COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

MIDDLESEX COUNTY 2024 SITTING

No. SJC-13561

COMMONWEALTH OF MASSACHUSETTS,
PLAINTIFF-APPELLANT,

V.

DEAN F. DONNELL, JR.,
DEFENDANT-APPELLEE.

ON APPEAL FROM AN ORDER OF THE LOWELL DISTRICT COURT
ALLOWING A MOTION TO DISMISS

BRIEF OF *AMICUS CURIAE* STATE OF NEW HAMPSHIRE IN SUPPORT OF DEFENDANT-APPELLEE FOR AFFIRMANCE

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Date: August 19, 2024

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IDENTITY AND INTERESTS OF THE *AMICUS CURIAE*

The State of New Hampshire is a sovereign state of the United States of America. It has a strong and substantial interest in ensuring that its citizens who are temporarily in Massachusetts are not returning to New Hampshire with felony criminal records simply for exercising their federal and state constitutional rights to keep and bear arms.

Under the United States and New Hampshire Constitutions, the right to bear arms is a fundamental right of paramount importance. The New Hampshire Constitution in particular declares that "[a]ll persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." N.H. Const. Pt. I, Art. 2-a. New Hampshire is an "open carry," or "constitutional carry," state. *See generally* N.H. Rev. Stat. Ann. §159. No license or permit is required for a New Hampshire resident to carry concealed or in plain sight, on foot or in a motor vehicle, a loaded or unloaded pistol or long gun, so long as he or she is not otherwise prohibited by state statute or federal law from possessing a firearm in New Hampshire. *See* N.H. Rev. Stat. Ann. §159:6.

New Hampshire has substantial concerns that Massachusetts is applying its criminal law in a way that is serially violating the federal constitutional rights of its citizens to keep and bear arms. New Hampshire residents commonly travel across the state's southern border into Massachusetts for brief periods of time —

sometimes even a matter of minutes. In this case, as well as in *Commonwealth v. Marquis*, Massachusetts appears to apply its license-to-carry regime and the prohibitions contained in M.G.L. c. 269, §10(a) strictly to transient New Hampshire citizens. For New Hampshire citizens, especially those living in southern New Hampshire, such a strict application of Massachusetts's laws means that legal, constitutionally protected conduct — namely, carrying a firearm from self-defense — can be transformed into felonious conduct during a routine trip to the grocery store, the mall, or to visit a next-door neighbor.

The State of New Hampshire therefore files this brief to address those concerns in accordance with its above-referenced interests.

DECLARATION OF *AMICI CURIAE*

Pursuant to Rule 17(c)(5), the Amicus, the State of New Hampshire, declares as follows:

A. No party or party's counsel authored this brief in whole or in part;

B. No party or party's counsel contributed money to fund preparing or submitting this brief;

C. No person or entity contributed money that was intended to fund preparing or submitting this brief; and

D. Counsel has not represented any party in this case or in proceedings involving similar issues, or any party in a case or legal transaction at issue in the present appeal.

QUESTION PRESENTED FOR *AMICI CURIAE*

Whether the district court judge erred in concluding, pursuant to *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), that M.G.L. c. 269, § 10 (a), and M.G.L. c. 140, § 131F, violated the defendants' constitutional rights to equal protection and interstate travel, as well as their rights under the Second Amendment to the United States Constitution, where the defendant-appellees were non-residents of Massachusetts charged in Massachusetts with carrying a firearm without a license, where the defendant-appellees could legally possess a firearm in their home State, and where there is no evidence that they applied for any license pursuant to the Massachusetts firearms licensing laws.

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 the New Hampshire Constitution is just as emphatic. 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 Second Amendment codifies a right of "the people," "*pre-existing*" the government that they created, to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). The Supreme Court of the United States has been clear that 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.'" *Bruen*, 597 U.S. at 6 (quoting *McDonald v. City of Chi.*, 561 U.S. 742, 780 (2010) (plurality op.)).

Pursuant to *Heller*, 554 U.S. 570, *McDonald*, 561 U.S. at 742, 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. Accordingly, it is beyond dispute that the constitutions of the United States and New Hampshire protect a fundamental right to carry a firearm for self-defense.

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 absence of widespread historical laws addressing the same conduct or circumstances is evidence that the Founders understood the Second Amendment to preclude such a regulation. *Id*. 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. *Id*. at 28-29; *see, e.g.*, *United States v. Rahimi*, 144 S. Ct. 1889 (2024). Massachusetts has 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 with multiple felonies (and imprisoned) if they were not in strict compliance with state law from the moment they crossed the border.

Therefore, Massachusetts's strict application of its license-to-carry regime and M. G. L. ch. 269, § 10(a) as against New Hampshire residents the moment they cross into Massachusetts has no historical precedent, directly or by analogy. Accordingly, the district court did not err in ruling the statute unconstitutional as applied.

SUMMARY OF THE RELEVANT FACTS

The defendant-appellee, Dean Donnell, was charged in the Lowell District Court with carrying a firearm without a license under M.G.L. c. 269, § 10(a) and moved to dismiss the charge. 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." *Bruen*, 597 U.S. at 19. Succinctly, in this case and in the companion case of *Commonwealth v. Philip Marquis*, the Lowell District Court found that a law-

abiding New Hampshire citizen who exercises their constitutional right to carry a firearm cannot be made a felon merely by exercising that right while temporarily traveling in Massachusetts solely because that New Hampshire citizen has not obtained a Massachusetts non-resident license to carry – a license that *shall* issue unless the applicant is otherwise disqualified.

ARGUMENT

The Second Amendment guarantees that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The New Hampshire Constitution declares that "[a]ll persons have the right to keep and bear arms in defense of themselves, their families, their property and the state." N.H. Const. Pt. I, Art. 2-a. "[T]hose who sought to carry firearms publicly and peaceably in antebellum America were generally free to do so . . . . history reveals a consensus that States could *not* ban public carry altogether." *Bruen* 597 U.S. at 52-53. In New Hampshire, that remains true today — 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.

By contrast, in Massachusetts, 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". M.G.L. c. 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. M.G.L. c. 269, §10(a)(5)(6).

To get a license to carry a firearm in Massachusetts as a non-resident, one must apply for what Massachusetts calls a "temporary license" to carry a firearm. In order to obtain the non-resident temporary license[1], a person must fill out an application and pay $100. M.G.L. c. 140, § 131F. The non-resident application also includes a state background check, a federal background check, a fingerprint-based background check, *and* a check with the Department of Mental Health. *See* https://www.mass.gov/how-to/apply-for-a-firearms-license (last visited Aug. 14, 2024). Massachusetts *also* requires non-residents to attend (and pay for) a certified "Massachusetts Basic Firearms Safety Course" certificate, and an applicant "may need" to appear in-person to apply for the license.[2] Massachusetts notes that the non-resident license process may take "up to 90 days." *See id*. Non-resident temporary licenses are valid for only one year, M.G. L. c. 140, § 131F, with no "grace period," whereas *resident* licenses-to-carry must only be renewed every five years and include a "grace period", M.G.L. c. 140, § 131(i). *See*

[1] There is no other license that a non-resident of Massachusetts can apply for when it comes to firearms.

[2] To apply for a resident license to carry (or to renew one), as opposed to a non-resident – no in-person appointment is necessary.

https://www.mass.gov/how-to/renew-a-firearms-license (last visited Aug 15, 2024).

Strict application of Massachusetts's firearm statutes imposes on many New Hampshire citizens, particularly those living close to the border with Massachusetts, something of a Hobbesian choice: lay down your right to armed self-defense upon entry into Massachusetts or face felony charges that carry harsh penalties and mandatory imprisonment. New Hampshire citizens cannot be forced to file administrative paperwork, undergo three background checks, a mental health check, attend a Massachusetts certified training course, and then pay Massachusetts $100 per year, (only to then wait 90 days to obtain the requisite license) solely to exercise their federal constitutional right to keep and bear arms and avoid that dilemma. *Cf. Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058-59 (9th Cir. 2009) (plaintiffs were injured where they were faced with the choice of signing unconstitutional agreements or facing a loss of customer goodwill and significant business); *Elk Grove Unified Sch. Dist. v Newdow*, 542 US 1, 36-37 (2004) ("There are no *de minimis* violations of the Constitution – no constitutional harms so slight that the courts are obliged to ignore them."); *see also State v. Reid*, 1 Ala. 612, 616-617 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be

clearly unconstitutional").

Demanding that New Hampshire citizens strictly comply with Massachusetts firearms regulations, even if the person is only making a brief and impromptu visit to Massachusetts, substantially burdens the right to carry a firearm for self-defense in a way that is contrary to this country's history and tradition. The right to bear arms "is among the 'fundamental rights necessary to our system of ordered liberty.'" *United States v. Rahimi*, 144 S. Ct. 1889, 1897 (2024) (quoting *McDonald*, 561 U.S. at 778). "Like most rights," the right to carry a firearm for self-defense "is not unlimited." *Id.* (quoting *Heller*, 554 U.S. at 626). Nevertheless,"[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17. In *Bruen*, the Supreme Court made clear that the right to carry a firearm outside the home for self-defense falls squarely within the Second Amendment's protection. *Id*. at 10.

I. Massachusetts has failed to "demonstrate that" M.G.L. c. 269, § 10(a), as applied in this case, "is consistent with this Nation's historical tradition of firearm regulation."

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). Still today, a person is "a good deal more likely to be

attacked on a sidewalk in a rough neighborhood than in his apartment." *Id*. 702 at 937; *see Bruen*, 597 U.S. at 33 (stating that "[m]any Americans hazard greater danger outside the home than in it.").

What was true at the founding remains true now — the need for self-defense "necessarily takes place wherever a person happens to be, whether in a back alley or on the back deck." *Peruta v. Cty. of San Diego,* 742 F.3d 1144, 1154 (9th Cir. 2014), vacated by, rehearing, en banc, granted by *Peruta v. Cty. of San Diego*, 781 F.3d 1106 (9th Cir 2015) (Peruta I) (citing, Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009)); *see also Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017) ("[T]he Amendment's core lawful purpose is self-defense, and the need for that might arise beyond as well as within the home." (internal quotation marks and citation omitted)).

Massachusetts, like many states, deals with significant and substantial crime in its communities.[3] Accordingly, it is illogical to think that the moment a New Hampshire citizen crosses the border into Massachusetts that he or she is stripped of his or her constitutionally protected right to self-defense.

As Judge Coffey noted in his order, the border between Massachusetts and

[3] *See e.g.*, Violent Crime 2023 (beyond2020.com).

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. Indeed, a New Hampshire citizen living on West Hollis Road in Hollis, New Hampshire might cross into Pepperell, Massachusetts by visiting a next-door-neighbor or walking down the road to find better cell phone reception. Surely the Second Amendment's protection of a person's right to carry a firearm for self-defense is not so fragile as to allow Massachusetts to compel a New Hampshire citizen to choose between exercising his or her right to self-defense and visiting the Buffalo Wild Wings at the Pheasant Lane Mall, *see infra* Fig. 1, or a next-door-neighbor on West Hollis Road/Brookline Street,[4] *see infra* Fig. 2.

[4] West Hollis Road in New Hampshire turns into Brookline Street once the border from New Hampshire to Massachusetts is crossed.

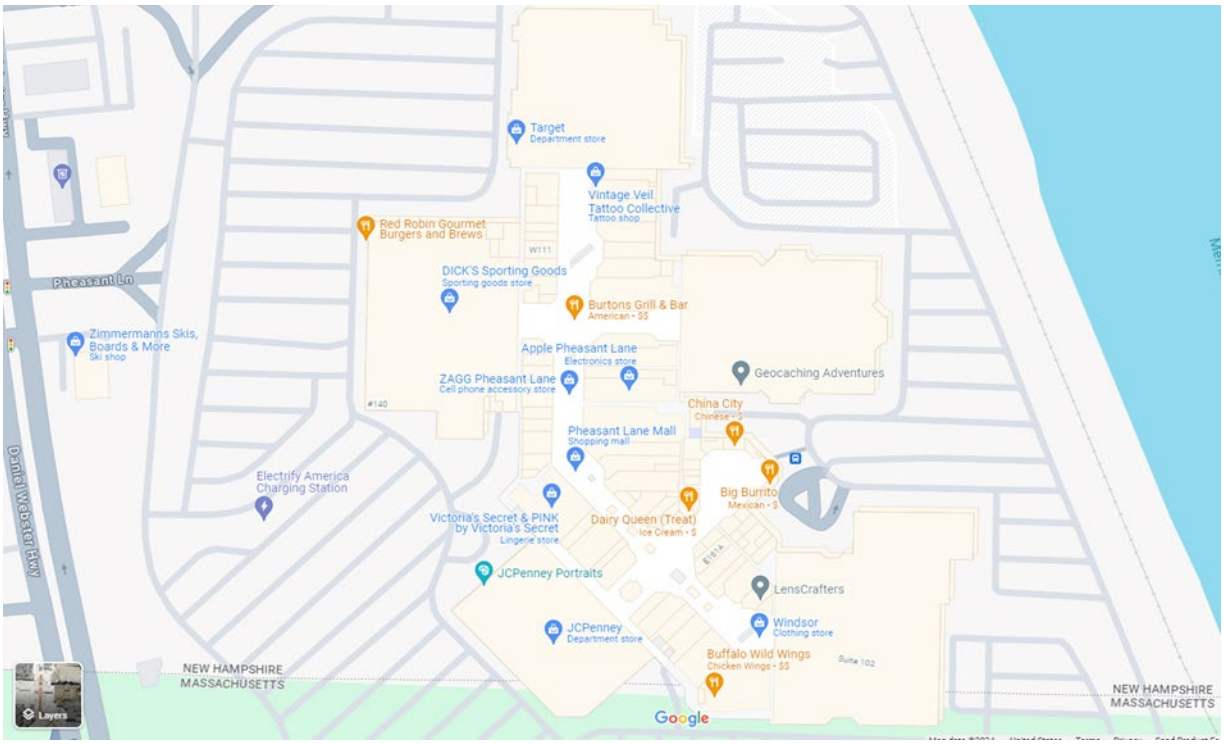

Figure 1 - Image from Google Maps depicting Pheasant Lane Mall and New Hampshire/Massachusetts border.

Figure 2 - Image from Google Maps depicting the New Hampshire/Massachusetts border on W. Hollis Rd./Brookline St.

In short, if M.G.L. c. 269, §10(a) is strictly applied to New Hampshire citizens the moment they cross the border into Massachusetts, thereby subjecting those New Hampshire citizens to criminal charges that carry mandatory-minimum sentences, then Massachusetts severely encroaches upon the fundamental rights of New Hampshire citizens protected by the Second Amendment. To justify applying M.G.L. c. 269, §10(a) in that manner, Massachusetts "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

a. Massachusetts has failed to demonstrate a historical tradition of states applying disparate restrictions on the right to carry firearms for self-defense to non-resident travelers.

It is not enough in this case for Massachusetts to show that this country's historical tradition of firearm regulation allows states to constitutionally enact permitting requirements. Given the facts and circumstances presented here, Massachusetts must demonstrate a historical tradition of states applying disparate restrictions on the right to carry firearms for self-defense to non-resident travelers (as compared to residents) such that the non-resident travelers faced imprisonment and disarmament if they were not in strict compliance with the same upon entry into the state. *See Rahimi*, 144 S. Ct. at 1898 (explaining that "[e]ven when a law regulates arms-bearing for a permissible reason, . . . it may not be compatible with the right if it does so to an extent beyond what was done at the founding.").

Massachusetts has failed to do so, understandably, because no such historical tradition exists. Massachusetts has not identified any firearm regulation from the founding-era that is analogous to M.G.L. c. 269, §10(a), let alone a regulation that was historically applied a way that is analogous how Massachusetts applied that statute in this case. The fact that Massachusetts cannot identify a founding-era law that operated upon non-resident travelers in a way similar to how M.G.L. c. 269, § 10(a) has been applied in this case serves as evidence that Massachusetts's strict application of M.G.L. c. 269, § 10(a) to New Hampshire residents who are briefly present in Massachusetts is inconsistent with the Second Amendment. *See Bruen*, 597 U.S. at 27 ("the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment.").

Instead, the development of the law over time reveals a historical tradition of exempting travelers from state firearm regulations. For example, in 1831, Indiana had a statute prohibiting "[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). 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

Moglinicki & Shultz, *The Incomplete Record*, 73 SMU L. REV. FORUM 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, 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*, 89 P.3d 341, 351 (Wyo. 2004). As the Supreme Court instructed in *Bruen*, "postenactment history" should not be given "more wieght than it can rightly bear." 597 U.S. at 28. However, these laws including travelers' exceptions demonstrate that, to the extent that our country has a

historical tradition of regulating the carriage of firearms by non-resident travelers, that history cuts against Massachusetts's arguments in this case.

In summary, it appears from the facts of this case that Massachusetts intends for M.G.L. c. 269, § 10(a) to strictly apply to New Hampshire citizens such that New Hampshire citizens – or any non-resident traveler for that matter – will be disarmed and imprisoned if they dare enter Massachusetts, even momentarily, while exercising their Second Amendment right to carry a firearm for self-defense, unless of course Massachusetts has permitted them to do so. Such a configuration is backwards — the Second Amendment, applicable to the states through the Fourteenth Amendment, sets the limits of governmental authority to burden the right to self-defense; the laws of the individual states do not define the contours of the Second Amendment.

Massachusetts has not identified a historical tradition of firearms regulations to justify its strict application of M.G.L. c. 269, § 10(a) to non-resident travelers who are only within the borders of Massachusetts for a short period of time. Indeed, to the extent that any historical tradition on that issue can be discerned, it suggests that non-resident travelers were often exempted from state firearm regulations. Accordingly, Massachusetts's purported application of M.G.L. c. 269, § 10(a) in this case clearly violates the Second Amendment.

II. It is not Massachusetts' licensing regime *in toto* that is at issue here, it is how such a regime is being applied to lawful non-resident travelers.

Seeking to avoid the unconstitutional application of these laws as against New Hampshire residents, Massachusetts relies on a historical tradition of disarming people who are or were deemed dangerous. Massachusetts also relies on "surety" laws and "going armed" laws as historical precursors justifying M.G.L. c. 269, § 10(a) and the way that statute has been applied in this case. However, Massachusetts's strict application of M.G.L. c. 269, § 10(a) to New Hampshire citizens who are briefly present in Massachusetts can find no constitutional refuge in such laws, neither in form nor application.

Massachusetts spends much of its brief – at least on the Second Amendment issue – arguing that its statutory scheme in requiring a license is valid because there is "a long history of firearm regulation . . . designed to prevent and disarm those deemed dangerous or unfit to carry a firearm . . . ." *See* App. Br.[5] at 35-39. Maybe so, but the laws at issue in this case do not make it a crime for a person found "dangerous" or "unfit" to carry a firearm.[6] It makes it a crime for a person to

[5] "App. Br." refers to the brief filed in this case by the Appellant, the Commonwealth of Massachusetts.

[6] The State of New Hampshire notes that Massachusetts has cited one case in which a Missouri law prohibiting intoxicated persons from carrying firearms was upheld against a constitutional challenge. *See* App. Br. at 38, n. 14 (citing *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886)). However, the *Shelby* Court's decision rested upon the fact that the "second amendment" was, in 1886, "a restriction upon the powers of the national government only, and [was] not a restriction upon state legislation." *Shelby*, 2 S.W. at 469. That "dispose[d] of the question so far as that

carry a firearm without a specific permit, which inevitably criminalizes the conduct of those who are not dangerous and are fit contrary to the Second Amendment.

Massachusetts contends that its strict application of M.G.L. c. 269, § 10(a) to New Hampshire residents who briefly visit Massachusetts is presumptively lawful because the Supreme Court approved background checks for concealed carry permits in *Bruen* and endorsed certain other forms of firearm regulations in *Heller*. App. Br. at 28-29. Those arguments are not persuasive for several reasons.

For starters, none of the regulations listed in *Heller* as historically acceptable are before this Court in this case.[7] *See Heller*, 554 U.S. at 626–27. Moreover, *Heller* did not exempt any firearms regulations from "an exhaustive historical analysis." *Id.* at 626. It simply gave some examples of regulations that survive that analysis as guideposts because the Court could not "undertake" an explication of "the full scope of the Second Amendment," in one opinion. *Id.* As the Supreme Court instructed in *Bruen*, it is Massachusetts's burden to prove the national historical tradition and this Court is "entitled to decide [this] case based on the

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amendment [was] concerned." *Id*. Thus, that statute was consistent with the Missouri Constitution, which prohibited certain forms of firearm carriage "in express terms," not the Second Amendment, which does not contain any express prohibition on any form of firearm carriage. Regardless, the law at issue in this case does not prohibit persons who are intoxicated from carrying firearms, directly or by analogy.

[7] Those "longstanding prohibitions" were more specific and related to "the possession of firearms by felons and the mentally ill", as well as "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27.

historical record compiled by the parties." *Bruen*, 597 U.S. at 25 n.7 (quoting *United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020)).

a. Even assuming that M.G.L. c. 269, § 10(a) was supported by this nation's historical tradition of firearms regulations, which it is not, Massachusetts has failed to demonstrate an analogous application of its statute.

Even if this Court were to assume that M.G.L. c. 269, § 10(a), as a general matter, could be sustained by this nation's historical tradition of firearms regulations, which it should not, Massachusetts must demonstrate that the same historical tradition can support the way in which M.G.L. c. 269, § 10(a) was applied in this case. *See Rahimi*, 144 S. Ct. at 1898 ("[e]ven when a law regulates arms-bearing for a permissible reason . . . it may not be compatible with the right if it does so to an extent beyond what was done at the founding."). Here, Massachusetts has failed to provide *any* historical regulation of any state that strictly forbade law-abiding, non-resident travelers to travel into the state with a firearm unless they were in strict compliance with the state's firearm regulations, and which carried penalties including disarmament and prison time if violated.

Accordingly, even this nation's general historical tradition of disarming people deemed dangerous cannot carry Massachusetts' burden in this case. Surety and "going armed" laws are examples of laws that required an individual *first* to show that another person was dangerous or otherwise threatening clear violence

against him or her *prior* to the person actually being disarmed. Thus, those historical precursors cannot rescue Massachusetts's application of M.G.L. c. 269, § 10(a) either.

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." M.G.L. c. 134, §16; see *id.* (marginal note) (referencing the earlier

statute); *see also Bruen* 597 U.S. at 55-60 (discussing surety laws, including an analysis of historical Massachusetts' law).

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. M.G.L. c. 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.

M.G.L. c. 269, § 10(a) shares none of those key characteristics. Even if it did, however, there are no facts in this record to support that the defendant was ever previously found to be dangerous or that he was otherwise unlawfully carrying his firearm at any point in time prior to crossing over the border into Massachusetts. *See Rahimi*, 144 S. Ct. at 1889 ("the Second Amendment right may only be burdened once a defendant has been found to pose a credible threat to the physical safety of others"). Because Massachusetts cannot reasonably stand on the argument that there is "probable ground" to believe that all New Hampshire

citizens carrying firearms are "suspect of future misbehaviour[,]"[8] Massachusetts's strict application of M.G.L. c. 269, § 10(a) to New Hampshire 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 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[9]. *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. As stated in *Rahimi*, "surety and going armed laws confirm what common sense suggests: When an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." 144 S. Ct. at 1901.

M.G.L. c. 269, § 10 is nothing like a "going armed" law. On the contrary, Massachusetts's strict application of M.G.L. c. 269, § 10(a) to non-resident travelers is the inverse of "surety" and "going armed" laws. As explained above,

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[8] Contrary to the wholly misleading allegations made in the Giffords Amici Brief, and as discussed thoroughly in the California Rifle & Pistol Association, et al. Amici Brief (hereinafter "CRPA Brief") – a brief in which New Hampshire joins on these points – New Hampshire is safer than Massachusetts. *See* CRPA Brief 30-32.

[9] 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)).

surety and going armed laws burdened a person's right to carry a firearm for self-defense only if the person was found by a court to pose a credible threat or danger to another person or to the public peace. By contrast, Massachusetts's strict application M.G.L. c. 269, § 10(a) to non-resident travelers presumes that such people are not permitted to exercise their Second Amendment right to carry a firearm for self-defense while in Massachusetts unless or until Massachusetts permits the person to do so through the extraction of a significant fee and administrative burden each and every year.

Consequently, the surety laws and going armed laws that Massachusetts relies on cannot carry its burden in this case because such laws are not similar, facially or in their application, to the statute at issue in this case. *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).

b. Any argument relating to exceptions that allows non-residents to possess unlicensed firearms for certain "legitimate sporting purposes" misses the core of what the Second Amendment protects.

Massachusetts also asserts in its brief that nonresidents have equal opportunity to apply for a firearm license and are also allowed to bring unlicensed firearms "for a variety of limited, authorized purposes: such as: hunting, to a firearm display or showing by a gun club, at a shooting range, and to a pistol competition." App. Br. At 47-48 (internal citations omitted). Massachusetts argues that this "balanced policy" allows "non-residents to travel through or bring guns to Massachusetts for legitimate *sporting purposes* without violating the law." *Id*. at 48 (emphasis added).

Notably, what is missing from Massachusetts's "balanced" policy is the core constitutional protection the Second Amendment affords – the right of a non-resident to carry a firearm for self-defense while journeying across the State's border, whether intentionally or accidentally. *See id*. at 47-48. Massachusetts's glib assertion that the strict application of M.G.L. c. 269, § 10(a) to New Hampshire citizens who are only briefly present in Massachusetts is constitutional because other portions of Massachusetts's laws[10] allow non-residents to carry a firearm into

[10] Massachusetts does not permit non-residents to carry a firearm for self-defense without a license issued by the Commonwealth of Massachusetts. However, Massachusetts does allow non-residents to carry a firearm into the state for activities such as hunting, M.G.L. c. 140, § 129C(f), displaying or showing a firearm at a gun show, M.G.L. c. 140, § 129C(i), visiting a shooting range, M.G.L. c. 140, § 129C(g), and participating in pistol competitions, M.G.L. c. 140, § 131G.

Massachusetts for non-constitutional purposes like sporting events makes a mockery of the right that the Second Amendment is intended to protect.

In summary, the Second Amendment cannot tolerate Massachusetts's strict application of M.G.L. c. 269, § 10(a) to New Hampshire citizens who make a brief visit to Massachusetts while carrying a firearm for self-defense. "The constitutional right to bear arms in public for self-defense is not 'a second-class right,'" *Bruen*, 597 U.S. at 70 (citation omitted), and Massachusetts cannot demand that New Hampshire citizens either leave that right at the border or strictly comply with Massachusetts's license-to-carry regime on pain of severe criminal penalty before they enter Massachusetts, no matter how brief the persons visit to Massachusetts may be.

CONCLUSION

Massachusetts's strict application of M.G.L. c. 269, § 10(a) has the potential to turn countless law-abiding New Hampshire residents who find themselves temporarily in Massachusetts into felons. Applying M.G.L. c. 269, § 10(a) in this way violates the Second Amendment because it is contrary to this Nation's historical tradition of firearms regulation.

This Court should therefore affirm the District Court's order granting Defendant-Appellee's Motion to Dismiss on the basis that M.G. L. c. 269 § 10(a) is unconstitutional as applied in this case.

CERTIFICATE OF COMPLIANCE

Pursuant to Mass. R. App. 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 Mass. R. App. P. 13, 16, 17, 18, 20. This brief was prepared in Microsoft Word 365 in 14-point Times New Roman font with 5,886 non-excluded words.