No. 24-1046

IN THE
Supreme Court of the United States

JASON WOLFORD, ALISON WOLFORD, ATOM KASPRZYCKI, AND THE HAWAII FIREARMS COALITION,
Petitioners,

v.

ANNE E. LOPEZ, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF HAWAIʻI,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly found, on the preliminary record before it, that Hawai‘i may require an individual to obtain a property owner’s express consent before bringing a gun onto private property that is open to the public.

2. Whether the court of appeals properly considered 19th-century history alongside consistent Founding-era history for purposes of evaluating petitioners’ likelihood of success on their facial Second Amendment challenge to state laws regulating firearms.

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INTRODUCTION

After this Court's decision in *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. 1 (2022), many States, including Hawai'i, revised their gun laws to ensure that their regulatory schemes comport with the limits of the Second Amendment, while vindicating the States' important interests in protecting private property and public safety. Questions regarding the constitutionality of these new laws have just begun to percolate, as the lower courts apply *Bruen* and this Court's even more recent guidance in *United States* v. *Rahimi*, 602 U.S. 680, 692 (2024), to a range of cases challenging the States' enactments. The resulting court of appeals decisions are likely to clarify the application of this Court's precedents in various contexts, and—ultimately—they may reveal areas of disagreement that warrant this Court's further intervention.

Petitioners seek to short-circuit this important stage of lower court percolation by asking the Court to decide the constitutionality of two aspects of Hawai'i's Act 52, even though their challenge to that law is still at the preliminary injunction stage and the current record was developed in a mere 21 days for purposes of deciding questions of preliminary relief, not final judgment. Specifically, petitioners contend that the Court should step in to review the constitutionality of Hawai'i's default-property rule, which requires a property owner's express consent before a person may bring a firearm onto her private property. Petitioners also contend that the Court should review the constitutionality of Hawai'i's sensitive places restrictions prohibiting guns in public parks, bars, and restaurants serving alcohol. Petitioners' contentions are wrong several times over.

First, this Court is "rightly wary of taking cases" in a preliminary posture, and the reasons for the Court's wariness are particularly pronounced in this case. *Harrel* v. *Raoul*,

144 S. Ct. 2491, 2492 (2024) (Thomas, J., concurring in the denial of certiorari in a Second Amendment case at the preliminary injunction stage). The court of appeals repeatedly emphasized that its decisions regarding the Hawai'i law's constitutionality were preliminary and that they might change based on additional proceedings in the district court. The court also identified specific unresolved disputes regarding the historical record and the reach of the default-property rule that would hamper the Court's review. And the Court's consideration would be further impeded by petitioners' litigation decisions: Petitioners failed to appeal the district court's determination that Hawai'i's default rule is constitutional as applied to private property closed to the public, and they failed to advance more than a facial challenge to Hawai'i's sensitive places restrictions. These omissions would artificially constrain the Court's ability to provide comprehensive guidance to the lower courts.

Second, petitioners' allegations of a circuit conflict warranting this Court's immediate intervention are wholly unpersuasive. Petitioners contend that the court of appeals' holding regarding the default-property rule conflicts with *Antonyuk* v. *James*, 120 F.4th 941 (2d Cir. 2024), a case in which this Court recently denied certiorari, No. 24-795, 2025 WL 1020368 (Apr. 7, 2025). But *Antonyuk* was also in a preliminary injunction posture, and it was based on a historical record even less developed than the one here, making allegations of a conflict decidedly premature. And petitioners' other alleged split—involving whether courts may rely solely on Reconstruction-era historical analogues—does not exist because neither the court of appeals below nor any other circuit court has suggested that *Bruen*'s historical inquiry can be conducted based purely on post-Founding-era history.

Third, the court of appeals correctly determined that the relevant provisions of Hawai'i's law withstand constitutional scrutiny at the preliminary injunction stage. The court carefully examined the existing historical record and found evidence supporting both the default-property rule and the sensitive places restrictions, while acknowledging that it may revisit those determinations based on the more complete record at final judgment. And Hawai'i's default-property rule is constitutional for the independent reason that it represents a permissible effort to vindicate the rights of Hawai'i's citizens to exclude armed individuals from their private property.

Accordingly, this Court should deny review of the petition for certiorari, staying its hand until the relevant issues have had time to percolate in the lower courts, or—at a minimum—until the case reaches final judgment.

STATEMENT

A. Legal Background

The Second Amendment protects "an individual right to armed self-defense," *Bruen*, 597 U.S. at 21, but like most rights, the right to bear arms is "not unlimited," *District of Columbia* v. *Heller*, 554 U.S. 570, 626 (2008). "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626.

In *Bruen*, the Court created a two-part framework to help delineate the contours of that right. First, plaintiffs challenging firearms regulations must show that "the Second Amendment's plain text covers [their] conduct." 597 U.S. at 17. If the text does not cover a plaintiff's conduct, the challenge fails. But if it does, "the Constitution presumptively protects that conduct," and the burden shifts to the

government to demonstrate that "the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

Bruen explained that the second-step inquiry calls for an "*analogue*, not a historical *twin*." *Id.* at 30. Nevertheless, some courts misunderstood *Bruen*'s directive, imposing a "regulatory straightjacket" on the government. *Id.* The Court corrected that error in *Rahimi*, clarifying that the Second Amendment simply requires a challenged regulation to be "consistent with *the principles* that underpin our regulatory tradition." 602 U.S. at 692 (emphasis added). All a court must find is that the new law "is 'relevantly similar' " in "why and how it burdens the Second Amendment right." *Id.* at 692, 698 (quoting *Bruen*, 597 U.S. at 29). Critically, a challenged regulation " 'still may be analogous enough to pass constitutional muster' " even if it "does not precisely match its historical precursors." *Id.* at 692 (quoting *Bruen*, 597 U.S. at 30).

The Court has also provided more specific guidance regarding how courts should approach modern-day regulations that prohibit "the carrying of firearms in sensitive places such as schools and government buildings." *Bruen*, 597 U.S. at 30 (quoting *Heller*, 554 U.S. at 626) (quotation marks omitted). The Court explained that, although "the historical record yields relatively few" examples of " 'sensitive places' where weapons were altogether prohibited," courts "can assume it settled" that States may prohibit carrying firearms in the locations identified in those "18th- and 19th-century" sensitive places regulations. *Id.* (quoting *Heller*, 554 U.S. at 626). And "courts can use analogies to those" regulations to recognize "*new* and analogous sensitive places" where States may prohibit firearms without falling afoul of the Second Amendment. *Id.*

B. Hawai‘i’s Law

Before *Bruen*, Hawai‘i had a long tradition of limiting the right to carry weapons in public spaces, dating back to well before statehood. *See* Act of May 25, 1852, § 1, 1852 Haw. Sess. Laws 19; *see also* Haw. Rev. Stat. § 134-9 (limiting carry permits to “exceptional” cases, “when an applicant shows reason to fear injury to the applicant’s person or property”). As a result, property owners in Hawai‘i could assume that—unless they made express arrangements to the contrary—firearms would not be carried onto their property, even if it was open to the public.

After *Bruen* invalidated New York’s licensing regime, Hawai‘i undertook a comprehensive reevaluation of its gun laws to ensure that its regulations were consistent with the Second Amendment. In 2023, Hawai‘i passed Act 52, the law at the center of this case. Act 52 was designed to bring Hawai‘i’s laws into compliance with *Bruen*’s limits.

As most relevant here, Section 134-E of the Act (commonly referred to as the “default-property rule”) prohibits the carrying of weapons onto another’s property without that person’s express oral or written authorization. Haw. Rev. Stat. § 134-E. The Act also designates several locations as sensitive spaces, including government buildings, *id.* § 134-A(a)(1); bars and restaurants serving alcohol, *id.* § 134-A(a)(4); parks and beaches, *id.* § 134-A(a)(9); and banks and financial institutions, *id.* § 134-A(a)(12). The Act exempts several categories of state and federal officials from those restrictions. *Id*. § 134-11.

C. Procedural History

Petitioners filed a pre-enforcement facial challenge to Act 52’s default-property rule and sensitive places provisions and sought a temporary restraining order (TRO).

1. The district court granted the TRO in part and denied it in part. The court first determined that petitioners

were unlikely to succeed on a facial challenge to the default-property rule because the "portion of § 134-E that regulates private property not held open to the public—*e.g.*, residential properties—is not covered by the Second Amendment's plain text." Pet. App. 151a. Rather than dismiss petitioners' facial claim, however, the court *sua sponte* converted it into an as-applied challenge, enjoining §134-E as applied to private property "held open to the public." Pet. App. 151a. The court also enjoined several of Hawai'i's "sensitive places" restrictions, including the prohibitions on carrying guns in restaurants and bars where alcohol is consumed, and in public parks and beaches. Pet. App. 166a.

The district court emphasized, however, that its conclusions were preliminary in all respects because its rulings turned on an abbreviated TRO record compiled in just 21 days. Pet. App. 83a-84a nn.2-3, 165a-166a. The court explained that its rulings could well "be changed" at a later stage of the litigation if Hawai'i offers additional historical "evidence to meet its burden." Pet. App. 165a.

The parties agreed to convert the TRO into a preliminary injunction, and Hawai'i appealed. Pet. App. 216a-217a. Petitioners did not cross-appeal the district court's decision that the Second Amendment is not implicated by a regulation that requires consent before bringing a firearm onto private property that is closed to the public. Pet. App. 10a.

2. The court of appeals consolidated the case with a similar challenge to a California statute, Pet. App. 19a, and issued a unanimous, 84-page opinion affirming in part and reversing in part the district court's injunctions in both cases.

a. The court of appeals vacated the portion of the district court's order enjoining Hawai'i's default-property rule as applied to private property open to the public. Pet.

App. 56a-64a. The court found that, at the first step of the *Bruen* analysis, Hawai'i's default rule implicates the Second Amendment. Pet. App. 57a. The court acknowledged that the Constitution protects property rights, including the right to exclude. Pet. App. 59a. And it acknowledged that "[n]othing in the text of the Second Amendment or otherwise suggests that a private property owner—even owners who open their private property to the public—must allow persons who bear arms to enter." Pet. App. 59a-60a. But the court ultimately determined that "carrying onto properties held open to the public is conduct that likely falls within the plain text of the Second Amendment." Pet. App. 58a (citation omitted).

The court of appeals concluded, however, that—at least at this preliminary stage—petitioners' constitutional challenge fails at *Bruen*'s second step. Pet. App. 60a-63a. Unlike the district court, the court of appeals found that Hawai'i had established "a relevant national historical tradition" supporting the default-property rule by offering two "dead ringers": a 1771 New Jersey law and an 1865 Louisiana law, both of which "prohibited the carry of firearms on private property without consent." Pet. App. 60a, 62a (citations omitted). The court reasoned that the laws had the same scope and purpose as Hawai'i's default-property rule because they "applied to *all* private property" and were designed "to prevent trespassing with Guns." Pet. App. 61a-62a (citations omitted). The court observed that the record before it contained "no evidence whatsoever that these laws were viewed as controversial or constitutionally questionable." Pet. App. 61a.

The court of appeals also analyzed five other 18th- and 19th-century laws that "prohibited the carry of firearms onto subsets of private land, such as plantations or enclosed lands." Pet. App. 60a. Hawai'i had produced expert evidence at the district court supporting the argument that

the term "enclosed lands" in those laws did not necessarily refer to lands closed to the public and instead referred broadly to "*any* property where * * * the owner paid taxes." Pet. App. 61a n.10 (emphasis added). The court found it unnecessary to "consider that argument" because petitioners were "unlikely to prevail" for other reasons. *Id.* Instead, the court assumed the laws applied only to private property closed to the public but determined that they still added to the tapestry of Founding-era traditions, reinforcing its conclusion that "the Nation has an established tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property." Pet. App. 62a. The court therefore reversed the portion of the district court's order enjoining Hawai'i's default-property rule.

The court of appeals reached a different outcome with respect to California's distinct default rule, which required gun owners to obtain written consent ahead of time before entering any private property with a gun. Pet. App. 63a. The court affirmed the preliminary injunction of that rule because it found "no historical support for that stringent limitation." *Id.* The court explained that, "under the historical laws," property owners could give "on-the-spot" permission to bring a weapon onto their property. *Id.* The same is true under the Hawai'i law; a person who wants to bring a gun into a store can simply ask the proprietor for oral permission. But under the California law, only a posted, public sign meeting specific requirements will do. Pet. App. 63a-64a. The court found that such a law could not satisfy Second Amendment scrutiny. Pet. App. 64a.

The court of appeals acknowledged that its finding with respect to the Hawai'i default-property rule differed from the Second Circuit's "preliminary" determination regarding the constitutionality of the New York default rule at stake in *Antonyuk*, 120 F.4th 941. *See* Pet. App. 64a. But

like the district court before it, the court of appeals emphasized that it reached only a "limited conclusion" based on the factual "record" before it at the preliminary injunction stage. *Id.*

b. The court of appeals also reversed the district court's grant of a preliminary injunction with respect to several of Act 52's sensitive places restrictions, after conducting a detailed historical analysis based on the preliminary record before it. *See* Pet. App. 32a-42a. The court of appeals found, for example, that the prohibition on carrying firearms in bars and restaurants that serve alcohol could stay in effect during the pendency of the litigation because Hawai'i offered sufficiently similar Founding- and Reconstruction-era regulations supporting the prohibition of firearms at crowded social gatherings and in places where "Liquors are sold." Pet. App. 41a-42a (citing, among others, a 1746 New Jersey law, 1817 New Orleans law, and an 1853 New Mexico law). The court of appeals also reversed the district court's injunction as to parks, explaining that "modern" parks were first established in the 19th-century, and local governments prohibited weapons in those spaces "[a]s soon as" they opened to the public. Pet. App. 33a-34a (collecting 23 19th-century laws).

The court of appeals declined to consider petitioners' arguments that the historical analogues did not support every application of the sensitive places restrictions the court allowed to go into effect—because, for example, the historical analogues focus on urban but not rural parks. Pet. App. 37a. The court explained that petitioners' arguments about the constitutionality of specific applications were misplaced because they have so far raised only a "*facial*" challenge to the sensitive places restrictions, meaning that Hawai'i "need only demonstrate that" the challenged restriction "is constitutional in some of its applications." *Id.* (quoting *Rahimi*, 602 U.S. at 693). The court found that

Hawai‘i’s analogues were sufficient to make that showing. *Id.*

c. The court of appeals also affirmed the district court’s injunction with respect to other provisions of the Hawai‘i law. The court found, for example, that petitioners had demonstrated a sufficient likelihood of success with respect to their challenge to Hawai‘i’s restrictions on carrying guns into banks and other financial institutions. Pet. App. 70a-71a. The court explained that, while banks have remained essentially unchanged since the Founding, Hawai‘i provided no evidence of Founding-era laws prohibiting the carrying of guns in those spaces. Pet. App. 71a.

3. The court of appeals denied petitioners’ request for rehearing en banc, over dissents by Judges Collins and VanDyke. Pet. App. 169a-202a.

REASONS FOR DENYING THE PETITION

Petitioners ask this Court to address the constitutionality of two key aspects of Hawai‘i’s Act 52—the default-property rule and the Act’s sensitive places restrictions covering parks, bars, and restaurants serving liquor. But the courts below have not issued a final decision on those issues. The case is still at the preliminary injunction stage, with an evidentiary record developed in just three weeks for the purposes of supporting a determination regarding emergency relief, not the law’s ultimate constitutionality. Petitioners therefore invite the Court to decide important questions regarding the extent to which the Second Amendment limits the States’ sovereign authority to regulate in an interlocutory posture, based on an underdeveloped record, and in the absence of any developed circuit split or legal defect in the court of appeals’ judgment. The Court should decline that invitation.

I. THE COURT SHOULD NOT GRANT REVIEW IN THIS INTERLOCUTORY POSTURE.

This case comes before the Court at the preliminary injunction stage, an interlocutory posture that can "alone furnish[] sufficient ground for the denial of" a petition for certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). And in this case, where petitioners ask the Court to analyze complex constitutional questions requiring detailed historical analysis based on a TRO record compiled in just 21 days, there are special reasons for finding that the case is "not ripe for review." *Bhd. of Locomotive Firemen and Enginemen* v. *Bangor*, 389 U.S. 327, 328 (1967).

A. This Court is "rightly wary of taking cases" in a preliminary posture. *Harrel*, 144 S. Ct. at 2492 (Thomas, J., concurring in the denial of certiorari). Awaiting final judgment ensures that the Court is able to rule upon a full record and with the benefit of the lower courts' resolution of any relevant factual disputes or legal questions. And when the Court intervenes before final judgment, it may inadvertently pass upon disputes that would have been resolved or rendered irrelevant by further proceedings in the lower courts. Thus, as Justice Thomas explained in *Harrel*—a recent case in which he concurred in the denial of a petition regarding the proper application of the Second Amendment because of the interlocutory posture—it is appropriate for the Court to stay its hand where a petition "arise[s] from a preliminary injunction" and where the lower court has stressed that "its merits analysis was merely 'a preliminary look at the subject.' " *Id.* at 2493.

The rationales for avoiding premature intervention apply with full force in this case. The parties developed the existing evidentiary record in just three weeks in preparation for the district court's decision on the propriety of emergency relief. That record is not suitable for this

Court's ultimate resolution of the constitutionality of Hawai'i's law. And the court of appeals could not have been clearer that it reached only a "limited conclusion" about petitioners' likelihood of success on their constitutional challenges based on the "preliminary" record before it. Pet. App. 64a. Over and over again, the courts below emphasized that it was "important to understand" that their rulings "could be changed" at the merits stage as the complex historical analysis evolves. Pet. App. 74a, 131a, 165a-166a, 184a-185a. Nor was that merely empty rhetoric. Because the Second Amendment inquiry typically requires detailed historical analysis, the parties' presentation of new or better historical evidence might well alter the courts' conclusions about the constitutionality of aspects of the Hawai'i law.

B. Moreover, the court of appeals' decision reveals several specific and significant areas in which the record is undeveloped. The court observed, for example, that the parties dispute the reach of certain colonial laws that Hawai'i relies on as historical analogues for its default-property rule. Pet. App. 61a n.10. The relevant Founding-era laws required a property owner's consent before bringing a gun onto "inclosed" lands. *Id.* Hawai'i argued (and submitted expert testimony establishing) that those laws support requiring consent before entering private property that is open to the public because the term "inclosed" referred to any lands on which an owner paid taxes. *Id.* The court of appeals found it unnecessary to address Hawai'i's argument because it determined that Hawai'i had met its burden by identifying two other historical analogues—a 1771 New Jersey law and an 1865 Louisiana law—that expressly required consent before entering private property of any kind. *Id.*; *see also* Pet. App. 61a-62a. But the reach of the other colonial laws might well affect the constitutional analysis going forward, and uncertainty on the issue would hamper the Court's review.

Similarly, the court of appeals declined to address arguments petitioners raised regarding whether the historical record supports specific applications of Hawai'i's sensitive places restrictions. Pet. App. 36a-38a. The court explained that those arguments were not relevant at this preliminary stage because petitioners had so far raised only a "facial" challenge. *Id.* Thus, the court did not decide—for example—whether the historical evidence might support restrictions on guns in urban, but not rural parks, or in places where alcohol is being consumed, rather than where it is merely available. *Id.* Those and other similar issues regarding the scope and application of the historical analogues might be ventilated through additional lower court proceedings.

The record is also underdeveloped with regard to the scope of and reach of Hawai'i's law. Petitioners boldly assert that Hawai'i's default-property rule will preclude gun owners from bringing weapons onto "96.4%" of publicly accessible land in Maui. Pet. 18. But that assertion comes from an ipse-dixit pleading-stage declaration subject to no factual testing. And as the court of appeals explained, because petitioners chose to bring a facial pre-enforcement challenge, "the precise reach" of Hawai'i's law "is uncertain" "at this preliminary stage." Pet. App. 38a n.4.

C. Two other factors counsel strongly against granting this preliminary-injunction-stage petition.

First, petitioners' litigation decisions have artificially narrowed the scope of the Hawai'i default-property rule that is before the Court. Although Hawai'i's rule applies to *all* private property, as this case comes before the Court, it concerns only the constitutionality of the law as applied to private property open to the public. That is because the district court held that the Second Amendment does not apply to private property closed to the public, and petitioners failed to challenge that aspect of the district court's

holding—even though, according to petitioners' own math, private property closed to the public accounts for 71.6% of Maui County. Dist. Ct. Dkt. 61-2 at 10.

While the district court's determination regarding private property that is closed to the public is correct, petitioners' failure to appeal that aspect of the law artificially narrows the scope of the Court's constitutional inquiry, making this case an unsuitable vehicle for considering the validity of property-default rules in the Second Amendment context.

Second, this Court decided *Rahimi* just last year, and the lower courts have not had a sufficient opportunity to absorb and apply that decision's Second Amendment guidance. Nor have the courts of appeals had an adequate opportunity to address the specific Second Amendment questions raised by Hawai'i's law. Indeed, petitioners cite just one court of appeals case—*Antonyuk*, 120 F.4th 941—addressing the constitutionality of a similar state law, and the Court recently denied certiorari in *Antonyuk* after the brief in opposition explained that the Second Circuit case was in a similar preliminary posture to this one. The same result is warranted here.

II. THERE IS NO CIRCUIT CONFLICT WARRANTING THIS COURT'S PREMATURE INTERVENTION.

Petitioners assert (Pet. 9-10, 20-24) that this Court should intervene despite the interlocutory posture because the court of appeals' decision creates one circuit conflict and deepens another. Petitioners are wrong on both counts.

A. Petitioners' Assertion Of A Split Regarding Default-Property Rules Is Premature.

Petitioners first contend (Pet. 9-10) that the Court should grant certiorari to resolve a dispute regarding the court of appeals' determination that—at least at this

preliminary stage—the historical record supports the constitutionality of the Hawai‘i law requiring a person to get consent from the property owner before bringing a gun onto her property, even when it is otherwise open to the public. Petitioners argue that the court of appeals' holding conflicts with the Second Circuit's recent decision in *Antonyuk*, which affirmed a preliminary injunction barring the enforcement of a similar default-property provision in a New York law. But as this Court's recent denial of the petition in *Antonyuk* suggests, that decision—like this one—is too preliminary to establish any firm position warranting this Court's review. And because additional cases concerning property-default rules are percolating in other courts, this Court's intervention would be premature.

1. As the *Antonyuk* respondents explained, the record in that case came together in a mere "three weeks"—far too short a timetable to "engage historical experts" or present comprehensive evidence. Br. in Opp. at 9, *Antonyuk* v. *James*, No. 24-795 (Feb. 2025). Indeed, for the limited purposes of the preliminary injunction, New York "concede[d]" certain points about the historical record supporting its property-default rule. *See Antonyuk*, 120 F.4th at 1046 (quoting New York brief). And New York "produced no evidence" that the historical analogues like New Jersey's 1771 law and Louisiana's 1865 law were "understood to apply to private property open to the public." *Id.* at 1047. Unsurprisingly, the Second Circuit enjoined New York's property-default rule on the record "*developed thus far*." *Id.* (emphasis added).

Hawai‘i, by contrast, cited expert testimony establishing (among other things) that the 1771 New Jersey law prohibited bringing a gun without consent onto "all varieties of real property, including the typical 'businesses' of the times," not just closed private property. COA Dkt. 7-3 at 19-20. After "carefully" examining that "record," the Ninth

Circuit concluded that Hawai'i's default provision was constitutional. Pet. App. 64a. This preliminary disagreement based on different records does not make a circuit split, and the disagreement may resolve itself on the next go-around—when the courts consider the issue on the merits with the benefit of discovery, full briefing, and each other's analyses.

2. The question regarding the constitutionality of property-default rules, moreover, is actively percolating through other courts. At least two similar preliminary injunctions are pending on appeal, *Koons* v. *Platkin*, 673 F. Supp. 3d 515, 607 (D.N.J. 2023), *appeal docketed*, No. 23-1900 (3d Cir. May 17, 2023); *Kipke* v. *Moore*, 695 F. Supp. 3d 638, 646 (D. Md. 2023), *appeal docketed*, No. 24-1799 (4th Cir. Aug. 22, 2024); and the Second Circuit will soon take another look at the issue in *Christian* v. *James*, 753 F. Supp. 3d 273 (W.D.N.Y 2024), *appeal docketed*, No. 24-2847 (2d Cir. Oct. 28, 2024). Decisions from those courts of appeals will "assist this Court's ultimate decisionmaking" should it choose to examine the issue in the future. *Snope* v. *Brown*, No. 24-203, 2025 WL 1550126, at *1 (U.S. June 2, 2025) (statement of Kavanaugh, J., respecting denial of certiorari). For now, this Court should deny review and allow this litigation to unfold in the normal course.

B. The Alleged Circuit Split Regarding The Court Of Appeals' Historical Methodology Is Illusory.

Petitioners' second alleged circuit conflict is even less compelling. While petitioners disagree with the court of appeals' preliminary determinations regarding the constitutionality of Hawai'i's sensitive places restrictions covering parks and bars and restaurants serving alcohol, Pet. 27-29, they do not (and cannot) point to any disagreement in the circuits on the constitutionality of such laws. To the contrary, the court of appeals observed that many of its specific holdings were in accord with the Second Circuit's

decision regarding New York's sensitive places restrictions in *Antonyuk*. *See, e.g.*, Pet. App. 35a (parks); Pet. App. 43a (establishments serving liquor).

Petitioners try to overcome this difficulty by alleging the same illusory split regarding methodology that was advanced by the unsuccessful petitioners in *Antonyuk*: They assert that, like the Second Circuit in *Antonyuk*, the court below broke with its sister circuits by relying "solely" on post-Reconstruction-era laws in "applying *Bruen*'s text, history[,] and tradition test." Pet. ii. But this argument did not work in *Antonyuk*, and it does not work here.

1. For one thing, as petitioners themselves acknowledge elsewhere, the court of appeals did *not* rely "solely" on post-Reconstruction-era analogues; it "look[ed] to the understanding of the right to bear arms *both* at the time of the ratification of the Second Amendment in 1791 *and* at the time of the ratification of the Fourteenth Amendment in 1868." Pet. 20 (quoting Pet. App. 29a). In fact, the court of appeals affirmed the preliminary injunction of Hawai'i's sensitive places law as to financial institutions because Hawai'i did not provide any evidence of comparable Founding-era regulations even though "banks and firearms existed at the time of the Second Amendment's ratification." Pet. App. 70a.

Nor does any aspect of the court of appeals' decision suggest—let alone hold—that *Bruen*'s historical analysis can be satisfied solely by reference to post-Reconstruction-era laws. Petitioners' argument to the contrary appears to rely on the court of appeals' discussion of the sensitive places restrictions regarding bars and parks. Petitioners suggest (Pet. 23-24) that the court erroneously relied solely on Reconstruction-era laws in upholding the constitutionality of those restrictions. That is simply wrong with respect to the court's discussion of bars and restaurants serving alcohol because the court cited, among other things, a 1746

New Jersey law. Pet. App. 41a-42a. And while the court relied on 19th-century analogues in upholding the restriction on firearms in public parks, it did so based on *Bruen*'s specific guidance regarding sensitive places regulations.

Bruen instructs that courts "can assume" sensitive places regulations are constitutional where they regulate spaces identified in comparable "18th- and 19th-century" regulations, and that courts may also recognize "*new*" sensitive places where doing so is consistent with these 18th- and 19th-century enactments. 597 U.S. at 30. The court of appeals faithfully adhered to those instructions, observing (among other things) that public parks in their current form did not exist in the Founding Era, and that as soon they were created in the 19th century, they were regulated as sensitive places. Pet. App. 33a-34a.

2. Petitioners do not cite any court of appeals cases requiring a different form of historical analysis in the sensitive places context. In fact, the cases petitioners describe as forming the other side of their alleged circuit split do not even concern sensitive places restrictions, passing instead upon the constitutionality of other forms of firearm regulation. *See Nat'l Rifle Ass'n* v. *Bondi*, 133 F.4th 1108 (11th Cir. 2025) (age restriction on public carry); *Lara* v. *Comm'r Pa. State Police*, 125 F.4th 428 (3d Cir. 2025) (same); *Reese* v. *Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 127 F.4th 583 (5th Cir. 2025) (same); *Worth* v. *Jacobson*, 108 F.4th 677 (8th Cir. 2024) (same); *United States* v. *Connelly*, 117 F.4th 269 (5th Cir. 2024) (possessing firearms and ammunition as an unlawful user of a controlled substance).

Nor do the cited cases embrace the sort of broad rule against looking to Reconstruction-era history that petitioners advocate. Start with *Bondi*. Although the Eleventh Circuit in that case began by "look[ing] to the Founding," it

then recognized that courts "*may* look to historical practice from the mid-to-late nineteenth century at least to confirm the Founding-era understanding of the Second Amendment." 133 F.4th at 1116 (emphasis added). That is exactly what the Ninth Circuit did here.

The Eighth Circuit in *Worth* and the Fifth Circuit in *Connelly* similarly assumed that courts may consider Reconstruction-era examples. The Eighth Circuit rejected those examples in *Worth* only because they were not sufficiently analogous to the age restriction at stake in the case. 108 F.4th at 696-698. The Fifth Circuit in *Connelly*, for its part, declined to put too much "weight" on Reconstruction-era evidence because the State offered *no* relevant "Founding-era law" at all. 117 F.4th at 280-281 (quotation marks and citation omitted). And in *Lara*, the Third Circuit declined to rely on 19th-century laws restricting firearm possession by 18-to-20-year-olds because the court found those laws *inconsistent* with Founding-era history. 125 F.4th at 441-442; *see also Reese*, 127 F.4th at 599.

Accordingly, there is no circuit split regarding the use of Reconstruction-era sources in the specific context of sensitive places regulations or more broadly.

III. PETITIONERS' CONSTITUTIONAL CHALLENGES LACK MERIT.

Even setting aside the interlocutory nature of the decision, petitioners' request for review should be denied because the court of appeals correctly determined that the challenged provisions of the Hawai'i law withstand constitutional scrutiny at the preliminary judgment stage.

A. Hawai'i's Default-Property Rule Is Constitutional.

There can be no dispute that a private property owner has the right to exclude a person from her property because the person is carrying a gun, even if she has

otherwise opened her property to the public. The Second Amendment protects "an individual right to keep and bear arms for self-defense." *Bruen*, 597 U.S. at 17. It does not override a property owner's fundamental right to exclude. *See, e.g.*, *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 149 (2021) ("The right to exclude is 'one of the most treasured' rights of property ownership." (quoting *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982))).

The only question, then, is whether Hawai'i may enact a rule that protects its citizens' right to exclude by requiring an armed individual to obtain express consent from a property owner before bringing a gun onto private property. The answer to that question is yes. As the court of appeals explained, at least at the preliminary injunction stage, Hawai'i has set forth sufficient historical evidence to establish that its rule is compatible with the Second Amendment. And the rule can be upheld for the independent reason that it represents a valid governmental effort to vindicate property owners' fundamental right to exclude by enacting a default rule that comports with the community's reasonable expectations regarding armed entry onto private property.

1. The court of appeals affirmed the Hawai'i default rule based on a *Bruen* step two analysis, which requires courts to determine whether there is sufficient historical evidence to conclude that a firearms regulation "is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 602 U.S. at 692 (citing *Bruen*, 597 U.S. at 26-31). In order to satisfy this test, the law in question need not "precisely match its historical precursors"; it need only be "'relevantly similar'" in "why and how it burdens the Second Amendment right." *Id.* at 692, 698 (quoting *Bruen*, 597 U.S. at 29). The court of appeals

faithfully articulated this legal test. *See* Pet. App. 23a-25a, 60a-63a.

The court of appeals also correctly applied the test to the historical evidence in this case. The court explained that Hawai‘i identified two "dead ringers" to its default-property law: a 1771 New Jersey law and a 1865 Louisiana law. Pet. App. 62a. The New Jersey law prohibited "any Person" from "carry[ing] any Gun on any Lands not his own" without "Permission in Writing from the Owner." 1771 N.J. Laws 343-347. One of the law's express statutory aims was to "prevent trespassing with Guns." 1771 N.J. Laws 343-344. The 1865 Louisiana statute similarly barred "any person" from "carry[ing] fire-arms" on "premises or plantations * * * without the consent of the owner." 1865 La. Acts 14-16. The only stated purpose of Louisiana's law was to "prohibit the carrying of fire-arms * * * without the consent of the owner." 1865 La. Acts 14.

The court of appeals found that, based on the record before it, the why and how of these historical laws lines up with the State's default-property rule. Like the Hawai‘i law, the New Jersey and Louisiana provisions prevented bringing guns onto *any* private property without consent, including property open to the public. And, like the Hawai‘i law, the New Jersey and Louisiana laws did so to protect the "right of private individuals and entities to choose * * * whether to allow or restrict the carrying of firearms on their property." S.B. No. 1230, A Bill for an Act Relating to Firearms § 1 (Haw. 2023). Further, the court observed that the record contained no evidence "whatsoever" that the historical laws were controversial. Pet. App. 61a.

Petitioners attempt (Pet. 15-16) to distinguish the New Jersey law because it spoke of a "Gun" instead of a "firearm" and applied to "trespassing" rather than mere presence on private property. But regulations in the 1700s used "Firearm" and "Gun" interchangeably. *Compare* 1763

N.Y. Laws, ch. 1233 § 1, *with* 1771 N.J. Laws 343. And then, as now, "trespassing" comprised any kind of entry upon property that exceeded the owner's consent. 3 William Blackstone, *Commentaries* *209. Regardless, this sort of flyspecking is exactly what *Rahimi* prohibits. Analogues need only be "sufficiently similar," and a court's task in fleshing out a historical tradition " 'is to seek harmony, not to manufacture conflict.' " 602 U.S. at 701 (quoting *United States* v. *Hansen*, 599 U.S. 762, 781 (2023)).

Petitioners also ask (Pet. 11-12) the Court to disregard the 1865 Louisiana statute on the ground that it was enacted as part of Louisiana's Black Codes. But petitioners forfeited that argument by failing to raise it before their petition for rehearing en banc and by failing to introduce any record evidence in support of their claim. *E.g.*, *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984) (finding that sort of untimely presentation "precludes [the Court's] consideration"). Were this a final decision on the merits, the Court might have reason to overlook this forfeiture, but petitioners—and Hawai'i—will be able to flesh out the relevance of the Louisiana statute after all discovery and expert declarations are in. *See, e.g.*, D.E. Sickles, General Order No. 1, § 16, reprinted in *A Handbook of Politics for 1868* 37 (Edward McPherson ed., 1868) (explaining that opponents of the Black Codes *agreed* that the Second Amendment "shall not be construed * * * to authorize any person to enter with arms on the premises of another against his consent"), *cited with approval in Bruen*, 597 U.S. at 62.

Moreover, before the district court, Hawai'i will be able to further develop the evidence it set forward concerning the other 18th-century laws that precluded persons from "carry[ing] a gun, upon any person's land, * * * without the owner's leave." 1715 Md. Laws 88-91; *see* 1721 Pa. Laws, ch. 246 (no right to "carry any gun or hunt on the improved or inclosed lands of any plantation owner" without

"permission"); 1722 N.J. Laws 141-142 (same); 1763 N.Y. Laws, ch. 1233 (no right to "carry, shoot, or discharge" a firearm on "inclosed Land" within "the City of New-York * * * without Licence in Writing"); *see also* 1893 Or. Laws 79 (barring "any person * * * armed with a gun" from going "upon any enclosed premises * * * without the consent of the owner"). The court of appeals did not rely on these additional laws because it found it "likely" that they applied only to private property closed to the public. Pet. App. 62a. But Hawai'i put forward expert evidence to the contrary that the court declined to consider, Pet. App. 61a n.10, 62a, and that may carry the day after further proceedings.

2. The court of appeals' decision upholding the constitutionality of Hawai'i's law is also correct for the independent reason that the State is free to enact default rules to vindicate property owners' right to exclude, even when those laws implicate conduct that is otherwise protected by the Constitution.

a. As the Constitution and centuries of our legal practice make clear, private property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 William Blackstone, *Commentaries* *2. Hawai'i's rule is part and parcel of that tradition; it protects the "right of private individuals and entities to choose * * * whether to allow or restrict the carrying of firearms on their property." S.B. No. 1230, A Bill for an Act Relating to Firearms § 1 (Haw. 2023).

This Court long ago recognized that a local government may establish default-property rules to vindicate its citizens' right to exclude, even when those rules implicate constitutionally protected activities. In *Breard* v. *City of Alexandria*, 341 U.S. 622 (1951), the Court upheld a municipal ordinance prohibiting door-to-door solicitation without a property owner's express consent. The Court

recognized that door-to-door sales constitute speech that is protected by the First Amendment and that the City's default rule made it less likely that solicitors would be able to engage in that protected activity, but the Court nonetheless upheld the ordinance because it effectively enforced *the owners*' preferred terms of entry. The Court explained that "a householder" reasonably "depends for protection on his city board rather than churlishly guarding his entrances with orders forbidding the entrance of solicitors." *See id.* at 640.

Breard's holding applies equally in the Second Amendment context because this Court has "repeatedly compared the right to keep and bear arms" to free-speech rights, *Bruen*, 597 U.S. at 24. Thus, just as the City in *Breard* did not impermissibly infringe the speech rights of solicitors by enacting an ordinance to vindicate its citizens' presumptive desire to exclude solicitors, Hawai'i does not impermissibly infringe Second Amendment rights by enacting a law vindicating its citizens' presumptive desire to prevent armed entry onto their private property. In both instances, the governmental action does not fall afoul of constitutionally protected rights because there is no right to engage in speech or carry firearms on someone else's property without her consent.

Petitioners counter (Pet. 17) that citizens' consent to armed entry is implied from centuries of tradition that allowed armed patrons into private spaces open to the public. *See Florida v. Jardines*, 569 U.S. 1, 8 (2013) (the scope of the implied license is determined "from the habits of the country" (citation omitted)). That may be true in other States, but in Hawai'i, open carry has never been the default. Hawai'i has limited the carrying of weapons in public spaces since at least 1852—decades before the U.S. Constitution was extended to Hawai'i. *See* Act of May 25, 1852, § 1, 1852 Haw. Sess. Laws 19. So the default expectation in

Hawai‘i is that gun owners may not bring weapons onto private property whether it is open or closed to the public.

Petitioners protest (Pet. 19) that Hawai‘i's purpose in setting a "no-carry" default was not to vindicate property rights but "to discourage the exercise of [Second Amendment] rights." Simply asserting that a statute has a discriminatory purpose, however, does not make it so. *See Rogers* v. *Lodge*, 458 U.S. 613, 618 (1982) (requiring a "sensitive inquiry" into "circumstantial and direct evidence" regarding the statute's purpose). Here, petitioners cite nothing to back up their accusations of improper motive. And petitioners will have an opportunity to provide the evidence underlying their assertions in the lower court proceedings on remand.

Petitioners further err in asserting (Pet. 18-19) that private property that has been opened to the public is essentially public property for Second Amendment purposes because *Bruen* mentioned the right to "public" carry, *e.g.*, 597 U.S. at 33. *Bruen* of course could not transform private property into public—that would be a taking. And as this Court has explained many times across many contexts, property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 81 (1980) (quoting *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 569 (1972)). That is why in *Lloyd*, for example, the Court allowed a mall owner to expel persons distributing handbills. As the Court put it, it "has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned." 407 U.S. at 568. Just so here.

3. The United States' uninvited amicus brief does not change the calculus. The United States asserts that the Court should grant certiorari with respect to the first question presented because the court of appeals erred in

upholding the default rule's constitutionality. (The United States says nothing about the second question presented, which speaks volumes.)

In advancing its argument, the United States primarily contends that the State's alleged reasons for passing the law—protection of private property and the owners' right to refuse consent—are pretextual. In support, the United States argues that the law (1) "singl[es] out" guns while permitting anything "from chainsaws and brass knuckles to megaphones and picket signs" and (2) exempts police officers and other workers whose jobs require them to be armed. U.S. Br. 10-13. But petitioners did not advance these arguments in the proceedings below, and no court has yet passed upon them, providing still another reason to deny certiorari. *See United Parcel Serv.* v. *Mitchell*, 451 U.S. 56, 60, n.2 (1981) (declining to consider an amicus argument "since it was not raised by either of the parties here or below").

The United States is also wrong on the merits. First, this Court has never required legislatures to explain why they chose not to regulate other potentially dangerous weapons in the laws directed to firearms—let alone entirely unrelated articles like megaphones and picket signs. To the contrary, the Court has consistently recognized a "tradition of *firearm* regulation." *Bruen*, 597 U.S. at 34 (emphasis added); *see also Heller*, 554 U.S. at 626 (noting "longstanding prohibitions" on "possession of firearms by felons" and "carrying of firearms" in sensitive places). And a State "need not address all aspects of a problem in one fell swoop," *Williams-Yulee* v. *Fla. Bar*, 575 U.S. 433, 449 (2015), especially when there is no record establishing similar problems for chainsaws, megaphones, and the like.

Nor do the law's exemptions for law enforcement officers and other officials whose duties "require them to be armed," Haw. Rev. Stat. § 134-11(a), render the legislation

pretextual. These exemptions merely implement federal law that *requires* States to permit those officials to carry firearms unless property owners themselves restrict "possession of concealed firearms on their property." 18 U.S.C. §§ 926B(a)-(b), 926C(a)-(b); *see also DuBerry* v. *District of Columbia*, 824 F.3d 1046, 1053 (D.C. Cir. 2016) (noting the statute's "categorial preemption" of contrary state laws). The exemptions, moreover, likely reflect property owners' background expectations: Officers have unique, "specialized" training, *Kolbe* v. *Hogan*, 849 F.3d 114, 147 (4th Cir. 2017) (en banc), *abrogated in part by Bruen*, 597 U.S. at 19, and society places within them a "special degree of trust" to use firearms to safeguard lives and property, *O'Donnell* v. *Barry*, 148 F.3d 1126, 1135 (D.C. Cir. 1998). The exemptions therefore support rather than detract from Hawai'i's stated purpose to codify existing property protections.

In short, neither petitioners nor the government has offered any persuasive reason to disturb the court of appeals' conclusion that Hawai'i's default-property rule withstands constitutional scrutiny at the preliminary injunction stage.

B. The Challenged Sensitive Places Regulations Are Constitutional.

Petitioners (but not the government) also briefly assert that Hawai'i's prohibitions on carrying guns in parks and establishments serving alcohol are unconstitutional. That is incorrect.

As explained, the court of appeals adhered to *Bruen*'s specific instructions regarding sensitive places restrictions in analyzing Hawai'i's restrictions on firearms in parks, bars, and restaurants. *See supra* at 17-18. *Bruen* permitted courts to uphold the constitutionality of sensitive places requirements based on "18th- and 19th-century" analogues and to recognize new sensitive places where doing so is consistent with those analogues and

does not conflict with the Founding-era history. 597 U.S. at 30.

Under this standard, Hawai‘i more than demonstrated the constitutionality of its restriction on carrying guns in parks and establishments serving alcohol. With respect to parks, Hawai‘i established that States and local governments restricted the right to carry in those spaces "[a]s soon as" they "began to take the shape of a modern park, in the middle of the 19th century." Pet. App. 33a-34a (citing 23 such laws). As to establishments that serve alcohol, Hawai‘i offered "three sets of historical regulations," including "a long line of regulations dating back to the colonial era" that recognized "firearms and intoxication [as] a dangerous mix," and "directly on point" 19th-century laws restricting carry in "bar[s]" and "saloon[s]." Pet. App. 40a-42a. And "[d]espite the widespread nature of the laws," petitioners "have not pointed to * * * *any* evidence that those laws were questioned as unconstitutional." Pet. App. 34a; *see also* Pet. App. 41a-42a.

Petitioners protest that this evidence is inadequate because Hawai‘i did not show Founding-era laws prohibiting the exact same conduct. But this Court's precedent has never required a "historical twin." *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 30). Petitioners, moreover, challenged Hawai‘i's provisions on their face and before they were enforced. Pet. App. 38a n.4. That is the "most difficult challenge to mount successfully," because it requires petitioners to "establish that no set of circumstances exists under which the Act would be valid." *Rahimi*, 602 U.S. at 693 (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). The court of appeals reasonably determined that petitioners had not made that difficult showing "at this preliminary stage," when "the precise reach of Hawaii's law is uncertain." Pet. App. 38a n.4.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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