this brief's preparation or submission; and (C) no *amici* or its counsel have represented any of the parties to the appeal in another proceeding involving similar issues, or were a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

SUMMARY OF ARGUMENT

When the Second Amendment's plain text covers an individual's conduct, the government must justify its regulation by demonstrating that it is consistent with the nation's historical tradition of firearm regulation. Because the Supreme Court has already held that the Second Amendment's plain text protects carrying handguns publicly for self-defense, the Commonwealth bears the burden of justifying its regulation with historical tradition. It has not and cannot do so.

No historical tradition exists that justifies the Commonwealth's nonresident licensing scheme. Historically, nonresidents traveling in a

state were treated no worse than residents with regard to firearm carry. If they were treated differently under the law, it was generally to exempt travelers from carry restrictions—not to subject them to more onerous burdens than residents. Moreover, a government license was not historically required to exercise the right to carry arms; carry licenses that applied to free citizens were not enacted until the late-19th-century and applied only to concealed carry, leaving open carry unrestricted.

The Commonwealth points to surety and going armed laws as proposed historical analogs. But those laws applied narrowly to individuals who were deemed dangerous and are inapposite to the Commonwealth's licensing scheme, which applies broadly to the general public. And nothing in *Bruen*'s ninth footnote, which notes that *Bruen* left "shall-issue" licensing regimes undisturbed, saves the regulation. Rather, the Commonwealth's licensing scheme is precisely the type of burdensome regulation the Supreme Court cautioned against. Thus, the Commonwealth's nonresident licensing law is unconstitutional.

ARGUMENT

I. The Second Amendment's plain text covers carrying firearms publicly for self-defense, so the Commonwealth must justify its licensing regime with historical regulations.

"When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct," and the "government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 24 (2022).

The conduct at issue in this case is carrying handguns publicly for self-defense. And the Supreme Court has already held that "the plain text of the Second Amendment protects . . . carrying handguns publicly for self-defense." *Id.* at 32; *see also id.* at 70 ("The Second Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public") (quoting *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008)); *Heller*, 554 U.S. at 592 (the Second Amendment's "textual elements . . . guarantee the individual right to possess and carry weapons"). Therefore, the Second Amendment's plain text covers the conduct at issue and the Commonwealth must justify its restriction on public carrying "by

demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24.

II. The Commonwealth's licensing regime contradicts the Nation's tradition of firearm regulation by prohibiting carry for self-defense, imposing greater restrictions on nonresidents, and requiring a license to bear arms.

A. The Supreme Court has held that no historical tradition supports prohibiting carry for self-defense.

Massachusetts's licensing law prohibits nonresidents from carrying firearms for self-defense. Mass. Gen. Laws Ann. ch. 140, § 131F allows a "nonresident" to apply for a "temporary license to carry firearms" *only* "for purposes of firearms competition."[1] There is no historical tradition supporting such a prohibition. As the *Bruen* Court held, traditionally, "American governments simply have not broadly prohibited the public

[1] The full provision provides:

> A temporary license to carry firearms, rifles or shotguns or feeding devices or ammunition therefor, within the commonwealth, shall be issued by the colonel of state police, or persons authorized by him, to a nonresident or any person not falling within the jurisdiction of a local licensing authority or to an alien that resides outside the commonwealth for purposes of firearms competition if it appears that the applicant is not a prohibited person and is not determined unsuitable to be issued a license as set forth in section 131.

carry of commonly used firearms for personal defense." 597 U.S. at 70.[2] Massachusetts's licensing regime thus violates the Second Amendment "in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id.* at 71.

The Commonwealth contends that the "firearms competition" language applies only to nonresident aliens. *Marquis* Op. Br. 23. But even then, as explained next, its restrictions on nonresident carry still contradict our nation's historical tradition of firearm regulation.

B. There is no historical tradition justifying disparate treatment of nonresidents compared to residents.

Massachusetts's licensing law imposes significantly greater burdens on the carry rights of nonresidents compared to residents. For starters, nonresidents may carry only for purposes of firearms competition. Mass. Gen. Laws Ann. ch. 140, § 131F. Additionally, as discussed *infra*, resident licenses are valid for six years, Robert Carlson,

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[2] The Court identified "certain reasonable, well-defined restrictions" that historically "limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials." *Bruen*, 597 U.S. at 70. But none of these support the State's ban on carry for self-defense by peaceable nonresidents.

What is a Class A firearms license in Massachusetts, THE GUN ZONE (Feb. 18, 2024),[3] while nonresident licenses must be renewed every year, *Apply for or renew a firearms license*, MASS.GOV.[4] And nonresident licenses have a longer processing time than resident licenses. *Id*. Such disparate treatment is historically unjustified.

Historically, nonresidents—including travelers—were never subject to greater restrictions than residents. Many jurisdictions subjected nonresidents to the same standards as residents. But whenever laws differentiated between residents and nonresidents, it was to provide nonresidents with greater carry protections.

1. Colonial Laws.

In 1686, the Province of East Jersey—a separate colony from 1674 to 1702—enacted what appears to be the first carry restriction in the American colonies applicable to the general population (as opposed to only a disfavored subset such as American Indians). 23 THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-

[3] https://thegunzone.com/what-is-a-class-a-firearms-license-in-massachusetts/ (last visited August 8, 2024).

[4] https://www.mass.gov/how-to/apply-for-or-renew-a-firearms-license (last visited August 8, 2024).

JERSEY 289–90 (1758). The colony prohibited "privately" wearing various weapons but exempted "all strangers, travelling upon their lawful occasions thro' this Province, behaving themselves peaceably." *Id*. at 290.

2. Early-to-Mid Nineteenth Century Laws.

After the founding of America, beginning in the 1810s and continuing through the end of the nineteenth century, many jurisdictions regulated carry but specifically exempted travelers.

In the 1810s, both Kentucky and Indiana prohibited the concealed carry of certain weapons—including pistols, dirks, and sword canes—but both states provided exemptions for travelers. 1813 Ky. Acts 100 (no concealed carry of certain weapons "unless when travelling on a journey");[5] 1820 Ind. Acts 39 (no concealed carry of certain weapons, "[p]rovided however, that this, act shall not be so construed as to affect travellers").

The following decade, Tennessee banned all carry, "either public or private," of a "dirk, sword cane, French knife, Spanish stiletto, belt or pocket pistols." 1821 Tenn. Pub. Acts 15. But the law specified "[t]hat

[5] This concealed carry ban was held unconstitutional in *Bliss v. Commonwealth*, 12 Ky. 90, 93 (1822).

nothing herein contained shall affect . . . any person that may be on a journey to any place out of his county or state." *Id.* at 16; *see also* Robert Looney Caruthers & Alfred Osborn Pope Nicholson, A COMPILATION OF THE STATUTES OF TENNESSEE 100 (1836) (1825 carry ban providing "that nothing herein contained shall affect any person that may be on a journey to any place out of his county or state").

By the start of the Civil War, three additional states—Indiana, Arkansas, and Alabama—banned the concealed carry of certain weapons but made exceptions for travelers. 1831 Ind. Acts 192 (applying to every person "not being a traveller"); 1843 Ind. Acts 982 (same); 1859 Ind. Acts 129 (same); Josiah Gould, A DIGEST OF THE STATUTES OF ARKANSAS 381–82 (1858) (1837 law applying to every person "unless upon a journey"); 1840 Ala. Laws 149 (prohibiting concealed carry "unless such person shall . . . be travelling, or setting out on a journey").

In 1860, the New Mexico Territory prohibited the carry of various weapons except by "persons when actually on trips from one town to another in this Territory." REVISED STATUTES AND LAWS OF THE TERRITORY OF NEW MEXICO 410 (1865). Travelers were required to

disarm, however, "after they shall have arrived at the town or settlement." *Id*.

Finally, Ohio banned the concealed carry of weapons "such as a pistol, bowie knife, dirk, or any other dangerous weapon" but allowed persons found carrying concealed weapons in violation of the law to assert an affirmative defense that he or she was "engaged in the pursuit of any lawful business, calling, or employment, and that the circumstances . . . were such as to justify a prudent man in carrying" a weapon. 1859 Ohio Laws 56–57. And at least one commentator of the era suggested that one such circumstance that would justify carrying arms was "traveling in a dangerous part of the country." Benjamin L. Oliver, THE RIGHTS OF AN AMERICAN CITIZEN 178 (1832).

Later in the century, in his annotations to Chancellor James Kent's *Commentaries on American Law*, future Supreme Court Justice Oliver Wendell Holmes, Jr., also tacitly confirmed that, whether or not prohibitions on the concealed carry of weapons are constitutional, carry by travelers is generally a recognized right:

> As the Constitution of the United States, and the constitutions of several of the states, in terms more or less comprehensive, declare the right of the people to keep and bear arms, it has been a subject of grave discussion, in some

> of the state courts, whether a statute prohibiting persons, *when not on a journey, or as travellers*, from *wearing or carrying concealed weapons*, be constitutional.

2 James Kent, COMMENTARIES ON AMERICAN LAW 340 n.2 (O.W. Holmes, Jr. ed., 12th ed. 1873) (first emphasis added).

3. Mid-to-Late Nineteenth Century Laws.

Throughout the remainder of the nineteenth century, various states, cities, and territories enacted (or restated) similar laws. During the Civil War, California prohibited the concealed carry of various weapons by "[e]very person, not being a peace officer or traveller." 1863 Cal. Stat. 748; 1864 Cal. Stat. 115. In 1867, Nevada enacted a law identical to California's 1863 prohibition, including the traveler exception. 1867 Nev. Stat. 66.

In 1867, Memphis, Tennessee, banned the carry of various weapons, but exempted those "on a journey to a place out of his county or State." William H. Bridges, DIGEST OF THE CHARTERS AND ORDINANCES OF THE CITY OF MEMPHIS 44 (1867). That same year, Memphis also enacted a law prohibiting providing certain weapons to minors, "except a gun for hunting or weapon for defense in traveling," further recognizing the right

of travelers—even minor travelers—to go armed for their own protection. *Id.* at 50.

In 1869, the town of Bedford, Indiana, banned the concealed carry of various weapons by anyone "not being a traveler." ORDINANCES OF THE TOWN OF BEDFORD 1–2 (1869). The city of Lebanon, Tennessee, followed suit in 1871. R.E. Thompson, A COMPILATION OF THE LAWS AND ORDINANCES OF THE CORPORATION OF LEBANON 56–57 (1871) (no concealed carry within the corporate limits of Lebanon "unless on a journey"). Also in 1871, the City of Newark, Ohio, copied the state's affirmative defense for those armed while "in the pursuit of any lawful business, calling or employment" where "the circumstances . . . were such as to justify a prudent man in carrying." T. B. Fulton, THE REVISED ORDINANCES OF THE CITY OF NEWARK 45 (1901).

In the 1870s, Tennessee, Alabama, and Arkansas all restated their respective carry bans, and all provided the same exemptions for travelers. 1870 Tenn. Pub. Acts 55 (no carrying certain arms unless "on a journey to a place out of his county or State"); Wade Keyes, THE CODE OF ALABAMA 882–83 (1877) (1873 law prohibiting the concealed carry of certain weapons unless "travelling, or setting out on a journey"); 1875

Ark. Acts 156 (no carry of certain weapons, but "nothing herein contained shall be so construed as to . . . prohibit persons traveling through the country, carrying such weapons while on a journey with their baggage").

That same decade, during the Reconstruction Era, several additional states, territories, and localities enacted their own carry bans with exceptions for travelers. In 1871, Texas instituted a fine for anyone caught "carry[ing] on or about his person, saddle, or in his saddle-bags, any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for purposes of offense or defense," providing, however, that "[t]he preceding article shall not apply . . . to persons traveling." THE REVISED STATUTES OF TEXAS 42–43 (1879); *see also* 1871 Tex. Gen. Laws 25 (no carrying certain weapons, "*provided*, that this section shall not be so construed as to . . . prohibit persons traveling in the State from keeping or carrying arms with their baggage"). In 1878, Mississippi banned the concealed carry of "any bowie knife, pistol, brass knuckles, slung shot or other deadly weapon of like kind or description" but exempted those "traveling (not being a tramp) or setting out on a long journey." 1878 Miss. Laws 175.

Nebraska did not specifically exempt travelers in its 1873 concealed carry ban, but followed the Ohio model by making it an affirmative defense that one was "engaged in the pursuit of any lawful business, calling, or employment, and that the circumstances in which he was placed . . . were such as to justify a prudent man in carrying." 1873 Neb. Laws 724; *see also* 1899 Neb. Laws 349 (same). Several localities took the same approach in their own laws. *See, e.g.*, REVISED ORDINANCES OF THE CITY OF SALINA, TOGETHER WITH THE ACT GOVERNING CITIES OF THE SECOND CLASS 99 (1879) (Salina, Kansas, 1879); THE REVISED ORDINANCES OF THE CITY OF MASSILLON 50–51 (1893) (Massillon, Ohio, 1880); W. J. Connell, THE REVISED ORDINANCES OF THE CITY OF OMAHA, NEBRASKA 344 (1890) (Omaha, Nebraska, 1890).

In 1875, the Wyoming Territory prohibited residents and nonresident sojourners from carrying "upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village." THE COMPILED LAWS OF WYOMING 352 (J. R. Whitehead ed., 1876). It appears that nonresidents who were not sojourners were not covered by the law.

In 1878, Los Angeles, California, banned all carry of certain "dangerous and deadly" weapons except by "persons actually traveling." REVISED CHARTER AND COMPILED ORDINANCES AND RESOLUTIONS OF THE CITY OF LOS ANGELES 83 (Wm. M. Caswell ed., 1878). Montgomery, Alabama, and Boise, Idaho, followed suit with respect to concealed carry in 1879. J.M. Falkner, THE CODE OF ORDINANCES OF THE CITY COUNCIL OF MONTGOMERY 148–49 (1879) (prohibiting concealed carry of certain weapons unless "traveling or setting out on a journey"); CHARTER AND REVISED ORDINANCES OF BOISE CITY, IDAHO 118–19 (1894) (1879 law prohibiting concealed carry of certain weapons within the Boise corporate limits "unless such persons be traveling or setting out on a journey").

In 1881, both Arkansas and Indiana again prohibited certain carry of various weapons except by travelers. Arkansas prohibited carrying "in any manner whatever, as a weapon, any dirk or bowie knife, or a sword, or a spear in a cane, brass or metal knucks, razor, or any pistol of any kind whatever," but provided "[t]hat nothing in this act be so construed as to prohibit any person from carrying any weapon when upon a journey." 1881 Ark. Acts 191. And Indiana prohibited "[e]very person, not being a traveler" from carrying concealed "any dirk, pistol, bowie-knife,

dagger, sword in cane, or any other dangerous or deadly weapon." 1881 Ind. Acts 191.

While late-19th-century laws are not entitled to much historical weight, *Bruen*, 597 U.S. at 66, it is worth noting that more jurisdictions continued to enact carry laws with traveler exceptions throughout the remainder of the century. In the 1880s, the Arizona Territory made it a misdemeanor to carry, either concealed or openly, "any dirk, dirk-knife, bowie-knife, pistol, rifle, shot-gun, or fire-arms of any kind . . . in any of the towns, villages or settlements" of two counties, but "provided, that any person traveling from one village, town or settlement, to another shall be permitted to carry fire-arms of any kind." 1883 Ariz. Sess. Laws 21–22; *see also* 1889 Ariz. Sess. Laws 30 (no carry of certain weapons in any settlement, town, village, or city in the Territory, except by "persons traveling"). In 1887, the New Mexico Territory banned all carry of deadly weapons but continued to exempt travelers: "Persons traveling may carry arms for their own protection while actually prosecuting their journey and may pass through settlements on their road without disarming." 1886 N.M. Laws 57. But if "travelers shall stop at any settlement for a longer time than fifteen minutes they shall remove all arms from their

person or persons, and not resume the same until upon eve of departure." *Id.* And in the 1890s, the Oklahoma Territory and the new state of Wyoming enacted their own similar restrictions. 1890 Okla. Sess. Laws 495 (no concealed carry of certain weapons, but persons may carry shotguns or rifles "while travelling or removing from one place to another"); 1893 Okla. Sess. Laws 503 (same); Dorset Carter, ANNOTATED STATUTES OF THE INDIAN TERRITORY 243–44 (1899) (Oklahoma) (no carry of certain weapons except "when upon a journey"); 1890 Wyo. Sess. Laws 140 (no concealed carry of certain weapons by those "not being a traveler"). Finally, various cities enacted carry restrictions exempting travelers, including Fort Worth, Texas (1885);[6] Dallas, Texas (1887);[7]

[6] REVISED ORDINANCES OF THE CITY OF FORT WORTH, TEXAS 207 (1885) (no concealed carry of certain weapons, but this section shall not "prohibit persons traveling in this State from keeping or carrying arms with their baggage").

[7] ORDINANCES OF THE COUNCIL OF THE CITY OF DALLAS AND ANNUAL REPORTS OF CITY OFFICERS 80 (1888) (no carrying certain weapons, but not applying to "persons traveling").

Oakland, California (1890);[8] Stockton, California (1891);[9] Huntsville, Missouri (1894);[10] Fresno, California (1896);[11] San Antonio, Texas (1899);[12] and McKinney, Texas (1899).[13]

Thus, there is a robust canon of historical laws allowing nonresidents to travel with weapons across state lines, even when state residents were subject to carry restrictions. And while many laws regulating carry applied to both residents and nonresidents, there were

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[8] CITY CHARTER OF THE CITY OF OAKLAND, CAL. ALSO GENERAL MUNICIPAL ORDINANCES OF SAID CITY 332–33 (1898) (no concealed carry of certain weapons within the City of Oakland except by "a traveler actually engaged in making a journey").

[9] CHARTER AND ORDINANCES OF THE CITY OF STOCKTON 240 (1908) (no concealed carry except by those "actually prosecuting a journey").

[10] THE REVISED ORDINANCES OF THE CITY OF HUNTSVILLE, MISSOURI 58–59 (1894) (no concealed carry of any "deadly or dangerous" weapons within the city except by "persons moving or travelling peaceably through this state").

[11] L. W. Moultrie, CHARTER AND ORDINANCES OF THE CITY OF FRESNO 30 (1896) (no concealed carry "excepting peace officers and travelers").

[12] Theodore Harris, CHARTER AND ORDINANCES OF THE CITY OF SAN ANTONIO 183–84 (1899) (no carrying certain weapons within city limits, but "[t]he preceding section shall not apply to . . . persons travelling").

[13] REVISED CODE OF ORDINANCES OF THE CITY OF MCKINNEY 13 (1899) (no carrying certain weapons within city limits, but "[t]he preceding section shall not apply to . . . persons travelling").

no pre-1900 laws that subjected nonresidents to greater restrictions than residents.

C. Traditionally, a government license was not required to exercise the right to carry arms.

Bruen provides that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." 597 U.S. at 26. "Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.* at 26–27. Especially when both are true, the historical inquiry is "straightforward." *Id.* at 26.

The Commonwealth's licensing regime is "designed to prevent those dangerous or unfit" from carrying arms. Op. Br. 33. This "general societal problem" has "persisted since the 18th century," but there is no "distinctly similar historical regulation addressing that problem" because "earlier generations addressed" it "through materially different means." *Bruen*, 597 U.S. at 26–27.

The materially different means are discussed in the following section. This section establishes that there is no tradition of prohibiting the carrying of arms without a government license.

To be sure, early American governments knew how to impose licensing requirements for arms carrying. But they applied only to slaves, freedmen, and American Indians. *See, e.g.*, 4 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 131 (William Waller Hening ed., 1820) (in the first known American licensing law, Viriginia in 1723 allowed "all negros, mullatos, or indians, bond or free, living at any frontier plantation" to "keep and use guns" if they "first obtained a license for the same, from some justice of the peace"); 2 A DIGEST OF THE STATUTE LAW OF KENTUCKY 1150 (William Littell & Jacob Swigert eds., 1822) (similar 1798 Kentucky law); Henry S. Geyer, A DIGEST OF THE LAWS OF MISSOURI TERRITORY 374 (1818) (similar 1804 Missouri Territory law). They never applied to individuals with recognized rights.[14] *See, e.g.*,

[14] *Bruen* makes clear that discriminatory historical laws cannot establish a tradition that justifies Massachusetts's licensing scheme. The *Bruen* Court did not consider any discriminatory historical laws requiring African Americans to acquire discretionary carry licenses to

Bruen, 597 U.S. at 60 ("If blacks were citizens, Taney fretted, they would be entitled . . . 'to keep and carry arms wherever they went.'" (quoting *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857)) (emphasis omitted); *Aldridge v. Commonwealth*, 4 Va. 447, 449 (1824) ("the Bill of Rights . . . was not intended to apply to our slave population," and "free blacks and mulattoes were also not comprehended in it"). The fact that many states applied licensing laws to disfavored noncitizens but never to free citizens indicates a recognition that such laws would violate the Constitution.

Carry licensing laws that applied to free citizens were not enacted until the late-19th-century. *Bruen* made clear that late-19th-century evidence cannot establish a tradition—it can only provide "confirmation of what . . . had already been established" by earlier history. 597 U.S. at 37 (quoting *Gamble v. United States*, 587 U.S. 678, 702 (2019)); *see also id.* at 66 ("late-19th-century evidence cannot provide much insight into

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carry arms when analyzing New York's discretionary licensing law for carrying arms—and many were presented to the Court. *See, e.g.*, Brief for *Amicus Curiae* National African American Gun Association, Inc. in Support of Petitioners at 4–11, July 16, 2021, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, No. 20-843. Rather, the Supreme Court "has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice.'" *Ramos v. Louisiana*, 590 U.S. 83, 129 (2020) (Kavanaugh, J., concurring) (quoting *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 221 (2017)).

the meaning of the Second Amendment when it contradicts earlier evidence") (citing *Heller*, 554 U.S. at 614).

Moreover, these licensing laws applied only to the concealed carry of weapons, not to open carry. And *Bruen* distinguished between laws regulating the manner of carry and laws restricting all carry: "the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing . . . the manner of carry," but there is no "tradition of broadly prohibiting the public carry of commonly used firearms for self-defense." 597 U.S. at 38.

Finally, it was primarily cities and towns—not states—that required a license to carry concealed in the late-19th-century. These laws applied only to a small percentage of the nation's population, and thus carry little evidentiary weight. *See id.* at 67–68 ("we will not stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1% of the American population, and also 'contradict the overwhelming weight' of other, more contemporaneous historical evidence" (quoting *Heller*, 554 U.S. at 632) (brackets omitted)).

In 1871, St. Louis, Missouri prohibited "any person to wear under his clothes, or concealed about his person, any pistol, or revolver," among various "other dangerous or deadly weapon[s] . . . without written permission from the Mayor." Everett Wilson Pattison, THE REVISED ORDINANCE OF THE CITY OF ST. LOUIS 491–92 (1871). The law did not regulate open carry of the listed weapons. *Id.*

In 1873, Jersey City, New Jersey, made it illegal for any person to "carry, have or keep on his or her person concealed" a "loaded pistol or other dangerous weapon," but provided that "[t]he Municipal Court of Jersey City may grant permits to carry any of the weapons" named therein. ORDINANCES OF JERSEY CITY 86–87 (1874). In 1876, Hyde Park, Illinois, prohibited anyone from carrying or wearing "under their clothes, or concealed about their person, any pistol, revolver, slung-shot, knuckles, bowie-knife, dirk-knife, dirk, dagger, or any other dangerous or deadly weapon, except by written permission of the Captain of Police." Consider H. Willett, LAWS AND ORDINANCES GOVERNING THE VILLAGE OF HYDE PARK 64 (1876). In 1880, Kansas City, Missouri, prohibited a person to "wear under his clothes or concealed about his person, any pistol or revolver, except by special permission from the Mayor." Gardiner

Lathrop & James Gibson, AN ORDINANCE IN REVISION OF THE ORDINANCES GOVERNING THE CITY OF KANSAS 264 (1880). In 1881, Wheeling, West Virginia, made it "unlawful for any person to . . . carry about his person, hid from common observation, any pistol, dirk, bowie knife, or weapon of the like kind, without a permit in writing from the mayor so to do." White & Allen, LAWS AND ORDINANCES FOR THE GOVERNMENT OF THE CITY OF WHEELING, WEST VIRGINIA 206 (1891). The same year, the state of Colorado prohibited anyone to "carry concealed upon his person any firearms, as defined by law, nor any pistol, revolver" or various other weapons "unless authorized so to do by the chief of police of a city, mayor of a town or the sheriff of a county." J. Warner Mills & John H. Gabriel, MILLS ANNOTATED STATUTES OF THE STATE OF COLORADO 856 (1912). None of these laws regulated open carry.

Also in 1881, New York City made it a misdemeanor for any person to have "a pistol of any description concealed on his person, or not carried openly" without a permit. ORDINANCES OF THE MAYOR, ALDERMEN AND COMMONALITY OF THE CITY OF NEW YORK 215 (1881). To obtain a permit, any person "may apply to the officer in command at the station-house of the precinct where he resided" and "if satisfied that the applicant is a

proper and law abiding person" the officer at the station-house would notify his superior, "who shall issue a permit to the said person allowing him to carry a pistol of any description." *Id*. The same permitting process applied to "[a]ny non-resident who does business in the city . . . and has occasion to carry a pistol." *Id*. But it did not require a license for either residents or nonresidents to open carry.

In 1882, St. Paul, Minnesota, banned the concealed carry of pistols and other weapons, but allowed for individuals to obtain a concealed carry permit. William Pitt Murray, THE MUNICIPAL CODE OF SAINT PAUL 290 (1884). And in 1885, Hoboken, New Jersey, made it unlawful "to carry, have or keep concealed on his or her person any instrument or weapon" including a "loaded pistol or other dangerous weapon," but excepted any "person who shall have made an application to and received a written permit therefor from the board of police commissioners on recommendation of the chief of police." James F. Minturn, ORDINANCES OF THE CITY OF HOBOKEN 240 (1892).

In 1890, New Haven, Connecticut outlawed individuals from "carry[ing] any weapon concealed on his person without permission of the Mayor or Superintendent of Police in writing." CHARTER AND ORDINANCES

OF THE CITY OF NEW HAVEN 203 (1898). Berlin, Wisconsin, also made it "unlawful for any person . . . to carry or wear under his clothes, or concealed about his person, any pistol, colt" or various other weapons, but the prohibition "shall not apply" to "persons who shall have obtained from the Mayor a license to carry such weapons for their protection." THE MUNICIPAL CODE OF BERLIN COMPRISING THE CHARTER AND THE GENERAL ORDINANCES OF THE CITY CODIFIED AND REVISED 112–13 (1890). And Oakland, California, outlawed "wear[ing] or carry[ing] concealed about his person with out a permit" various weapons including pistols. CITY CHARTER OF THE CITY OF OAKLAND, CAL. ALSO GENERAL MUNICIPAL ORDINANCES OF SAID CITY 332–33 (1898). The following year, 1891, Stockton, California similarly banned "wear[ing] or carry[ing] concealed about his person any pistol . . . or any other deadly or dangerous weapon, except he first have a written permit to so do from the Mayor." CHARTER AND ORDINANCES OF THE CITY OF STOCKTON 240 (1908). Both Oakland and Stockton exempted travelers from their concealed carry bans and permit requirements.

The trend of prohibiting concealed carry except with a permit—but not restricting open carry—continued throughout the 1890s. 1891 N.Y.

Laws 177 (prohibiting anyone to "carry concealed" weapons in Erie, New York, "without first obtaining a permit"); 27 Stat. 116–17 (1892) (prohibiting persons "to have concealed about their person any deadly or dangerous weapons" unless such persons "have been granted a written permit to carry such weapon or weapons by any judge of the police court of the District of Columbia"); Eugene McQuillen, THE MUNICIPAL CODE OF ST. LOUIS 737–38 (1901) (making it unlawful for "any person to wear under his clothes, or concealed about his person, any pistol or revolver" or various other weapons "without written permission from the mayor"); George W. Hess and Frank R. Grover, REVISED ORDINANCES OF THE CITY OF EVANSTON 131–32 (1893) (making it "unlawful for any person . . . to carry or wear under his clothes or concealed about his person, any pistol" or other deadly weapon except those "who shall have obtained from the mayor a license so to do"); 1895 Neb. Laws 209–10 (making it "unlawful for any person . . . to carry about the person any concealed pistol, revolver," or other deadly weapon except those "who shall have obtained from the Mayor a license so to do"); 1896 Va. Acts 826 (no person shall "carry about his person, hid from common observation, any pistol" or certain other weapons, but a county judge "upon a written application

and satisfactory proof of the good character and necessity of the applicant to carry concealed Weapon may grant such permission for one year."); Rose M. Denny, THE MUNICIPAL CODE OF THE CITY OF SPOKANE, WASHINGTON 309–10 (1896) (no one "shall carry upon his person any concealed weapon, consisting of either a revolver, pistol or other fire-arms" except "persons having a special written permit from the Superior Court to carry weapons."); Charles H. Hamilton, THE GENERAL ORDINANCES OF THE CITY OF MILWAUKEE 692–93 (1896) (making it unlawful "to carry or wear concealed about his person, any pistol or colt" or other deadly weapon, "provided, however, that the chief of police of said city may upon any written application to him made, issue and give a written permit to any person residing within the city of Milwaukee, to carry within the said city a pistol or revolver"); L. W. Moultrie, CHARTER AND ORDINANCES OF THE CITY OF FRESNO 30 (1896) (Making it a misdemeanor to "carry concealed upon his person any pistol or firearm, slungshot, dirk or bowie-knife, or other deadly weapon, without a written permission (revocable at any time) from the president of the board of trustees." Fresno also specifically excepted travelers.); THE CHARTER OF OREGON CITY, OREGON, TOGETHER WITH THE ORDINANCES AND RULES OF

ORDER 259 (1898) (making it unlawful "for any person to carry any sling shot, billy, dirk, pistol or any concealed deadly weapon . . . however, permission may be granted by the mayor to any person to carry a pistol or revolver"); CHARTER AND ORDINANCES OF THE CITY OF BARRE, VERMONT 117 (1904) ("No person shall . . . carry any weapon concealed on his person without permission of the mayor or chief of police in writing.").

In sum, the historical licensing laws do not establish a tradition that justifies Massachusetts's licensing law because they were enacted too late, covered too little of the nation's population, and most importantly, did not forbid *all* carry without a license.

III. The Commonwealth's proposed analogs are inapplicable to Massachusetts's licensing scheme under *Bruen* and *Rahimi*.

A. *Rahimi* confirms that the licensing law is unconstitutional.

In *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024), the Supreme Court upheld 18 U.S.C. § 922(g)(8)—the federal law disarming individuals subject to domestic violence restraining orders. The Court determined that founding-era surety and going armed laws were appropriate analogues for Section 922(g)(8) because each regulation required individualized findings of dangerousness. *Id.* at 1901–02.

The Commonwealth points to those same laws here. Op. Br. 36–38. But *Rahimi* and *Bruen* make clear that the surety and going armed laws cannot justify laws—like the Commonwealth's licensing law—that "broadly restrict arms use by the public generally." *Rahimi*, 144 S. Ct. at 1901. That is because "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." *Id.* at 1902. So while surety and going armed laws were "an appropriate analogue" for Section 922(g)(8)'s "narrow" restriction that "applies to individuals found to threaten the physical safety of another," *id.* at 1901, they were inappropriate analogs "for a broad prohibitory regime like New York's" licensing regime at issue in *Bruen* because it applied to the public generally, *id.* at 1902. Thus, the surety and going armed laws cannot justify Massachusetts's licensing law, because like New York's law invalidated by *Bruen,* it "broadly restrict[s] arms use by the public generally." *Id.* at 1901.

The Commonwealth also argues that its licensing restriction is justified by "laws that allowed for the disarmament of those perceived to be dangerous to state government and public safety." Op. Br. 38. *Rahimi*

reiterated that "[w]hy and how the regulation burdens the right are central to [the historical] inquiry." *Id.* at 1898 (citing *Bruen*, 597 U.S. at 29); *see also Bruen*, 597 U.S. at 29 ("whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are *central* considerations when engaging in an analogical inquiry") (quotation marks omitted). In *Rahimi*, surety and going armed laws both shared the "why" with Section 922(g)(8) and they each satisfied part of the "how"—going armed laws shared the penalty aspect of the "how" and surety laws shared the duration aspect of the "how." 144 S. Ct. at 1901–02. In other words, both historical analogs shared the "why" and part of the "how." Since none of the laws disarming loyalists, tramps, or intoxicated persons cited by the Commonwealth required anyone—let alone the general population—to acquire a license, they cannot satisfy the "how" of Massachusetts's licensing law and thus cannot serve as analogs.

Finally, the Commonwealth claims that it "need only establish that its firearm regulations are consistent with our Nation's historical tradition to be imposed on any law-abiding citizen, regardless of residency status." Op. Br. 33 n.9. But as *Bruen* explained, it is "evidence

that a modern regulation is unconstitutional" if "earlier generations addressed the societal problem . . . through materially different means." 597 U.S. at 26–27. And as described *supra*, that is precisely the case here. Armed individuals traveling over state lines is not a new or novel issue. While historically some states implemented restrictions on residents and nonresidents alike, this nation's history and tradition show that whenever laws differentiated between residents and nonresidents, it was to provide nonresidents with greater carry protections. Given this distinct tradition, the Commonwealth's argument fails.

B. The licensing scheme is precisely the type of unduly burdensome regime cautioned against in Footnote Nine of *Bruen*.

The Commonwealth contends that the Supreme Court has blessed its nonresident licensing scheme by virtue of dicta in *Bruen*'s ninth footnote, which states that "nothing in our analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes." 597 U.S. at 38 n.9; Op. Br. 28. But *Bruen* made clear that shall-issue licensing schemes violate the Second Amendment if they are "put towards abusive ends," for example, by "deny[ing] ordinary citizens their right to public carry" via "lengthy wait times" or "exorbitant fees." 597

U.S. at 38 n.9. Massachusetts's licensing scheme is *exactly* the type of burdensome regulation the Court cautioned against.

Massachusetts's regime provides for disparate treatment of nonresidents versus residents of the Commonwealth. For instance, a Class A resident firearms license is valid for six years. Robert Carlson, *What is a Class A firearms license in Massachusetts*, THE GUN ZONE (Feb. 18, 2024).[15] Conversely, "[n]on-resident firearms licenses expire after one (1) year from the date it was issued." *Apply for or renew a firearms license*, MASS.GOV.[16] Additionally, resident license processing takes up to 60 days, while nonresident license processing takes up to 90 days.[17] *Id*.

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[15] https://thegunzone.com/what-is-a-class-a-firearms-license-in-massachusetts/ (last visited August 8, 2024).

[16] https://www.mass.gov/how-to/apply-for-or-renew-a-firearms-license (last visited August 8, 2024).

[17] While processing may only take 60 days for residents, obtaining an appointment to begin the process is not an immediate guarantee. *See License to Carry/Firearm Identification Card*, THE CITY OF WORCESTER, https://www.worcesterma.gov/police/permits-licensing/ltc-fid (last visited August 8, 2024) ("the License Division typically books appointments four months out."); *White v. Cox*, No. 1:23-cv-12031 (D. Mass. 2023), Doc. 10, ¶ 34 (Plaintiff submitted LTC application to Boston PD on July 12, 2023), and Doc. 14, ¶ 36 (Defendants admit as of December 12, 2023, Plaintiff had not been contacted to schedule an appointment for his fingerprints and the application remains pending).

Moreover, Massachusetts's licensing scheme is unduly prejudiced against nonresidents. New nonresident license applications require an in-person appointment in Massachusetts, necessitating an extra (unarmed) trip to the Commonwealth—which, especially for residents of distant states, becomes a barrier to entry that may be financially untenable. *Application for Non-Resident Temporary License to Carry Firearms*, MASS.GOV[18] ("Every applicant is required to appear in-person at the Firearms Records Bureau (FRB) for the first non-resident license to carry (LTC) application.").[19] Conversely, residents can apply for a license to carry "through the police department in the city/town where [they] reside." *Apply for or renew a firearms license*, MASS.GOV;[20] *cf. How do I Apply for a Concealed Firearm Permit?*, UTAH.GOV[21] (Utah Non-Resident Concealed Firearm Permit whereby applications are accepted *through the mail* and applicants are required to submit a photocopy of

[18] https://www.mass.gov/doc/non-resident-license-to-carry-firearms-application-0/download (last visited August 8, 2024).

[19] The FRB is located in Chelsea, MA.

[20] https://www.mass.gov/how-to/apply-for-or-renew-a-firearms-license (last visited August 8, 2024).

[21] https://bci.utah.gov/concealed-firearm/how-do-i-apply-for-a-concealed-firearm-permit/ (last visited August 8, 2024).

their state-issued driver's license, passport style photograph, fingerprint card, a copy of their state-issued license to carry (in some instances), and proof they completed a training course certified by the Bureau of Criminal Identification).

Massachusetts also requires applicants to certify completion of a Massachusetts Basic Firearms Safety Course. *Application for Non-Resident Temporary License to Carry Firearms*, MASS.GOV.[22] Courses such as the NRA Home Safety Course are on the approved course list. *Approved Basic Firearms Safety Course List Updated*, MASS.GOV.[23] However, the course "must have been taken with an instructor who is certified by the Colonel of the Massachusetts State Police." *Application for Non-Resident Temporary License to Carry Firearms*, MASS.GOV[24] (emphasis omitted). And almost all of the publicly listed certified instructors are located in the American Northeast. *Basic Firearms*

[22] Available at https://www.mass.gov/doc/non-resident-license-to-carry-firearms-application-0/download (last visited August 8, 2024).

[23] https://www.mass.gov/doc/approved-basic-firearms-safety-course-list/download (last visited August 8, 2024).

[24] Available at https://www.mass.gov/doc/non-resident-license-to-carry-firearms-application-0/download (last visited August 8, 2024).

Instructors, MASS.GOV.[25] Thus, nonresidents may have to travel to New England to take a course from an approved instructor, even though the same course is available in their home state. And this is likely a separate trip from the trip to complete the required in-person interview: a Massachusetts Basic Firearms Safety Course certificate is required as part of the completed application, and the in-person interview is scheduled after the application is received. *Apply for or renew a firearms license*, MASS.GOV.[26] This overly and unnecessarily burdensome licensing regime is precisely the type that *Bruen* cautioned against. 597 U.S. at 38 n.9.

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[25] https://www.mass.gov/doc/basic-firearms-instructor-listing-07-01-2024/download (last visited August 8, 2024).

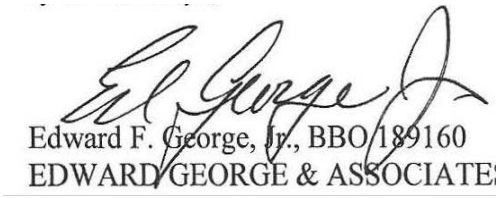
[26] https://www.mass.gov/how-to/apply-for-or-renew-a-firearms-license (last visited August 8, 2024).

"If you are a first-time or renewal applicant that requires an in-person appearance, you will be contacted by mail or email within 2-3 weeks of receipt of your application with your scheduled appointment date." *Application for Non-Resident Temporary License to Carry Firearms*, available at https://www.mass.gov/doc/non-resident-license-to-carry-firearms-application-0/download (last visited August 8, 2024).

CONCLUSION

Because the Commonwealth's nonresident licensing law violates the Second Amendment, the district court's order of dismissal should be affirmed.

Respectfully submitted,



Edward F. George, Jr., BBO 189160
EDWARD GEORGE & ASSOCIATES
P.O. Box 254
Arlington, MA 02476
(781) 710-4312
ed@egalawoffices.com

ERIN M. ERHARDT*
JOSEPH G.S. GREENLEE*
NATIONAL RIFLE ASSOCIATION
OF AMERICA – INSTITUTE FOR
LEGISLATIVE ACTION
11250 Waples Mill Road
Fairfax, VA 22030
(703) 267-1161
eerhardt@nrahq.org

ADAM KRAUT*
SECOND AMENDMENT FOUNDATION
12500 N.E. 10th Place
Bellevue, WA 98005
(425) 454-7012
akraut@saf.org
**Pro Hac Vice Motions pending*

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. A. P. 16(k), I hereby certify that this brief complies with the Rules of Court pertaining to the filing of briefs, including but not limited to Rules 13, 16, 17, 18, and 20. This brief was prepared in 14-point Century Schoolbook font, and contains 7,171 non-excluded words.

Edward F. George, Jr., BBO 189160
EDWARD GEORGE & ASSOCIATES

Counsel for *Amici Curiae*

Dated: August 14, 2024

CERTIFICATE OF SERVICE

I certify that on August 15, 2024, I filed the foregoing *amici curiae* brief in *Commonwealth v. Donnell*, SJC-13561, with the Massachusetts Supreme Judicial court through the Court's electronic filing service, which will automatically serve the same by electronic means upon:

Attorneys for Plaintiff-Appellant, the Commonwealth:
Ryan J. Rall, Esq.
Thomas D. Ralph, Esq.
Middlesex District Attorney's Office
15 Commonwealth Avenue
Woburn, MA 01801

Attorneys for Defendant-Appellee, Dean F. Donnell, Jr.:
Alexandra Meghan Brunelle, Esq.
Committee for Public Counsel Services
Public Defender Division
40-44 Church Street, 4th Floor
Lowell, MA 01852

Patrick Levin, Esq.
Committee for Public Counsel Services
Public Defender Appeals Unit
75 Federal Street, Suite 625
Boston, MA 02110

Edward F. George, Jr., BBO 189160
EDWARD GEORGE & ASSOCIATES

Counsel for *Amici Curiae*
Dated: August 15, 2024