No. 25-5280

IN THE

Supreme Court of the United States

PHILLIP MARQUIS,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

On Petition for A Writ of Certiorari to the Massachusetts Supreme Judicial Court

BRIEF FOR THE STATE OF NEW HAMPSHIRE AND 24 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST AND INTRODUCTION[1]

Under the Constitution of the United States, an American citizen is as free to speak openly on matters of public concern in New York as he is in Florida; his right to be free from unreasonable searches and seizures applies in New Jersey with the same force that it does in Montana; and his right to due process provides the same protection in Illinois that it does in Iowa. It should therefore follow that an American citizen is as free to carry a firearm in public for the purpose of self-defense in Massachusetts as he is in New Hampshire, but it does not.

In Massachusetts, the process of obtaining permission to exercise one's Second Amendment rights is riddled with arbitrary barriers. An application for a license-to-carry will be denied if the colonel of the state police determines that the applicant is "unsuitable to be issued a license[.]" Mass. Gen. Laws ch. 140, § 131F; *see Commonwealth v. Marquis*, 252 N.E.3d 991, 1009 (Mass. 2025). If an applicant can clear that hurdle, he will then have to pay a hefty sum and endure a long wait to obtain a license-to-carry from Massachusetts. *See* Mass. Gen. Laws ch. 140, § 121F(a); Mass. Gen. Laws ch. 140, § 131F. Though Massachusetts claims to be a "shall issue" jurisdiction, it has smuggled discretionary powers into its licensing regime designed to burden the exercise of a citizen's Second Amendment right

[1] As required by Rule 37.2, counsel for amici timely notified counsel of record of its intent to file this brief. No counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel contributed money intended to fund the preparation or submission of this brief.

while routinely refusing to recognize permits issued by other states.

The consequence is that those who temporarily travel into such restrictive states are forced to earn their Second Amendment rights from an authority that conditionally withholds them. Travelers must prove to the colonel of another state's police force that, *inter alia*, they are "suitable" to exercise their unalienable Second Amendment rights—while still being allowed to operate a vehicle, which is not an unalienable right. No other federal constitutional right works this way. A New Hampshire citizen cannot be forced to certify to another state's police that he will not issue true threats before he may speak there; Massachusetts may not set up a checkpoint at the state border to search travelers coming from New Hampshire for contraband; and Massachusetts cannot disarm travelers that its police colonel deems "unsuitable" to exercise Second Amendment rights.

Carrying a firearm in public for self-defense is an unequivocal fundamental right of the People—an inalienable freedom that is to be exercised without interference, not a privilege for a government to regulate with an iron fist. Amici States stand steadfast in their position that states like Massachusetts cannot take this important right away from their citizens and require them to earn it back on pain of criminal penalties. Yet, Massachusetts has in place a law that does just that. It requires a New Hampshire citizen temporarily in the state to earn – through a suitability determination, a significant fee, and a lengthy waiting period – his fundamental constitutional right to bear arms in public for self-defense before he can exercise it. That conception of the Second Amendment is simply wrong. Americans earned the fundamental constitutional

right to bear arms in public for self-defense by ratifying the Second and Fourteenth Amendments.

STATEMENT OF THE CASE

The defendant-appellee, Phillip Marquis, a New Hampshire resident, was in a car accident while traveling on Interstate 495 in Massachusetts. When the police arrived, Mr. Marquis informed them that he had a pistol on him, but did not have a license to carry in Massachusetts. His firearm was then seized, and he was charged in the Lowell District Court with carrying a firearm without a license under Mass. Gen. Laws ch. 269, § 10(a). The Lowell District Court found that Massachusetts failed to "affirmatively prove that its firearms regulation[s are] part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 19 (2022).

The Massachusetts Supreme Judicial Court reversed the district court's ruling. *See Marquis*, 252 N.E.3d 991. The Supreme Judicial Court held that the defendant-appellee did not have standing to challenge Massachusetts's non-resident license-to-carry regime as-applied to him because he did not apply for a license. *Id*. at 999-1001.

The Supreme Judicial Court also upheld Massachusetts's license-to-carry regime against a facial challenge. *Id*. at 1001-22. The Court held that Massachusetts's licensing regime, employed narrow, objective, and definite standards consistent with this Court's decision in *Bruen*. *Id*. at 1011-12. The Court concluded that Massachusetts's licensing regime was supported by this Nation's history and tradition of regulating the carriage of firearms by likening the

regime to surety laws and going armed laws. *Id*. at 1012-13.

SUMMARY OF ARGUMENT

The Second Amendment provides that "[a] well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The right to keep and bear arms embodied in most of the Amici State Constitutions are just as emphatic. *See e.g.*, N.H. Const. Pt. I, Art. 2-a.

Derived from English practice and codified in the Second Amendment, the right secures for Americans a means of self-defense. *Bruen*, 597 U. S. at 17. The right to keep and bear arms "is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Id*. at 6 (quoting *McDonald v. City of Chi.*, 561 U.S. 742, 780 (2010)) (plurality opinion).

Pursuant to *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chi.*, 561 U.S. 742 (2010), and *Bruen,* 597 U.S. 1, the Second and Fourteenth Amendments protect the rights of ordinary, law-abiding citizens to carry firearms for self-defense outside the home. To justify any restriction on the fundamental rights conferred by the Second Amendment, the government must show the restriction is "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

The Massachusetts Supreme Judicial Court erred in holding that Massachusetts's non-resident license-to-carry permitting regime uses narrow, objective, and definite standards, and that it finds historical support in surety and going armed laws. In fact, Massachusetts (and its Supreme Judicial Court) failed to show *any*

historical tradition of states strictly applying their firearms regulations to non-resident *travelers* such that non-resident *travelers* could be disarmed and criminally charged if they were not in strict compliance with state law from the moment they crossed the border – no matter how long the traveler intended to stay.

As a consequence of the Supreme Judicial Court's error, Massachusetts is permitted to incarcerate residents of other states for exercising their Second Amendment rights if they fail to comply with the Bay State's ahistorical license-to-carry regime, which is laden with official discretion, a substantial fee, and a lengthy waiting period. Notwithstanding this Court's decision in *Bruen*, it continues to be the case that individual states, like Massachusetts, believe it is within their power to relegate the Peoples' right of self-defense to the second-class in the name of crime prevention. It is not.

REASONS TO GRANT THE PETITION

I. This case presents an important and recurring Second Amendment issue with significant implications for law-abiding citizens' everyday activities, and, in turn, their liberty.

Massachusetts's militantly enforced criminal laws transform the briefest or most inadvertent crossing of its border with a firearm into a potential felony—Amici States' residents risk prison time for simply exercising a fundamental, constitutionally protected right. Thus, absent this Court's definitive ruling, citizens of the Amici States confront an intolerable ultimatum: submit to flagrantly unconstitutional regulations each year that fly in the face of *Bruen* or

abandon their Second Amendment rights at Massachusetts' border.

In this case, a New Hampshire resident interacted with law enforcement in Massachusetts due to a car accident that he was in while traveling to work and for which he was not at fault. As soon as he encountered the police, he did the responsible thing and alerted the officer to the gun. Even under those circumstances he was arrested and charged with a felony for possessing a firearm without a Massachusetts license despite being constitutionally allowed to carry that same firearm only a few miles north in New Hampshire.

Accordingly, Amici States are gravely concerned that any person who enters Massachusetts, no matter how briefly, while engaging in constitutionally protected activity—carrying a firearm for self-defense—risks being branded a felon and imprisoned unless they satisfy the State's onerous licensing requirements.

This poses significant concern to New Hampshire and its residents. As the underlying district court noted in its order dismissing the charge, the border between Massachusetts and New Hampshire runs directly through the parking lot of the Pheasant Lane Mall (as well as the mall itself), one of the largest malls in New Hampshire. The geography of the mall is such that a New Hampshire resident might find themselves in Massachusetts if she parks on the south side of the parking lot or visits Buffalo Wild Wings. If that person is carrying a firearm without a Massachusetts license—which would be constitutionally protected activity in most of the mall—that person risks being charged as a felon and facing mandatory incarceration in Massachusetts.

Indeed, a person living on West Hollis Road in Hollis, New Hampshire might cross into Pepperell, Massachusetts by crossing the street to visit a neighbor or backing out of her driveway in a southerly direction. As another example, the nature of sharing a border creates circumstances such that sometimes the grocery store nearest to a New Hampshire resident is in Massachusetts, or the most direct route to a job in New Hampshire takes a New Hampshire resident briefly on a Massachusetts road.

The activity protected by the Second Amendment is the only activity protected by the Bill of Rights that can become a felony offense with nothing more than slight geographic movement. That is because, even post-*Bruen*, not every state in this country treats the Second Amendment as the inalienable, fundamental right that it is.

The Amici States stand unyielding in defense of the liberties our Founders declared inviolate. Yet Massachusetts compels travelers to either surrender their birthright or bow to an exorbitant permit regime—a scheme that treats inherent rights as negotiable privileges. This Court should step in and clarify that Massachusetts may not impose such a Hobson's choice on law-abiding Americans or criminalize the exercise of a fundamental right enshrined by the Constitution.

A. Unreasonable Delay: Massachusetts's Response to *Bruen* is "Pay to Delay"

Massachusetts does not reciprocally recognize licenses to carry a firearm issued by *any* state. *See Massachusetts Concealed Carry Reciprocity Map & Gun Laws* (https://www.usconceal edcarry.com/resources/ccw_reciprocity_map/ma-gun-laws/) (last visited September 4, 2025). Even still, any person who does

not have a license-to-carry issued under Massachusetts law is prohibited from "knowingly ha[ving] in his possession; or knowingly ha[ving] under his control in a vehicle; a firearm, loaded or unloaded". Mass. Gen. Laws ch. 269, §10(a)(1)-(5). A violation of Massachusetts's law carries a *mandatory*-minimum sentence of 2½ to 5 years in prison or 18 months to 2½ years in jail. Mass. Gen. Laws ch. 269, §10(a)(5)-(6).

Massachusetts purports to maintain a "shall issue" permitting regime for non-resident travelers who wish to carry a firearm within its borders. *See* Mass. Gen. Laws ch. 140, § 131F; *Marquis*, 252 N.E.3d at 1011 (stating that Mass. Gen. Laws ch. 140, § 131F bore "all three hallmarks" of a "shall issue" regime). However, the permit "shall issue" *only* if the non-resident: (1) pays $100; (2) waits 40-149 days;[2] (3) proves that he or she has completed a Massachusetts's certified firearms safety course; (4) is not a prohibited person; and (5) is "not determined unsuitable" by the colonel of the Massachusetts State Police. *See* Mass. Gen. Laws ch. 140 at § 121F; § 131F; and § 131P. Temporary licenses expire after one year, so Amici State citizens would be required to repeat this process annually. *See* Mass. Gen. Laws ch. 140, § 131F.

Massachusetts does not maintain a "shall issue" regime. Rather, it maintains a licensing regime

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[2] Despite the statute's command that the permit "shall" be issued or denied in 40 days, Mass. Gen. Laws ch. 140, § 121F(a), Massachusetts's own government website advises that the process "may take up to 90 days." *See Apply for a Firearms License* (https://tinyurl.com/5n93p8u8) (last visited September 2, 2025)). The website also notes, however, that Massachusetts is "[c]urrently approving and printing licenses that were submitted for review by police departments *between March 15 and March 28.*" *See id*. (emphasis added).

embedded with discretion and "lengthy wait times in processing license applications [and] exorbitant fees" in clear violation of the Second Amendment. *See Bruen*, 597 U.S. at 38, n. 9; *see also United States v. Rahimi*, 144 S. Ct. 1898 (2024).

First, $100 is a substantial amount of money — more than one would make in a full workday at the federal minimum wage. Out of that $100, "$25 of the fee" is retained by the "licensing authority[;]" "$50 of the fee" is "deposited into the general fund of the Commonwealth[;]" and "$25 of the fee" is "deposited in the Firearms Fingerprint Identity Verification Trust Fund" – a governmentally managed fund. Mass. Gen. Laws ch. 140, § 131F. While a $25 fee to the licensing authority for processing the license application might be reasonable, there is no reason whatsoever that Amici State citizens seeking to exercise Second Amendment rights in Massachusetts should be required to deposit $50 into that State's general fund and deposit another $25 to the department of state police. There is no historical support for Massachusetts charging $100 for an application to carry a firearm for self-defense (and then pocketing half of it).

Moreover, "[a] state may not impose a charge for the enjoyment of a right granted by the Bill of Rights." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943); *see Blue Island v. Kozul*, 41 N.E.2d 515, 519 (Ill. 1942) (holding that a person cannot be compelled "to purchase, through a license fee or a license tax, the privilege freely granted by the constitution."). The $100 fee imposed by Massachusetts cannot even be justified by asking "whether the state has given something for which it can ask a return." *Murdock*, 319 U.S. at 115. "The [fee] is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The

privilege in question exists apart from state authority. It is guaranteed the people by the Federal Constitution." *Id*.

Second, Massachusetts' 40-day waiting period is also unreasonable. *See* Mass. Gen. Laws ch. 140, § 121F(a). Even more so in that Massachusetts apparently interprets, "shall, within 40 days from the date of receipt . . . either approve the application and issue the permit . . . or deny the application," as a mere suggestion. Massachusetts's website warns that non-resident applications may take "up to 90-days" to process, and perhaps longer – up to 170 days as of the date of this writing. *See Apply for a Firearms License (*https://tinyurl.com/5n93p8u8 *last visited 8/22/2025)*. By comparison, in New Hampshire, a permit *must* be issued or an application denied "within 14 days" of the application being submitted. N.H. Rev. Stat. Ann. § 159:6, I(b).

Practically speaking, Massachusetts's waiting period means that the defendant in this case may have had to wait five months before he could lawfully carry a firearm for self-defense on his way to work. Similarly, since the Commonwealth apparently does not intend to comply with its obligation under Mass. Gen. Laws ch. 140, § 121F(a) as strictly as it expects New Hampshire citizens to comply with Mass. Gen. Laws ch. 269, § 10(a), a New Hampshire citizen planning a vacation to Cape Cod with his family might apply for a license-to-carry 90-days before his vacation and still not have a decision on his permit when it is time to leave. Processing applications with such apathy and complacency is characteristic of a state that views the Second Amendment as a "second-class right[.]" *Bruen*, 597 U.S. at 6.

B. The Pre-Crime Predicament: Massachusetts's 'Suitability' Standard and its Chilling Effect on Second Amendment Rights

While the "lengthy wait times in processing license applications [and] exorbitant fees," *Bruen*, 597 U.S. at 38, n. 9, imposed by Massachusetts to obtain a license to carry a firearm are unreasonable and without historical support, the law's requirement that an applicant not be "determined unsuitable" to carry a firearm might be the one most offensive to the Second Amendment. *See* Mass. Gen. Laws ch. 140, § 131F; *see also Marquis*, 252 N.E.3d at 1009 (quoting Mass. Gen. Laws ch. 140, § 131(d)) (where the court stated: "[a] determination of unsuitability shall be based on reliable, articulable and credible information that the applicant or licensee has exhibited or engaged in behavior that suggests that, if issued a license, the applicant or licensee may create a risk to public safety or a risk of danger to self or others.").

Thus, the licensing authority is left to determine, in its discretion, whether: (1) the information submitted is credible; (2) the behavior identified is relevant; and (3) the identified behavior "suggests" that the applicant "may" pose a risk to some unspecified person at some indeterminate time in the future. Accordingly, Mass. Gen. Laws ch. 140, § 131F may contain less discretion than the statute at issue in *Bruen*, but it contains more than the Second Amendment can tolerate.

In the view of the Massachusetts Supreme Judicial Court, however, this requirement was a "hallmark" of a "shall issue" regime because the statute, the Court claimed, guided the licensing authority's decision by means of "narrow, objective, and definite standards."

Marquis, 252 N.E.3d at 1011. Massachusetts admittedly dresses its statute up in empirical language, but in substance, it requires the "appraisal of facts, the exercise of judgment, and the formation of an opinion," *Bruen*, 597 U.S. at 38, n. 9. The statute tasks the licensing authority with reviewing "credible information" related to an applicant's past "behavior" and deciding whether that information "suggests" to the person reviewing the application that the applicant "may" pose a risk of danger if they are granted permission to carry a firearm. The statute does nothing to establish that it is based on the requirements of the Second Amendment per *Bruen*.

Further, a finding that a person "has exhibited or engaged in behavior," at some unspecified time in the past, which "suggests" that the person "may" pose a risk of danger if he carries a firearm to some unspecified person at some unspecified point in the future, amounts to nothing more than a finding that the person *might* be irresponsible. The *Rahimi* Court flatly rejected the contention that the government can disarm a person "simply because he is not 'responsible.'" *Rahimi*, 602 U.S. at 701. Accordingly, Massachusetts does not have the authority to disarm people that it deems may be "unsuitable" (*i.e.* irresponsible) to carry a gun, no matter how credible the information leading Massachusetts to that conclusion may be. In effect, the law grants the government a predictive power reminiscent of the precrime system depicted in *Minority Report*, where individuals are judged not for what they have done, but for what they someday might do.

In line with *Bruen*, in New Hampshire, among other Amici States, any person not otherwise prohibited by law from possessing a firearm has the right to carry a

firearm for self-defense without obtaining permission from the government. *See* N.H. Rev. Stat. Ann. §159:6; N.H. Const. Pt. I, Art. 2-a; *see also* Ala. Code § 13A-11-75; Alaska Stat. § 18.65.700; Ariz. Rev. Stat. § 13-3112; Ark. Code Ann. § 5-73-309; Fla. Stat. § 790.06; Ga. Code Ann. § 16-11-129; Idaho Code Ann. § 18-3302; Ind. Code § 35-47-2-3; Iowa Code § 724.11; Kan. Stat. Ann. § 21-6302; Ky. Rev. Stat. Ann. § 237.020; Me. Stat. Ann. tit. 25, § 2003; Miss. Code Ann. § 45-9-101; Mo. Rev. Stat. § 571.101; Mont. Code Ann. § 45-8-321; Neb. Rev. Stat. § 69-2443; N.D. Cent. Code § 62.1-04-02; Ohio Rev. Code Ann. § 2923.11; Okla. Stat. tit. 21, § 1290.9; S.C. Code Ann. § 23-31-245; S.D. Codified Laws § 23-7-7; Tenn. Code Ann. § 39-17-1351; Tex. Gov't Code Ann. § 411.172; Utah Code Ann. § 53-5a-102.2; W. Va. Code § 61-7-4; Wyo. Stat. Ann. § 6-8-104. Nevertheless, residents and nonresidents alike may apply for a permit in New Hampshire, which issues in 14 days and enjoys reciprocity with 29 other states as of this writing. N.H. Rev. Stat. Ann. § 159:6, I(a)-(b); *see Pistol and Revolver Licensing* (https://tinyurl.com/yryuykwj) (last visited September 4, 2025); *see also* N.H. Rev. Stat. Ann. § 159:6-d.

Accordingly, New Hampshire citizens, and those of other Amici States, are conditioned to exercise their Second Amendment rights liberally. Since Massachusetts appears steadfast in its refusal to reciprocally recognize other states' permits, this Court's answer to whether Massachusetts can constitutionally enforce its licensing regime against non-resident travelers through the criminal law is vital to American citizens who wish to enter Massachusetts for mere moments while exercising their fundamental right to carry a firearm for self-defense.

C. A Clear Violation of Historical Tradition: Massachusetts' Unlawful Restrictions on the Right to Bear Arms while Traveling

The Bill of Rights does not protect privileges permitted by any government, but rather "unalienable Rights" of the People that "are endowed by their Creator." The Declaration of Independence (U.S. 1776). The Second Amendment guarantees that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

To justify any restriction on the fundamental rights conferred by the Second Amendment, the government must show the restriction is "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. If the challenged regulation addresses a general societal problem that has persisted since the founding, the lack of a "distinctly similar" historical regulation addressing the problem is evidence of the regulation's unconstitutionality. *See Wolford v. Lopez*, 116 F.4th 959, 976-77 (9th Cir. 2024) (quoting *Bruen*, 597 U.S. 26-27) (referring to this mode of analysis as the "distinctly similar" test"). In contrast, modern circumstances or considerations that did not exist at the time of the Founding require an analogical analysis of the government's proffered historical record, but one that is still grounded in the Founding. *See Wolford*, 116 F.4th at 976-77 (*quoting Bruen*, 597 U.S. at 27-30) (referring to this mode of analysis as the "more nuanced approach").

In this case, while modes of transportation have changed since the founding, "efforts to curb violence committed by those who are traveling certainly are nothing new." *State v. Barber*, 2025 Ohio App. LEXIS 1159, **28 (1st Dist. Ohio Ct. App.) (April 4, 2025).

Accordingly, for the Commonwealth's scheme of strictly enforcing its license-to-carry regime against travelers using the punishing stick of the criminal law to pass constitutional muster, the Commonwealth must identify a "distinctly similar historical regulation" addressing the carriage of firearms by travelers. *See Wolford*, 116 F.4th at 976-77 (*quoting Bruen*, 597 U.S. at 27-30). It cannot.

This Nation's history and tradition surrounding firearms regulations for travelers and permitting regimes does not support Massachusetts's strict application of its permitting regime to transitory non-residents. At the time of the founding, ordinary Americans would have understood the Second Amendment to protect the right to travel with a firearm because traveling without one presented significant dangers. *See Moore v. Madigan*, 702 F.3d 933, 936-37 (7th Cir. 2012). As this Court has recognized, "[m]any Americans hazard greater danger outside the home than in it." *Bruen*, 597 U.S. at 33; *Moore*, 702 F.3d at 936-37.

Indeed, a 1623 Virginia law, which was reissued in 1632, required "[t]hat no man go or send abroad without sufficient parte will armed . . .. That go not to worke in the ground without their arms (and a centinell upon them.)[.]" William Waller Hening, *The Statutes at Large; Being a Collection of all the Laws of Virginia, from the First Session of the Legislature, in the Year 1619* (New York: R. & W. & G. Bartow, 1823) 1:127, 198.

In 1636, Massachusetts adopted a statute stating that "no person shall travel above one mile from his dwelling house, except in places wheare other houses are neare together, without some armes, upon paine of 12*d*. for every default . . .." Nathaniel B. Shurtleff,

Records of the Governor and Company of the Massachusetts Bay in New England (Boston: William White, 1853), 1:190).

A 1639 Rhode Island law reads: "It is ordered, that noe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword . . .[.]" John Russell Bartlett, ed., *Records of the Colony of Rhode Island and Providence Plantations, in New England* (Providence, R.I.: A. Crawford Greene and Brother, 1856) 1:94. Failure to adhere to the law carried a fine of five shillings. *Id*.

And a 1642 Maryland statute stated that "[n]oe man able to bear arms to goe . . . any considerable distance from home without fixed gunn and 1 Charge at least of powder and Shott." William Hand Browne, ed. *Archives of Maryland* (Baltimore: Maryland Historical Society, 1885) 3:103.

Moreover, to the extent that colonies or states *did* regulate the carriage of firearms around the time of the founding, "history reveals a consensus that States could *not* ban public carry altogether." *Bruen*, 597 U.S. at 53; *see Nunn v. State*, 1 Ga. 243, 251 (1846) (holding that a law prohibiting carrying arms "secretly" was permissible, but insofar as it contained "a prohibition against bearing arms *openly*, [was] in conflict with the Constitution, and void . . ."). And even to that extent, many laws regulating the carriage of firearms specifically included exceptions for travelers. *See State v. Barber*, 2025 Ohio App. LEXIS at **17 ("Usually, however, historical concealed-carry prohibitions 'made exceptions for travelers passing through an area while armed.'" (citation omitted)).

For example, an 1831 Indiana statute prohibited "[e]very person, *not being a traveler*" from "wear[ing]

or carry[ing] a" concealed "dirk, pistol, sword in a cane, or other dangerous weapon." *See McIntryre v. State*, 83 N.E. 1005 (Ind. 1908) (emphasis added).

In 1871, Texas enacted a statute forbidding "any person" from carrying "about his person, saddle, or in his saddle bags, any pistol," but the statute exempted "'persons traveling' to and from Texas." *Suarez v. Paris*, 2024 U.S. Dist. LEXIS 130327 (M.D. Pa. July 24, 2024) (citing Eric J. Moglinicki & Alexander Shultz, *The Incomplete Record in* New York State Rifle & Pistol Association v. City of New York, 73 SMU L. Rev. F. 1 (2020) at 4 & n. 19 (quoting An Act to Regulate the Keeping and Bearing of Deadly Weapons, 12th Leg., R.S., ch. 34, § 1, 1871 Tex. Gen. Laws 25, 25)).

California's 1863 "armed carriage law" also included a "travelers" exception, as did an 1870 statute in Tennessee. *See* Patrick J. Charles, *The Second Amendment And The Basic Right To Transport Firearms For Lawful Purposes*, 13 Charleston L. Rev. 125 (2018), 150-53.

In 1887, the then-territory of New Mexico enacted a law prohibiting the carriage of any deadly weapon, "either concealed or otherwise," but allowed travelers to "carry arms for their own protecting while actually prosecuting their journey." *See id*. at 153. The New Mexico statute required travelers to "remove all arms from their person" if they "stop[ped]" their journey "for a longer time than fifteen minutes," but allowed travelers to "resume the same" upon the "eve of departure." *Id*.

In 1890, contemporaneous with the adoption of the Wyoming Constitution, the state legislature enacted a statute prohibiting the concealed carry of "pistol[s]" and "other dangerous or deadly weapon[s]" by any

person, except "traveler[s]." *See King v. Wyo. Div. of Crim Investigation*, 59 P.3d 341, 351 (Wyo. 2004).

As this Court instructed in *Bruen*, "postenactment history" should not be given "more weight than it can rightly bear." 597 U.S. at 28. However, these 19th-century laws including travelers' exceptions demonstrates that the colonial-era tradition of traveling with a firearm persisted all the way through the Reconstruction era.

Additionally, the founding generation was not unfamiliar with the concept of regulating activities involving firearms through licensing regimes. For example, colonies such as Virginia and Maryland maintained licensing regimes related to hunting with firearms at various times. *See* William Waller Hening, *The Statutes at Large; Being a Collection of all the Laws of Virginia, from the First Session of the Legislature, in the Year 1619* (New York: R. & W. & G. Bartow, 1823) 3:69, 180; William Hand Browne, ed. *Archives of Maryland* (Baltimore: Maryland Historical Society, 1885) 3:255. Nevertheless, Amici States are aware of no historical evidence that colonies or states around the time of the founding broadly required people to obtain a license from the government to simply carry a firearm in public or while traveling. *See Bruen*, 597 U.S. at 27.

Therefore, there is no historical evidence for Massachusetts's statutory and enforcement scheme of requiring transitory non-residents to obtain a permit by satisfying onerous requirements before they can carry firearms, and incarcerating them if they fail to do so. Indeed, there is history to the contrary. Massachusetts's licensing regime and its enforcement through the criminal law is unconstitutional.

D. A Presumption of Guilt: How Massachusetts's Licensing Regime Inverts the Foundational Principles of the Second Amendment

The Massachusetts Supreme Judicial Court reasoned that Mass. Gen. Laws ch. 140, § 131F was analogous to "surety laws and 'going armed' laws." *Marquis*, 252 N.E.3d at 1012. Just like those laws, the Court averred, Mass. Gen. Laws ch. 140, § 131F presumes that non-residents have a right to carry firearms and "begins with the presumption that all nonresident applicants 'shall be issued'" a license. *Id*. But the Supreme Judicial Court is wrong.

Mass. Gen. Laws ch. 140, § 131F does not truly presume that all nonresident applicants shall be issued a license. It certainly does not issue them one and only take it away if the suitability determination does not work out or the $100 fee is not paid. Rather, the statute envisions nonresident applicants being issued a license only if they pay into the Commonwealth's general fund and earn the stamp of "suitability" from the colonel of the Massachusetts State Police. It cannot be presumed that a person will be issued a license when issuance of the license requires satisfaction of substantial and discretionary burdens imposed by the licensing authority.

Further, neither Mass. Gen. Laws ch. 140, § 131F nor Mass. Gen. Laws ch. 269, § 10(a) are anything like surety or going armed laws. Indeed, the two sets of laws do not even begin from the same premises. Massachusetts's law purports to grant permission to exercise the right protected by the Second Amendment upon satisfaction of onerous regulatory conditions, whereas surety and going armed laws revoked the right to carry a weapon for self-defense upon

particular findings being made by a court. Thus, the former purports to grant a right that the People already possess, while the latter purports to strip away a right of the People under specific circumstances.

Surety laws were a form of "preventative justice". *See Rahimi* 144 S. Ct. at 1899-1900. Under surety laws, a magistrate could "oblige those persons, of *whom there is a probable ground to suspect of future misbehaviour*, to stipulate with and to give full assurance that such offence shall not happen, by finding pledges or securities." *Id*. (cleaned up; emphasis added). The *Rahimi* Court emphasized that those historical laws did "not broadly restrict arms use by the public generally," and that their application "involved judicial determinations of whether a particular defendant likely would threaten or had threatened another with a weapon." *Id*. at 1902. The Court also stressed that "surety bonds" were "of limited duration." *Id*.

Surety laws also targeted the *misuse* of firearms. In 1795, for example, Massachusetts enacted a law authorizing justices of the peace to "arrest" all who "go armed offensively [and] require of the offender to find sureties for his keeping the peace." 1795 Mass. Acts ch. 2, in Acts and Resolves of Massachusetts, 1794-1795, ch. 26, pp. 66-67 (1896). Later, Massachusetts amended its surety laws to be even more specific, authorizing the imposition of bonds from individuals "[who went] armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." Mass. Gen. Laws ch. 134, §16; *see id.* (marginal note) (referencing the earlier statute); *see also Bruen* 597 U.S. at 55-60.

Most notably, however, before the accused could be compelled to post bond for "go[ing] armed," a complaint had to be made to a magistrate by "any person having

reasonable cause to fear" that the accused would do him harm or breach the peace. Mass. Gen. Laws ch. 134, §§1, 16. The magistrate would take evidence, and—if he determined that cause existed for the charge—summon the accused, who could respond to the allegations. *Id*. at §§3-4. Bonds could not be required for more than six months at a time, and, importantly, an individual could obtain an exception if he needed his arms for self-defense or some other legitimate reason. *Id*. at §16.

Because Massachusetts cannot reasonably stand on the argument that there is "probable ground" to believe that all Amici State citizens carrying firearms are "suspect of future misbehaviour[,]" Massachusetts's strict application of Mass. Gen. Laws ch. 269, § 10(a) to Amici State citizens cannot be persuasively analogized to a "surety law." *See Rahimi* 144 S. Ct. at 1899-1900.

Similar to surety laws, "going armed" laws provided a mechanism for punishing those who had first terrified others with firearms or other weapons. *Bruen* 597 U.S. at 50. Such laws were a particular subset of the ancient common-law prohibition on affrays[3]. *Rahimi*, 144 S. Ct. at 1900-1901. "But as with the earlier periods, there is no evidence indicating that these common-law limitations impaired the right of the general population to peaceable public carry." *Bruen* 597 U.S. at 50-51.

By contrast, the Massachusetts law places discretion in a colonel of State Police to determine

[3] Affrays encompassed the offense of "arm[ing]" oneself "to the Terror of the People," *United States v. Rahimi*, 144 S. Ct. 1889, 1901 (2024) (citing to T. Barlow, The Justice of the Peace: A Treatise 11 (1745)).

whether some behavior that a person engaged in at some point in the past *suggests* that the person might pose a danger to some unspecified person at some uncertain point in the future if he or she is permitted to carry a firearm. Massachusetts can claim that its statute has a similar public safety purpose to going armed and surety laws — after all, most gun regulations are public safety measures — but it does not operate in remotely the same way and the Supreme Judicial Court's analysis likening Mass. Gen. Laws ch. 140, § 131F to such laws is simply not persuasive.

Consequently, the surety laws and going armed laws that the Massachusetts Supreme Judicial Court relied on cannot carry the Commonwealth's burden in this case because such laws are not similar to the statute at issue. *See Bruen*, 597 U.S. at 29 (where the Court noted that "Green trucks" and "green hats" are analogous only when the relevant metric is "things that are green."). As Justice Gorsuch wrote, "[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).

CONCLUSION

Massachusetts's overzealous application of its unconstitutional license-to-carry regime severely encroaches on the rights of Amici State residents to carry firearms for self-defense. Unless this Court intervenes, the Second Amendment rights of Amici State citizens are at the mercy of Massachusetts.

The Court should grant the petition.

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