

No. 24-565

**United States Court of Appeals
for the Ninth Circuit**

MARK BAIRD,

Plaintiff-Appellant,

– v. –

ROB BONTA, in his official capacity as Attorney General
of the State of California,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA IN NO. 2:19-CV-00617-KJM-AC
HONORABLE KIMBERLY J. MUELLER, DISTRICT JUDGE

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*
THE NATIONAL ASSOCIATION FOR GUN RIGHTS AND
THE RIGHT TO BEAR ASSOCIATION, LLC IN SUPPORT OF
PLAINTIFF-APPELLANT ON REHEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1(a) of the Federal Rules of Appellate Procedure, counsel for amicus curiae certifies that The National Association for Gun Rights is a non-profit organization and thus has no parent corporations and no stock. Counsel further certifies that amicus curiae The Right to Bear Association, LLC is a subsidiary of Freedom Central Holdings, LLC, which is owned entirely by individuals and is not a publicly held corporation.

Date: May 6, 2026

ALEXANDER A. FRANK, ATTORNEY AT LAW

/s/ Alexander A. Frank

Alexander A. Frank

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE AMICUS BRIEF

National Association for Gun Rights (“NAGR”) and The Right to Bear Association, LLC (“RBA”) (collectively “Amici”) respectfully seek leave from this Court to participate as *amici curiae* in this pending *en banc* matter under Federal Rule of Appellate Procedure 29(a)(3) and Circuit Rule 29-2(b).

NAGR is a decades old organization representing more than 4.5 million members that has participated as *amicus curiae* in various Second Amendment matters throughout the nation, including at the Supreme Court. *See Brief for National Association for Gun Rights as Amicus Curiae in Support of Petitioners* at 1, *Snope v. Brown*, No. 24-203, *cert. denied*, 145 S. Ct. 1534 (mem.) (2025). NAGR is also a party to Second Amendment litigation throughout the nation. Cases it is participating in as a party, for example, include *National Association for Gun Rights v. Garland*, 741 F. Supp. 3d 568 (N.D. Tex. 2024) and *National Association for Gun Rights v. Polis*, No. 24-1209 (10th Cir. filed May 20, 2024). Accordingly, NAGR has a strong interest in Second Amendment matters, as demonstrated by its participation as both *amicus curiae* and a party to significant Second Amendment litigation. Moreover, NAGR represents millions of members throughout the nation, including in California.

RBA is one of the fastest-growing self-defense membership associations in the country, providing access to legal protection, education, training, and a nationwide attorney network to law-abiding gun owners before and after lawful self-defense incidents. Its members include private citizens, families, law enforcement officers, former military servicemembers, and houses-of-worship safety teams, all of whom rely on the right to keep and bear arms protected by the Second Amendment.

Because the right to carry outside the home is the essential reason for its existence and business, RBA has an interest in the outcome of any litigation involving the scope of the right to keep and bear arms—especially in an area as jurisdictionally broad as the Ninth Circuit and a state as populated as California. Moreover, its vast familiarity and depth of experience in the specific domain of carry and self-defense outside the home makes it one of the most knowledgeable and well-informed institutions in the nationwide landscape of firearms rights. Thus, its perspective on the key issues here is very relevant to the Court.

Indeed, the brief that Amici have prepared and seek leave to file in this pending en banc matter will be helpful to the Court for several reasons. First, Amici have attempted to shed further light on the issues raised in the partial concurrence and dissent, rather than focus on the majority opinion’s reasoning. This will hopefully provide useful analysis to the en banc panel. Second, Amici seek to emphasize that the right to concealed carry in California is very restricted, which is an important aspect of the partial dissent’s reasoning. Third, building on what Amici seek to say regarding the partial dissent’s take on open versus concealed carry, Amici attempt to highlight why open and concealed carry are not merely interchangeable aspects of the right to bear arms in public, but are sufficiently distinct and not interchangeable. Amici believe these issues are critical, and deserve further discussion that will be useful.

Dated: May 6, 2026

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CERTIFICATE OF COMPLIANCE

I certify that this Motion complies with Fed. R. App. P. 32(a)(5) and (6). The motion was drafted in 14-point Garamond, and is proportionally spaced. I further certify that this Motion complies with the type-volume limitation under Fed. R. App. P. 27(d)(2)(a) because it contains 529 words per Microsoft Word.

Date: May 6, 2026

ALEXANDER A. FRANK, ATTORNEY AT LAW

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Alexander A. Frank
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this Motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on May 6, 2026, using the ACMS system, which will send notice of such filing to all registered ACMS users.

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INTEREST OF AMICI CURIAE¹

The National Association for Gun Rights (“NAGR”) is a non-profit membership and donor-supported organization with millions of members nationwide. The sole reason for NAGR’s existence and its core mission is to defend American citizens’ right to keep and bear arms for all lawful purposes. In furtherance of this mission, NAGR has brought numerous legal actions seeking to uphold Americans’ Second Amendment rights, and has participated as amicus curiae in numerous matters. NAGR has a strong interest in this case because the outcome will impact a critical component of the right to self-defense outside of the home and will impact NAGR’s ongoing litigation efforts in support of the right to keep and bear arms throughout the nation.

The Right to Bear Association, LLC is one of the fastest-growing self-defense membership associations in the country, providing access to legal protection, education, training, and a nationwide attorney network to law-abiding gun owners before and after lawful self-defense incidents. Its members include private citizens, families, law enforcement officers, former military servicemembers, and houses-of-worship safety teams, all of whom rely on the right to keep and bear arms protected by the Second Amendment.

¹ This brief is filed simultaneously with a motion for leave under the Federal Rules of Appellate Procedure and Ninth Circuit 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 amici, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

Since *District of Columbia v. Heller*, 554 U.S. 570 (2008), Second Amendment jurisprudence nationwide inexplicably departed from the hornbook rule that federal Supreme Court decisions interpreting the scope of federal constitutional rights apply strictly and uniformly in this nation’s courts. Both in the Ninth Circuit and elsewhere, the historical framework *Heller* announced for scope of the Second Amendment questions received inconsistent, and in some cases, wholly aberrant application. *See, e.g., Silvester v. Harris*, 583 U.S. 1139, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of certiorari) (acknowledging the “lower courts’ general failure to afford the Second Amendment the respect due an enumerated constitutional right.”).

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), the Supreme Court told the lower courts to stop substituting an evasive multi-part interest balancing test in place of *Heller’s* text-and-history framework. Plainly stated, “*Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment Context.” *Id.* at 19. Amici Curiae *National Association for Gun Rights* and *The Right to Bear Association, LLC* (“Amici”) are concerned that the evasion and misapplication of the historical framework that proliferated in *Heller’s* wake is happening again post *Bruen*. Unfortunately, a pattern of divergence from the text-and-history approach to arms-bearing questions has emerged that deeply concerns Amici, and it appreciates the opportunity to share its concern about how this problem has arisen in this matter before this en banc Court.

Amici’s primary focus here is Judge Smith’s concurrence in part and dissent in part. Amici believe that it both reaches the wrong conclusions about the important arms-bearing question at issue here, and presents an analytical error that poses serious concerns for Second Amendment rights in the Ninth Circuit.

The issue in this case—the scope of the right to bear arms for self-defense outside the home—could not be more important because self-defense is the “core” Second Amendment right. *Heller*, 554 U.S. at 630. Yet, seizing upon some purportedly definitive language in *Bruen*, the partial dissent reasons that as long as governments tolerate the *concealed* carry of firearms outside the home for self-defense, then the answer to whether *open* carry outside the home is protected is not only *no*; but the question does not even implicate the “first step” of the text-and-history framework established in *Heller* and galvanized in every subsequent Supreme Court Second Amendment ruling. *Baird v. Bonta*, 163 F.4th 723, 770-72 (9th Cir. 2026) (N.R. Smith, J., concurring in part and dissenting in part), *vacated, reh’g en banc granted*, No. 24-565, 2026 WL 1021186, at *1 (9th Cir. 2026).

Amici’s goals here are to highlight why that reasoning is wrong and the grave implications it carries, to explain why the right to concealed carry in California is not as strong as it may seem, and to explain why open carry and concealed carry are not mere substitutes for one another. They are very different methods of carry, and are not mere and immaterial *manner* differences.

ARGUMENT

I. THE OPEN CARRY QUESTION HERE IS UNMISTAKABLY ENTITLED TO TEXT-AND-HISTORY ANALYSIS AND SURVIVES IT EASILY

The partial dissent is at least partially correct that “*Bruen* controls this case,” but not for the reason identified. *Baird*, 163 F.4th at 769 (N.R. Smith, J., concurring in part and dissenting in part). Essentially, the partial dissent reasons that one version of carry rights—open carry—is not entitled to the historical scrutiny that *Bruen* says arms-bearing questions are entitled to. *Id.* Purportedly because all that *Bruen* recognizes is the right to *some* form of public arms-bearing. *Id.* So as long as one is recognized, the other may be prohibited. *Id.*

But no Supreme Court case interpreting the Second Amendment has announced that when one Second Amendment right is already recognized, adjacent questions are exempt from text-and-history analysis. Quite the opposite. *Bruen* was crystal clear that all Second Amendment questions are entitled to text-and-history analysis, notwithstanding whatever *Heller*'s dicta about certain categories of “presumptively lawful” regulations say. *Bruen*, 597 U.S. at 20-22; *but see Heller*, 554 U.S. at 627 n.26. Just as courts until *Bruen* seized upon *Heller*'s dicta to resist recognition of any new Second Amendment rights beyond what *Heller* established, the partial dissent would invite this panel to renew that resistance by recognizing an implicit rule of extraordinary power in *Bruen* to the same effect. This approach must be rejected because it bypasses the historical scrutiny the Supreme Court requires, and would establish a safe harbor where courts can all too easily give Second Amendment arms-bearing questions short shrift—or worse.

Under the partial dissent's logic, courts could cite *Heller*'s protection of handguns, and hold that there is no Second Amendment protection for other types of firearm hardware like rifles or shotguns, because a handgun is enough weapon for self-defense. But as *Heller* plainly stated, “[i]t 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.” 554 U.S. at 629. Indeed, *Heller* clearly provided that the Second Amendment “extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” *Id.* at 582. Thus, the partial dissent's argument that “[f]ollowing the reasoning of *Bruen*, California may lawfully eliminate one manner of public carry to protect its citizens so long as its citizens may carry weapons in another manner that allows for self-defense,” is not legitimate and is yet another chapter in the unfortunately longstanding and widespread effort to avoid applying the Supreme Court's straightforward text-and-history framework to arms-bearing questions. *Baird*,

163 F.4th at 770 (N.R. Smith, J., concurring in part and dissenting in part). This Court’s en banc review should be cautious of this line of reasoning, because to embrace it is to discard Supreme Court precedent.

Indeed, the argument that “[b]ecause California allows concealed carry, California may restrict open carry,” *id.* at 771 (citing *Bruen*, 597 U.S. at 24), is not any different than contending that because California allows handguns, it may restrict rifles. *Heller* expressly precludes this, 554 U.S. at 629, and *Bruen* cannot properly be interpreted to establish such a rule either. Neither conclusion is constitutionally plausible under any straightforward application of the Supreme Court’s text-and-history framework for Second Amendment questions. How the partial dissent can say that “*Heller* included both concealed carry and open carry in its definition of ‘bear arms,’” yet simultaneously say that “such conduct [open carry] is not covered by the plain text of the Second Amendment” reveals an irreconcilable incoherence in this reasoning. *Baird*, 163 F.4th at 771 (N.R. Smith, J., concurring in part and dissenting in part).

If it is constitutionally correct that “a state may not prohibit the public carriage of firearms by eliminating both open and concealed carry, but a state can lawfully eliminate one manner of carry to protect and ensure the safety of its citizens, as long as they are able to carry in another manner,” then interest balancing is alive and well in the Second Amendment space, and nothing beyond the handgun at issue in *Heller* will ever be protected. *Id.* at 775. That cannot be squared with *Heller*, and is essentially a blank check that would bankrupt the Second Amendment. Simply put, the answer to this case’s arms-bearing question does not begin with whether an adjacent arms-bearing question has already been answered; it begins with the text-and-history framework and ends there somewhat abruptly in cases like this one, as the majority found. Only when the question at issue is so unusually contemporary that it justifies the more “nuanced” version of the text-and-history approach does judicial license to

indulge more abstract analogical reasoning become permissible. *Bruen*, 597 U.S. at 27. Even then, the obligation to moor that nuanced approach to some credible historical evidence of solidly analogous regulation still applies. *Id.* So, where is the support for citing the availability of an alternative as the reason for not applying *Heller*'s text-and-history framework to be found?

For the partial dissent, it is effectively anchored in one section of *Bruen*, which states "history reveals a consensus that States could not ban public carry altogether." *Baird*, 163 F.4th at 770 (N.R. Smith, J., concurring in part and dissenting in part) (quoting *Bruen*, 597 U.S. at 53). That passage from *Bruen* briefly discusses three decisions from antebellum Alabama (*State v. Reid*, 1 Ala. 612 (1840)), Louisiana (*State v. Chandler*, 5 La. 489 (1850)), and Georgia (*Nunn v. State*, 1 Ga. 243 (1846)). *Bruen*, 597 U.S. at 53-54. Three cases from the late antebellum era might show what the consensus was in the late antebellum south, but do not evidence a clear, established and nationwide consensus that, as long as some form of carry is allowed, the other can be banned. And as the majority here correctly reasoned, the most they represent was a strong antebellum era preference for open carry and a suspicion and distaste for concealed carry. *Baird*, 163 F.4th at 736-37. Not a take-your-pick attitude.

As the Supreme Court further explained, the pre-ratification through ratification era historical record shows a scant number of regulations that prohibited bearing arms in public "to terrorize the people." *Bruen*, 597 U.S. at 47. These statutes were essentially descendants of the Statute of Northampton, a medieval British enactment that faded into obsolescence long before the ratification era and ostensibly did not apply to small personal defense weapons like knives or daggers, but to large 10–12 foot-long fighting lance weapons. *Id.* at 40-46. This category of prohibitions essentially banned carrying weapons in what is essentially akin to the modern crime of brandishing a firearm without a legitimate defensive purpose. *See, e.g.*, Cal. Penal Code

§ 417 (prohibiting drawing or exhibiting a firearm in a “rude, angry, or threatening manner”).

Ironically, the one “solitary” and short-lived statute discussed in *Bruen* that did unambiguously prohibit a species of public carry—an East New Jersey enactment from 1686—addressed concealed carry of “pocket pistols” – not open carry. 597 U.S. at 49 (citing An Act Against Wearing Swords, &c., ch. 9, in Grants, Concessions, and Original Constitutions of the Province of New Jersey 290 (2d ed. 1881) (Grants and Concessions)). And the other two statutes discussed were clear Northampton style prohibitions which prohibited bearing arms in a manner that would cause “terror.” *Id.* (citing 692 Mass. Acts and Laws no. 6, pp. 11-12; 1699 N. H. Acts and Laws ch. 1).

Post ratification, the record of “common-law offense, statutory prohibitions, and ‘surety’ statutes” fared no better at showing a historical tradition of prohibiting any type of carry. *Id.* at 50. The common law statutes were also essentially Northampton style prohibitions, the statutory prohibitions provide a snap shot of a few aforementioned southern jurisdictions’ take on public arms-bearing, and the surety statutes presumed there was a right to public carry but that some individuals might justifiably incur a heightened burden to ensure they do so responsibly and peaceably. *Id.* at 50-59. Moreover, there is no evidence in *Bruen*’s discussion of the Fourteenth Amendment era authorities that support the purported take-your-pick approach to concealed versus open carry either. *Id.* at 60-66.

Thus, from *Bruen*’s analysis of half a millennia’s worth of evidence dating from medieval Britain to the Fourteenth Amendment, a few antebellum cases are all that support the partial dissent’s view that there is a firmly established tradition of citing the permission of one type of carry as license to prohibit the other. This is not enough evidence to support the conclusion that as long as concealed carry is honored then open carry is properly prohibited today. Such tradition simply never existed.

II. UPHOLDING CALIFORNIA’S OPEN CARRY PROHIBITION BECAUSE CONCEALED CARRY RIGHTS ARE PURPORTEDLY STRONG IN CALIFORNIA CANNOT BE RECONCILED WITH THE SEVERITY OF CALIFORNIA’S RESTRICTIONS ON CONCEALED CARRY

As discussed, the partial dissent’s willingness to embrace a prohibition on open carry rests significantly on the observation that Californians who wish to bear arms outside their homes are able to do so with a permit to carry concealed. *Baird*, 163 F.4th at 769 (N.R. Smith, J., concurring in part and dissenting in part). While that observation should have no bearing on the application of text-and-history analysis and the clear outcome that application should produce, even if it did it would be questionable because the right to carry concealed is highly restricted in California.

Senate Bill 2 is California’s mostly successful effort to nullify concealed carry rights post *Bruen*. See S.B. 2, 2022-2023 Reg. Sess. (Cal. 2023); See Cal. Penal Code § 26230. So while it is technically true that “Californians may publicly carry in a concealed manner throughout the state[,]” the reality is that under California Penal Code section 26230, the list of places where concealed carry permit holders in California cannot carry is extensive and very burdensome. *Baird*, 163 F.4th at 769 (N.R. Smith, J., concurring in part and dissenting in part). Section 26230’s list of prohibited places that are not enjoined as of right now include: bars and restaurants that serve alcohol, playgrounds, youth centers, parks, athletic areas, athletic facilities, most real property under the control of the Department of Parks and Recreation or Department of Fish and Wildlife, casinos and similar gambling establishments, stadiums, arenas, public libraries, amusement parks, zoos, museums, and their parking areas. See *Wolford v. Lopez*, 116 F.4th 959 (9th Cir. 2024), *cert. granted in part*, 146 S. Ct. 79 (mem.) (2025); Cal. Penal Code § 26230.

The only areas that Senate Bill 2 would have prohibited that are currently enjoined are hospitals and similar medical facilities, public transit, gatherings that require a permit, places of worship, financial institutions, their attendant parking lots,

and the rule that would have converted all private property that is held open to the public into prohibited locations unless the proprietor posts signage allowing concealed carry. *Id.* at 992-94. Accordingly, reports of the well-being of concealed carry rights in California are greatly exaggerated.

III. OPEN CARRY AND CONCEALED CARRY ARE WHOLLY DISTINCT METHODS OF CARRY AND ARE NOT INTERCHANGEABLE WAYS TO EXERCISE THE RIGHT TO SELF-DEFENSE

The partial dissent reasons “to provide that individuals must conceal their weapons as they carry them is a restriction on the manner of carry, not a restriction on the right to bear arms or to carry in public.” *Baird*, 163 F.4th at 772 (N.R. Smith, J., concurring in part and dissenting in part). It is true that the Second Amendment is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* (quoting *Heller*, 554 U.S. at 626; *Bruen*, 597 U.S. at 21). But to whatever extent *Heller* looked favorably on the concept of “manner” restrictions, it does not excuse the open carry question from text-and-history analysis. Nor is it reasonable to characterize banning open carry for 95% of California’s residents as simply restricting a “manner” of carry.

Concealed carry is tactically very different than open carry. Concealed carry has no element of deterrence because it is discreet in nature. An assailant who attacks a concealed carrier has no indication that their victim is armed. The same cannot be said about an individual openly carrying a firearm, which is the core material advantage of open carry. An attack that never happens because an individual is signaling a serious deterrent is a far superior outcome to an ambush attack survived via defensive use of a firearm in extremis. Unfortunately, it is impossible to measure the incidence of events that never occurred, so reliable data on the deterrent effect of open carry is not likely to materialize. Massad Ayoob, *Concealed Carry or Open Carry – Critical Mas Episode 19*, YouTube (Apr. 15, 2022), <https://www.youtube.com/watch?v=PlydVnLBBaU>.

Concealed carry also requires hiding the firearm underneath clothing or in an off-body compartment like a purse or fanny pack, and that makes drawing the firearm in a life-threatening emergency slower and more complicated. Drawing from concealment is especially challenging for individuals who are less physically fit, dexterous, and mobile. Open carry eliminates those disadvantages. Open carry also allows people to use a variety of long guns which can be equipped with slings for carrying across the torso or back, whereas concealed carry does not.

These are not trivial or inconsequential differences in mere *manner* of carrying; they are completely different in material tactical respects. Even for individuals physically capable of both methods of carry, there are situations in which concealed carry is tactically more advisable than open carry, and vice versa. These are not mere alternatives; they are different self-defense strategies for different situations, lifestyles, and physical characteristics.

To be certain, concealed carry and open carry are very different ways to bear arms in public. They are not trivially interchangeable any more than a two-seat Mazda Miata is interchangeable with a Chevrolet Suburban. It is only at a basic and abstract level that both are automobiles. Functionally, they are designed for very different purposes and are different tools for different needs. A family of six would not find much use with the two-seat convertible, so prohibiting what they need and telling them to make do is unreasonable. This is no different.

While there is no question that some people in modern society find the visible presence of firearms in civilian hands unsettling, there is also no question that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Heller*, 554 U.S. at 636. Moreover, there is also no question that the deterrent effect of projecting the ability to meaningfully protect oneself is not only very valuable in the self-defense context, but was not prohibited throughout American history.

CONCLUSION

This case does not involve a tangential arms-bearing question of little consequence. It involves the core right of self-defense. And the panel majority's opinion reaches the right conclusion for the right reasons. To even entertain the possibility that the public arms-bearing question in this case does not implicate the Second Amendment's plain text is to veer off into judicial nullification of not only *Bruen*, but the Second Amendment itself. To deem the historical showing presented in support of California's prohibition of open carry sufficient is to flout the core feature of the historical framework set forth in *Heller* and since. The purported carve out here from the historical framework the partial dissent describes is illusory. And although "the right secured by the Second Amendment is not unlimited[,]” broadly prohibiting open carry is not constitutional. *Heller*, 554 U.S. at 626. Amici hope their viewpoint of the issues discussed herein assists this Court in rehearing this important case.

Date: May 6, 2026

Respectfully submitted,

ALEXANDER A. FRANK, ATTORNEY AT LAW

/s/ Alexander A. Frank

Alexander A. Frank

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

I certify that this Motion complies with Fed. R. App. P. 32(a)(5) and (6). It is drafted in 14-point Garamond, a proportionally spaced font. I further certify that this Motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(a) because it contains 3,361 words according to Microsoft Word.

Date: May 6, 2026

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/s/ Alexander A. Frank

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Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Amici Curiae National Association for Gun Rights and The Right to Bear Association, LLC with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on January 2, 2026, using the ACMS system, which will send notice of such filing to all registered ACMS users.

Date: May 6, 2026

ALEXANDER A. FRANK, ATTORNEY AT LAW

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