No. 24-565

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK BAIRD,
Plaintiff-Appellant

v.

ROB BONTA,
IN HIS OFFICIAL CAPACITY AS THE
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,
Defendant-Appellee

On Appeal from the
United States District Court for the Eastern District of California
Case No. 2:19-cv-00617-KJM-AC
Honorable J. Kimberly J. Mueller

BRIEF OF AMICI CURIAE SECOND AMENDMENT FOUNDATION, CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, MINNESOTA GUN OWNERS CAUCUS, AND THE CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1(a) of the Federal Rules of Appellate Procedure, counsel for amici curiae certify that Second Amendment Foundation, California Rifle & Pistol Association, Incorporated, Minnesota Gun Owners Caucus, and the Citizens Committee for the Right to Keep and Bear Arms are nonprofit organizations and thus have no parent corporations and no stock.

Date: May 5, 2026

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INTEREST OF AMICI CURIAE[1]

Second Amendment Foundation ("SAF") is a non-profit 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. Currently, SAF is involved in several Second Amendment-related lawsuits and thus has great interest in the outcome of this case.

Founded in 1875, California Rifle & Pistol Association, Incorporated ("CRPA") is a nonprofit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. In service of its mission to preserve the constitutional and statutory rights of gun ownership, CRPA regularly participates as a party or amicus in Second Amendment litigation.

Minnesota Gun Owners Caucus ("MGOC") is a 501(c)(4) non-profit organization incorporated under the laws of Minnesota with its principal place of business in Shoreview, Minnesota. MGOC seeks to protect and promote the right of citizens to keep and bear arms for all lawful purposes. MGOC serves its members and the public through advocacy, education, elections, legislation, and legal action. MGOC's members reside both within and outside Minnesota.

The Citizens Committee for the Right to Keep and Bear Arms is a non-profit corporation organized under Section 501(c)(4) of the Internal Revenue Code,

[1] This brief has been accompanied by a motion for leave as required by this Court's rules. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution to fund this brief. No person other than the amici, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

dedicated to promoting the benefits of the right to bear arms. The Court's interpretation of the Second Amendment directly impacts the Committee's organizational interests, as well as the Committee's members and supporters, who enjoy exercising their Second Amendment rights. The Committee's substantial expertise in the field of Second Amendment rights would aid the Court in this case.

INTRODUCTION

Historical precedent demonstrates a longstanding tradition of lawful open carry predating the founding of the United States. Accordingly, the Second Amendment protects the right to open carry arms for lawful purposes. And through both the plain text of the Second Amendment as well as the choices of Americans in the modern era, concealed carry is protected as well despite it once being commonly prohibited. Neither form of carry may be banned.

Very clear history — and *Bruen*'s clear methodological approach — command this result. To rule otherwise, this Court would need to effectively delete *Bruen*'s default historical analysis from the text of that opinion in favor of applying the "more nuanced approach" all of the time. By doing so, it would inevitably water down the Second Amendment, when it should instead "seek to honor the fact that the Second Amendment 'codified a *pre-existing* right' belonging to the American people, one that carries the same 'scope' today that it was 'understood to have when the people adopted' it." *United States v. Rahimi*, 602 U.S. 680, 709 (2024) (Gorsuch, J., concurring) (citing *District of Columbia v. Heller,* 554 U.S. 570, 592 (2008)).

If it takes away the primary method of lawful carry that existed in the founding era and throughout the Nineteenth Century, this Court would not be giving the

Second Amendment "the same scope" today that the people who adopted it understood it to have. Nor were Americans prior to 1900 silent about this understanding, as secondary sources from the time period were clear that they saw the right to bear arms as a right to openly carry arms.

A sampling of those secondary sources will be a focus of this brief. But before that, Amici will cover why the plain text of the Second Amendment clearly is implicated in this case, and will also discuss the correct approach to selecting the proper level of generality in cases that do not involve "unprecedented societal concerns or dramatic technological changes." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 27 (2022). The brief will conclude with an explanation of why California's panicked assertions about the public safety risks of open carry, already irrelevant under *Bruen*, are also factually baseless.

Finally, some of the Amici here previously submitted a brief in the pending *Yukutake* matter which was critical of this Court's continuing practice of vacating almost every Second Amendment panel victory with en banc rehearing. *See* Brief of Amici Curiae Second Amendment Foundation et al. in Support of Plaintiffs-Appellees at 3-12, *Yukutake v. Lopez*, No. 21-16756 (9th Cir. Aug. 25, 2025). Amici stand by the significant concerns expressed in that brief, but they also accept that this Court apparently disagrees with those concerns, given it has since granted rehearing and vacated two more Second Amendment cases. Thus, rather than reiterate the same points again, Amici incorporate the arguments made in their *Yukutake* brief by reference here, and respectfully urge this Court to reconsider its approach.

ARGUMENT

I. THE SECOND AMENDMENT'S PLAIN TEXT APPLIES TO BOTH OPEN AND CONCEALED CARRY.

The Second Amendment refers to keeping and bearing arms as the operative rights it protects. Bearing arms, whether openly or concealed, is therefore covered by the plain text of the Second Amendment. Indeed, the Appellant's proposed course of conduct here does not differ one iota from the *Bruen* plaintiffs: "carrying handguns publicly for self-defense." *Bruen*, 597 U.S. at 32.

A. The plaint text of the Second Amendment applies to restrictions on open carry.

In examining the plain text of the Second Amendment and its application to this case, properly describing the proposed course of conduct is key. In *Bruen*, New York had argued that the Second Amendment "permits a State to condition handgun carrying in areas 'frequented by the general public' on a showing of a nonspeculative need for armed self-defense in those areas." *Id.* at 33. When it decided that case, the Supreme Court did not say that "carrying handguns publicly for self-defense without a showing of nonspeculative need" was the proposed course of conduct, because that "showing of nonspeculative need" was the ***burden*** on the Second Amendment right. The burden is not part of the proposed course of conduct; it is the law or practice that is being challenged. *See United States v. Martinez*, No. 23-cr-114, slip op. at 3 (E.D. Tex. Apr. 14, 2025) ("The Government next suggests that the 'conduct' covered by the text of the Second Amendment should be defined narrowly to fit the precise conduct regulated by § 922(d)(10)—something like 'selling a firearm to a drug trafficker.' . . . But this impermissibly conflates the two steps of *Bruen*.").

The same applies here. The proposed course of conduct may not be defined with unneeded specificity to short-circuit the historical analysis. For example, in this case it would be improper to define the conduct at issue as "carrying handguns openly in public for self-defense, when the law already provides for concealed carry as its preferred mode of carry." California's open carry restriction is the *burdensome law being challenged*, and it therefore has no place in the analysis until this Court reaches the historical test. Another court that has examined this issue concluded simply: "The State does not dispute that Florida's Open Carry Ban targets conduct protected by the Second Amendment's plain text. **Nor could it credibly contend otherwise**." *McDaniels v. State*, 419 So. 3d 1180, 1188 (Fla. Dist. Ct. App. 2025) (bold added). The same is true here, an open carry ban implicates the plain text of the Second Amendment, and California cannot credibly contend otherwise.

The dissent of the now-vacated three-judge panel ruling saw things differently because it read the plain text of the Second Amendment to contain extra wording that is nowhere to be found in the provision.[2] Specifically, the dissent argued that there is

[2] The panel dissent also asserted that no facial challenge is available in this case unless there is no set of circumstances under which the open carry ban would be invalid. But the difference between facial and as-applied challenges is not such a binary choice. "The label is not what matters. The important point is that plaintiffs' claim and the relief that would follow . . . reach beyond the particular circumstances of these plaintiffs. They must therefore satisfy our standards for a facial challenge to the extent of that reach." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). Here, the relief would extend to everyone who is eligible to open carry and wants to do so but is unable due to California law.

Moreover, people who are prohibited from possessing firearms cannot be punished for violating California's bans on carrying firearms (loaded or unloaded, openly or concealed) under state law pursuant to the California Supreme Court's opinion in *People v. Jones*, 278 P. 3d 821, 352 (2012). So even under the dissent's maximalist interpretation of the facial challenge standard, such a challenge is available here.

no infringement because "[t]he people of California may keep and bear arms throughout the state in a concealed manner." *Baird v. Bonta*, 163 F.4th 723, 769 (9th Cir. 2026) (N.R. Smith, J., dissenting). The error there is that the Second Amendment does not refer to bearing arms "in a concealed manner." It refers only to bearing arms, period.

If the dissent were correct, then *Heller* should have gone the other way; after all, the District of Columbia had not banned *all* firearms, just handguns. In the same way the panel dissent argues that the plain text is not even implicated here because concealed carry is still an available option, so too were other firearms available to D.C. residents in *Heller*, and the District had argued as much. The Supreme Court rejected that argument expressly: "It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Heller*, 554 U.S. at 629.

Thus, adapting that portion of *Heller* to the present case: it is no answer to say, as California does, that it is permissible to ban one form of carry so long as another form is available.[3] And even if it is permissible, then that may not be decided at the plain text stage, but must satisfy *Bruen*'s historical burden on the government.

[3] To be sure, in the modern era, open carry is not as popular as concealed carry. But it is still a common practice, and "California is the *only* state in the Ninth Circuit that has entirely banned open carry for the overwhelming majority of its citizens." *Baird*, 163 F.4th at 728. Amici doubt *Heller* would have gone the other way if it had concerned the *second* most popular type of arm used for lawful purposes, such as rifles or shotguns, rather than handguns.

B. *Bruen*'s "plain text" qualifier is not meant to relieve the government of its historical burden through a "Goldilocks" test that is simultaneously underinclusive and overinclusive.

The issues with the panel dissent's views on the plain text analysis touch on a much greater analytical problem that this Court should take the opportunity to address in this case. Four years on from *Bruen*, many lower courts have improperly turned the "plain text" step, paired with footnote 9, into the substantive part of the *Bruen* analysis. In all too many instances, a historical analysis never even occurs because courts decide arms-bearing conduct is not arms-bearing conduct.

In some cases, courts accomplish this by being draconian in their application of the text. To those courts, no conduct is protected by the plain text of the Second Amendment unless it literally consists of keeping or bearing arms. For example, the First Circuit just ruled that "laws regulating the purchase or acquisition of firearms do not target conduct covered by the Second Amendment's 'plain text.'" *Beckwith v. Frey*, No. 25-1160, 2026 U.S. App. LEXIS 9723, at *15-16 (1st Cir. Apr. 3, 2026). According to that court, such laws are "constitutional unless plaintiffs demonstrate that the Act is abusive toward Second Amendment rights." *Id.* at *16. So much, then, for *Bruen*'s rejection of judge-empowering interest-balancing inquiries. 597 U.S. at 22. If judges are now going to decide whether a law is "abusive" enough before any historical analysis can even occur, then interest-balancing has made its triumphant return.[4]

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[4] This Court has adopted a similar test, as it has ruled that if a law only affects ancillary rights like acquiring arms, then there is no Second Amendment violation unless it "meaningfully constrains" the right to keep and bear arms. *See B&L Productions, Inc. v. Newsom*, 104 F.4th 108, 118 (9th Cir. 2024). Of course, this "meaningful constraint" test is just another way of saying there is no Second

This funhouse mirror version of strict textualism evaporates when courts prefer to *narrow* what the Second Amendment protects in its plain text. When a law directly impedes the literal keeping or bearing of arms, some courts *add* words to the text of the Second Amendment so they can assert, e.g., that a particular arm is not covered by the plain text of the Second Amendment. In those cases, it is no longer enough to just be an "arm" as the Supreme Court has defined that term using founding-era dictionaries. Instead, several circuits now say "arms" are *only* those weapons commonly used for self-defense. If a plaintiff doesn't have sufficient statistical data to prove that common use in self-defense specifically (other lawful purposes, like hunting or sports shooting, are not even considered), they lose, and no meaningful historical analysis occurs.

A recent example of that is the Second Circuit's summary order in *Calce v. Tisch*. In that case, plaintiffs challenged New York state and city laws that prohibit the possession of stun guns and tasers. No. 25-861-cv, 2026 U.S. App. LEXIS 10458, at *2 (2d Cir. Apr. 13, 2026). The district court had ruled that "Plaintiffs 'failed to provide any evidence that stun guns and tasers are in common use' and therefore, on the summary judgment record before it, 'no reasonable jury could return a verdict that stun guns and tasers are presumptively protected by the Second Amendment.'" *Id.* (quoting the district court ruling). The Second Circuit agreed, and this Court has ruled similarly. *See United States v. Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023).

Amendment violation unless this Court thinks the burden on the right is too great relative to the government's interest. In other words, interest balancing.

But the plain text makes no such distinctions, and there is no "commonly used for self-defense" qualifier to be found. The Second Amendment presumptively protects *all* "arms," which includes common arms, uncommon arms, non-lethal arms, and even "dangerous and unusual" arms. All arms come under the plain text, so any restrictions on them must comport with historical tradition. Undoubtedly, the government will have no trouble upholding certain restrictions under the historical analysis. But it must still meet its historical burden even if it will do so easily in some cases; it cannot dodge it by insisting the weapons it regulates are not "arms" or by, as relevant here, arguing that open carry does not fall under "bearing arms."

Thus, the current state of Second Amendment law in many circuits is a restrictive "Goldilocks" test that keeps historical analysis at bay and upholds almost every challenged law. Under these "extremely narrow reading[s]," the Second Amendment is "wrongly. . .reduced to 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Yukutake v. Lopez*, 130 F.4th 1077, 1092 (9th Cir. 2025) (citing *Bruen*, 597 U.S. at 70).[5] If a plaintiff sues over an "ancillary" right that is not the literal keeping or bearing of arms, their conduct is "too cold," too far away from the plain text to merit historical analysis. If instead a plaintiff challenges a law that undeniably blocks the keeping or bearing of an arm, then it is "too hot," and no historical analysis will occur unless the plaintiff can prove, with statistical evidence, that the specific type of arm is commonly used for

[5] *Yukutake* was vacated and reheard en banc, and a ruling is pending. Still, the three-judge panel's point quoted above is persuasive.

self-defense (or as applied to this case, the method of carry is the most socially acceptable kind).

Amici urge this Court to break that pattern and restore the intended scope of the plain text of the Second Amendment. From there, the government will still have an opportunity to justify its law using historical tradition, as *Bruen* intended.

C. The plain text of the Second Amendment applies to concealed carry as well, and it would not be permissible to restrict that practice today even though it may have been in the past.

The historical tradition of restricting concealed carry, discussed further in section III, may make it seem like it could also be banned today so long as open carry is allowed. Not so. Acknowledging the historical pedigree of open carry and its primacy prior to 1900 does not mean that concealed carry is unprotected. Amici acknowledge that this Court had said otherwise prior to *Bruen*: "[i]f there is such a right [to public carry], it is … a right to carry a firearm openly." *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (abrogated in part on other grounds by *Bruen*, 597 U.S. 1). That prior conclusion supports Appellant as to his desire to openly carry firearms for self-defense.

But when it comes to concealed carry, Amici believe that one of the first courts to ever look at this mode of carry issue reached the correct result when it ruled that *all* bans on a form of carry, including concealed carry, violated Kentucky's state equivalent of the Second Amendment: "to be in conflict with the constitution, it is not essential that the act should contain a prohibition against bearing arms in every possible form; it is the *right* to bear arms in defence of the citizens and the state, that is secured by the constitution, and whatever restrains the full and complete exercise of

that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution." *Bliss v. Commonwealth*, 12 Ky. 90, 91-92 (1822). That ruling came only shortly after the Founding Era, while some of the founders and their contemporaries were still alive.

A number of later rulings subsequently went the other way in the decades that followed, with state courts frequently upholding restrictions on concealed carry. Those courts saw open carry as the right protected by the Second Amendment's various state counterparts. "These many courts … explicitly rejected the argument that the two kinds of carry were interchangeable, and they explicitly premised their conclusion on the ground that the right to carry arms 'in full open view' is 'guaranteed by the Constitution of the United States.'" *Baird*, 163 F.4th at 735 (quoting *State v. Chandler*, 5 La. Ann. 489, 490 (1850)).

But even if all these other courts were right and *Bliss* was wrong, it still would not change the fact that concealed carry is protected today, for the very same reason handguns are. Recall that the Supreme Court had acknowledged that handguns may have once been arms that could be banned, but that time had passed because of the choices of the American people. "Whatever the likelihood that handguns were considered 'dangerous and unusual' during the colonial period, they are indisputably in 'common use' for self-defense today." *Bruen*, 597 U.S. at 47. In the same way, because concealed carry is now the favored method of lawful carry by Americans, it may no longer be banned even if it could be at a prior time in our history.

To be clear, the ascendancy of concealed carry in the modern era in no way means open carry may now be restricted. Just as the rise in popularity of

semiautomatic handguns does not mean that once-dominant revolvers may now be banned, so too is open carry still protected by the Second Amendment's historical tradition. The First Amendment did not stop protecting print media just because the internet became much more popular, and the same principle applies to the Second Amendment.

II. THE "NUANCED APPROACH" IS NOT APPLICABLE TO THIS CASE, AND EVEN IF IT WERE, COURTS MUST NOT TURN TO HIGHER LEVELS OF GENERALITY WHEN CLOSER HISTORICAL ANALOGUES ARE AVAILABLE.

A. Why *Bruen*'s "nuanced approach" is not applicable to this case.

As the Supreme Court has explained, "[i]n some cases, [the historical] inquiry will be fairly straightforward ... 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." *Bruen*, 597 U.S. at 26. And when the same or similar problem was addressed in the past through "materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id.* at 26-27. The panel majority in this case was thus being entirely faithful to *Bruen* when it wrote that:

> [I]t should be clear enough that courts may not turn "straightforward" cases into "nuanced approach" cases and then use the "nuanced approach" to ban the very things that were universally protected from the Founding through Reconstruction. If that were allowed, then *Bruen*'s instruction that the absence of "a distinctly similar historical regulation addressing [the] problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment," would have little practical force.

Baird, 163 F.4th at 732-33 (citations omitted). While that ruling was vacated when this Court granted rehearing, that portion of it is entirely consistent with that this Court had previously ruled in *Nguyen v. Bonta*:

> It cannot reasonably be disputed that firearm manufacturing and availability are different today than they were in our early history. But arms trafficking is not a new problem … Because the industrialized production of guns can be traced back to the mid-nineteenth century, it is not a "dramatic technological change[]" requiring a nuanced approach … In sum, **the modern problems that California identifies as justification for its one-gun-a-month law are perhaps different in degree from past problems, but they are not different in kind. Therefore, a nuanced approach is not warranted**.

140 F.4th 1237, 1244-45 (9th Cir. 2025) (bold added).

Nguyen's logic applies just as much, if not moreso, to open carry. To the extent open carry is a "problem," it is certainly not a new one, as it was the primary method of carry throughout the Nineteenth Century. And while the history of arms manufacturing that was relevant to *Nguyen* is different in degree but not in kind to modern manufacturing, open carry is different in neither degree nor kind. Thus, to use the "nuanced approach" of *Bruen*'s here would mean effectively deleting the default historical approach of its analysis, and this Court may not effectively overrule the Supreme Court. As the panel majority explained, "if the 'nuanced approach' can be properly applied here … then the 'nuanced approach' exception has completely swallowed *Bruen*'s rule and there is no case where the default rule under *Bruen* would apply." *Baird*, 163 F.4th at 739-40.

B. Courts must not rise to higher levels of generality in cases where a close historical analogue is apparent.

Even if this Court disagrees and decides to give California the extra analogical leeway that *Bruen* appears to forbid in these circumstances, that leeway must not be effectively endless. "It is not enough to rely on a generalized tradition of firearms regulation, for at that level of abstraction almost any law could be sustained." *McDaniels*, 419 So. 3d at 1194.

No doubt that under the nuanced approach, there will be disagreements in the analysis when it comes to the degree of similarity between a modern law and proposed analogues, because "reasonable minds sometimes disagree about how broad or narrow the controlling principle should be." *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring). But a core interpretive rule that can be discerned from *Bruen* and *Rahimi* is that when a close historical analogue exists to the modern technology or societal problem at issue, lower courts may not resort to more stretched analogies to avoid the inconvenient fact that the closer analogue does not support the government's position. Indeed, *Bruen*'s analogical method "instructs courts to use closely matching analogues where available and to abstract up only when necessary." George A. Mocsary, *The Wrong Level of Generality: Misapplying Bruen to Young-Adult Firearm Rights*, 103 Wash. U. L. Rev. Online 100, 101 (2025); *id.* ("*Bruen* directs courts to begin with the text, and then to look for distinctly similar Founding-era firearm regulations before resorting to higher levels of abstraction.").

The improper application of levels of generality has become a widespread issue. For example, in a case involving new bans on carry in restaurants that happen to serve alcohol in Hawaii and California (a restriction which applied even to those who are

not drinking), this Court disregarded the lack of historical carry restrictions in the numerous bars and taverns that existed in the founding era. Instead, it pointed to colonial laws that restricted the sale of liquor to militia members, and to a few cities that banned carry in ballrooms a century later, and upheld the modern laws on that basis. *Wolford v. Lopez,* 116 F.4th 959, 986 (9th Cir. 2024). It also did not consider that earlier generations solved the problem of armed drunks by barring only presently intoxicated people from carrying arms, not sober individuals who happened to be carrying firearms in proximity to alcohol. *See United States v. Connelly*, 117 F.4th 269, 282 (5th Cir. 2024).

In another case about non-resident firearms carry and the onerous permitting processes that included wait times spanning over eight months (even for those with a carry permit in their home state), the Supreme Judicial Court of Massachusetts upheld the non-resident permit requirement, citing "going armed" and surety laws. *Commonwealth v. Marquis*, 495 Mass. 434, 456 (2025). In doing so, it ignored the far closer historical analogue: the extensive historical tradition of "traveler's exception" laws, which exempted visitors from other states from local concealed carry restrictions. *See* Brief for Nat'l Rifle Ass'n of Am. & Second Amend. Found. as Amici Curiae at 16-28, *Commonwealth v. Donnell*, No. SJC-13561 (Mass. filed August 16, 2024) (discussing many traveler's exception laws); *see also* Brief for Second Amendment Foundation et al. as Amici Curiae Supporting Petitioner at 7-13, *Gardner v. Maryland*, No. 25-5961 (U.S. Dec. 11, 2025) (discussing the same).

When a close historical analogue is apparent, courts should not rise to higher levels of generality, particularly when earlier generations addressed the same problem

in a different way (e.g., exempting travelers from carry restrictions rather than requiring them to get a permit, or disarming those who were drinking or intoxicated only, and not sober people). "[W]hen there is a clear and unbroken historical tradition, it is impermissible to analogize at levels of generality so high that precisely what was recognized as protected may now be banned." *Baird*, 163 F.4th at 738.

That is also exactly what the Supreme Court has already explained. *See Bruen*, 597 U.S. at 26-27 ("[I]f earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional."). To do otherwise here, in a case concerning a practice that long predates the founding, would "read a principle at such a high level of generality that it waters down the right." *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring).

III. SECONDARY SOURCES CONFIRM THAT EARLIER GENERATIONS OF AMERICANS DID NOT SEE OPEN CARRY AND CONCEALED CARRY AS FUNGIBLE.

"For most of American history, open carry has been the default manner of lawful carry for firearms." *Baird*, 163 F.4th at 727. This included California from the time it became a state in 1850 through 1967. *Id.* This extensive history demonstrates that "open carry and concealed carry have never been treated as fungible under the Second Amendment..." *Id.* at 735; *see also McDaniels*, 419 So. 3d at 1193 ("In sum, the historical record from the relevant period shows that our Nation did not regard concealed carry and open carry as interchangeable … Open carry … was understood to be the manner of bearing arms that gave full effect to the rights secured by the Second Amendment."); *Lara v. Comm'r Pa. State Police*, 125 F.4th 428, 446 (3d Cir.

2025) (ruling barring Pennsylvania from "arresting law-abiding 18-to-20-year-olds who openly carry firearms during a state of emergency declared by the Commonwealth," without ordering the state to issue young adults concealed carry permits.).

The panel dissent disagreed. It argued that the "historical laws mirror both the 'how'—eliminating one manner of public carry—and the 'why'—reducing violence and protecting the safety of citizens—of California's regime." *Baird*, 163 F.4th at 773 (N.R. Smith, J., dissenting). Aside from the level of generality issue that was already discussed *supra*, that view of things would have been unacceptable to the legal scholars of the Nineteenth Century,[6] who almost uniformly supported restrictions on concealed carry and were explicit that open carry was the only mode of carry they saw as protected by the Second Amendment. These citations are legion, and Amici list just a sampling of them here:

1. Oliver Wendell Holmes Jr., who would later serve on the Supreme Court for three decades, thought that "a state acting pursuant to its general police power may (and should) prohibit the 'atrociously abused' practice of concealed carry." *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1164 (9th Cir. 2014) (discussing 2 J.Kent, *Commentaries on American Law* *340 n.2 (Holmes ed., 12th ed. 1873)).[7]

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[6] The now-vacated panel majority covered Nineteenth Century court rulings on this topic extensively, and the plentiful historical laws restricting concealed carry prior to 1900 have been discussed sufficiently elsewhere. *See, e.g. McDaniels*, 419 So. 3d at 1191 (discussing eight statutes prohibiting concealed carry); *Frey v. City of N.Y.*, 157 F.4th 118, 138 (2d Cir. 2025) (discussing laws from ten states or territories between 1813 and 1859 that prohibited concealed carry). Thus, Amici focus on less-explored contemporary commentaries.

[7] *Peruta* was later reheard en banc, 824 F.3d 919 (9th Cir. 2016), but the original three-judge panel was ultimate vindicated by *Bruen*.

2. Thomas M. Cooley, who served on the Michigan Supreme Court from 1864 to 1885 and was arguably the leading constitutional scholar of the late Nineteenth Century, wrote that "the secret carrying of [weapons] suited merely to deadly individual encounters may be prohibited." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271–72 (Little, Brown 1880), https://books.google.com/books?id=6z3iAAAAMAAJ.

3. Benjamin Vaughan Abbott, a lawyer and author most famous for his efforts in drawing up New York's penal code in 1864, wrote that "[t]he constitutional right to keep and bear arms does not extend to carrying bowie knives, firearms … concealed upon the person." Benjamin Vaughan Abbott, *Dictionary of Terms and Phrases Used in American or English Jurisprudence* 83 (vol. 1, Little, Brown 1879), https://www.google.com/books/edition/Dictionary_of_Terms_and_Phrases_Used_in/exu3uPQy5aoC?hl=en&gbpv=1&bsq=given%20rise.

4. Henry Campbell Black, the original author of *Black's Law Dictionary*, wrote that the Second Amendment "is not infringed by a state law prohibiting the carrying of concealed deadly weapons … But a law which should prohibit the wearing of military weapons openly upon the person, would be unconstitutional." Henry Campbell Black, *Handbook of American Constitutional Law* 403-404 (3d ed. West Publ'g Co. 1910), https://babel.hathitrust.org/cgi/pt?id=hvd.hnqe5l&seq=434.

5. Herman Eduard von Holst, a German who emigrated to the United States and wrote extensively on the Constitution of the United States, wrote that "the secret carrying of arms can be prohibited." Hermann Von Holst, *The Constitutional Law of the*

United States of America 230 (Alfred Bishop Mason trans., Callaghan 1887), https://books.google.com/books?id=mD4vAAAAYAAJ.

6. Anna Laurens Dawes, the daughter of Senator Henry Laurens Dawes and a political activist in her own right, wrote that "[a] law prohibiting the use of weapons would take away all possibility of resisting any injustice … But it has been carefully explained by statute that [this right] does not allow the carrying about of … concealed weapons." Anna Laurens Dawes, *How We Are Governed: An Explanation of the Constitution and Government of the United States. A Book for Young People* 313 (D. Lothrop 1885), https://www.google.com/books/edition/How_We_are_Governed/cUcIAAAAQAAJ?hl=en&gbpv=1&bsq=carefully%20explained%20by.

7. John Norton Pomeroy, a lawyer, writer, and law professor who authored key textbooks in the Nineteenth Century, wrote that the Second Amendment "is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons." John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States: Especially Designed for Students, General and Professional* 152–53 (Hurd and Houghton 1868), https://www.google.com/books/edition/An_Introduction_to_the_Constitutional_La/BaBDAAAAcAAJ?hl=en&gbpv=1&bsq=dangerous%20or%20concealed.

8. Christopher G. Tiedeman, a legal scholar of the era, wrote that while the constitution secures a right to bear arms, "a law against the carrying of concealed weapons … is only a reasonable regulation … It only prohibits the carrying of concealed weapons, and does not interfere with any other mode of carrying them." Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States*

503 (F.H. Thomas Law Book Co. 1886), https://books.google.com/books?id=wU0kPEafj10C.

9. George Chase, the editor of the leading American student edition of Blackstone's Commentaries which was also cited in *Heller*, 554 U.S. at 626, wrote that "statutes prohibiting the carrying of *concealed* weapons are not in conflict with [the Second Amendment]." George Chase (ed.), *The American Students' Blackstone* 84 n.11 (Banks & Brothers 1884), https://books.google.com/books?id=TAA0AQAAMAAJ.

10. Laura Donnan, a teacher and civic activist, wrote that the Second Amendment "does not mean that only organized state militia may keep and bear arms, but it means that every citizen may do so … However, it does not mean that men are allowed to carry concealed weapons." Laura Donnan, *Our Government: Brief Talks to the American Youth on Our Governments, General and Local* 238 (Bowen-Merrill Company 1900), https://www.google.com/books/edition/Our_Government/KD319BK75aAC?hl=en&gbpv=1&bsq=state%20militia.

. . .

The commentary compiled above is in accord with dozens of historical laws and every notable state court ruling prior to 1900. Open carry was unquestionably seen as a protected right, and it would be making a mockery of our historical tradition to ignore this overwhelming history and allow it to be banned today. The vacated panel majority's core conclusions were correct, and this Court should readopt them: "Open carry is unquestionably part of our Nation's history and tradition of 'the right to keep and bear arms.' The clear protection for open carry, stretching back to the Founding, means that … California's ban on open carry in counties with a population

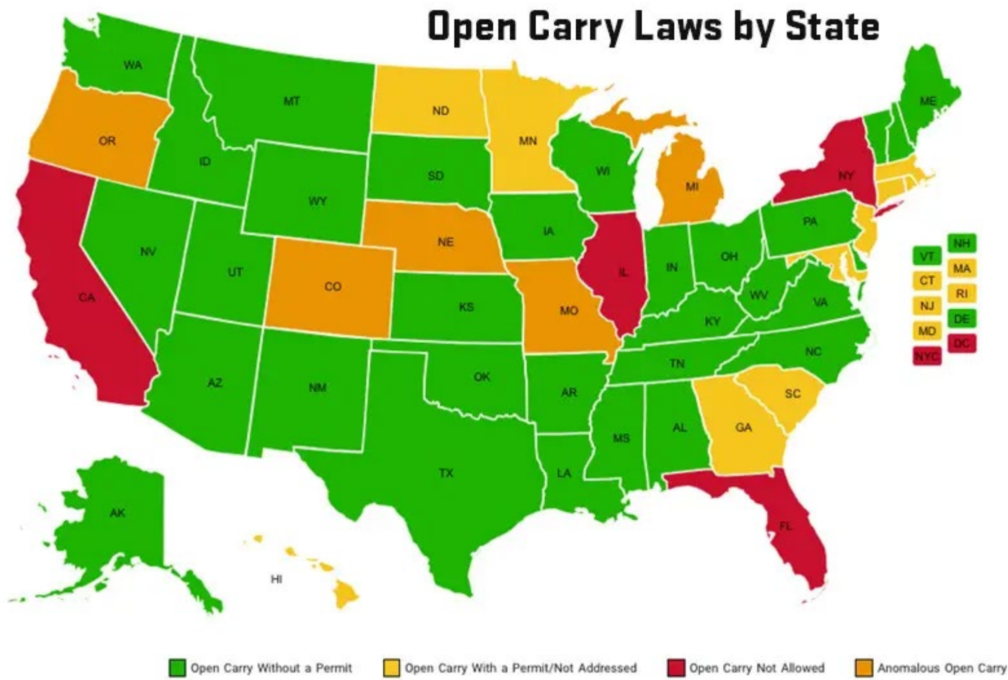
greater than 200,000 is [ ] inconsistent with the Second Amendment." *Baird*, 163 F.4th at 751.

IV. LAWFUL OPEN CARRY IS NOT A PUBLIC SAFETY RISK.

Bruen reiterated that *Heller* and *McDonald* "expressly rejected the application of any 'judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.''' *Bruen*, 597 U.S. at 22 (citing *Heller*, 554 U.S. at 634). Appeals to public safety thus have no place in the Second Amendment analysis.

That has not stopped the State from arguing otherwise consistently throughout this case, including in its en banc petition, where it urged this Court to grant rehearing to ensure that "California can continue to prevent fear, panic, and chaos on the streets of its cities." Petition for Rehearing or Rehearing En Banc of Defendant-Appellee at 3, *Baird v. Bonta*, No. 24-565 (9th Cir. Jan. 16, 2026). Legalizing open carry, the State argues, creates an "untenable public safety risk." *Id.* at 8. Specifically, "public safety would be imperiled by the risk that members of the public would mistake the intentions of someone openly carrying a gun, causing panic and distress. *Id.* at 16-17.

These claims merit a response, as the State ignores that the overwhelming majority of other states allow open carry, and no mass chaos has ensued. Indeed, far from there being a representative historical tradition of banning open carry, there is not even a *modern* tradition of such restrictions. Open carry is legal in the overwhelming majority of states, as the following map demonstrates (note that it is slightly out of date, as Florida has since legalized open carry):



USCCA, *What Is Open Carry and Which States Allow It?*, USCCA Blog (Apr. 8, 2025), https://www.usconcealedcarry.com/blog/what-is-open-carry-and-which-states-allow-it/.

This includes states with large urban populations. As noted, last September, Florida was forced to allow open carry statewide. *McDaniels*, 419 So. 3d at 1193. Chaos did not ensue, nor did the change stop the state's major cities from reporting huge drops in homicide. For example, the Tampa Police Department reported a 21.5% overall drop in crime in 2025, including a 52.8% decline in homicide, outpacing the national decline. *See* Jennifer Kveglis, *Tampa Crime Drops in 2025, Outpacing National Trend: TPD*, FOX 13 Tampa Bay (Feb. 25, 2026), https://www.fox13news.com/news/tampa-crime-drops-2025-outpacing-national-trend-tpd. Orlando saw similar progress. *See* Emma Delamo, *Police Say Crimes, Including Homicides, Declining in Orlando*,

Spectrum News 13 (Feb. 14, 2026), https://mynews13.com/fl/orlando/news/2026/02/14/orlando-crime-homicides-decrease ("According to OPD, only 10 homicides were recorded [in Orlando] in 2025. The agency says this was the lowest number since it started tracking the data in 1971.").

According to the CDC's data, many states that allow open carry had a lower gun-related homicide rate than California in 2024, including: New Hampshire, Maine, Idaho, North Dakota, Utah, Vermont, Wyoming, Iowa, Nebraska, Montana, Minnesota, Oregon, and Washington. *See* Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics System, *Provisional Mortality on CDC WONDER Online Database*, http://wonder.cdc.gov/mcd-icd10-provisional.html (data from final Multiple Cause of Death Files, 2018-2024, as compiled from the 57 vital statistics jurisdictions through the Vital Statistics Cooperative Program) (accessed May 2, 2026).

Open carry bans are unconstitutional because they are completely without foundation in our historical tradition, and that should be all that matters under *Bruen*. Yet even if this Court were to consider appeals to public safety, the State's arguments in that regard are without merit.

CONCLUSION

The Second Amendment protects the right to bear arms, and for most of our history, that was always understood as a right of open carry. While the American people have expanded that right to include concealed carry as well in the modern era, there is no historical support for the idea that open carry may be banned. California's prohibition on open carry in populous counties thus fails *Bruen*'s test and should be stricken.

Dated: May 5, 2026

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 24-565

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Amici Curiae with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on May 5, 2026, using the ACMS system, which will send notice of such filing to all registered ACMS users.

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