No. 24-1046

IN THE
Supreme Court of the United States

JASON WOLFORD, ET AL.,
Petitioners,

v.

ANNE E. LOPEZ, ATTORNEY GENERAL OF HAWAII,
Respondent.

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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

The overwhelming thrust of Respondent's ("Hawaii") Brief in Opposition ("BIO") is that this case should be allowed to go back down for historical development. But the same lead counsel representing Hawaii here expressly told the Ninth Circuit at oral argument that there is nothing further to litigate in the trial court. In short, Hawaii had presented all the evidence it had. Hawaii may not raise factual assertions that it has conceded away. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (parties may not play "fast and loose with the courts").

More fundamentally, the questions presented here are purely legal in nature and, as *District of Columbia v. Heller,* 554 U.S. 570 (2008), and *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), demonstrate, such questions can be resolved as questions of law without a factual record.[1] Review is needed for the reasons the United State outlines in its amicus brief, *viz.,* to provide much needed guidance to the lower courts on applying *Bruen's* methodology and to resolve the conflict between the Ninth Circuit and Second Circuit on the issue of whether private property default rules are constitutional.

There is an acknowledged direct conflict between the Ninth Circuit and the Second Circuit on whether the Second Amendment allows a State to presumptively ban exercise of the Second Amendment right to armed self-defense on private property

[1] Petitioners incorporate and endorse the arguments made of the United States in its amicus brief.

otherwise open to the public. Hawaii does not even try to deny this conflict. The Ninth Circuit also held that the relevant historical period depends, at least in part, on whether the challenge is to a State law or a federal law. On that issue, the Ninth Circuit's rule conflicts with *Bruen* and every other circuit (with the possible exception of the Second Circuit) to have reached the issue. Plenary review is warranted on both issues.

I. THERE IS NO NEED FOR FURTHER HISTORICAL DEVELOPMENT

Hawaii argues this Court should deny this petition because the record is undeveloped. BIO at 11. That argument is irreconcilable with its concession in the lower court that no such further development was necessary. At oral argument in the Ninth Circuit Judge Schroeder asked counsel for Hawaii,[2] "Can I ask you a question on the preliminary injunction point? What else is there left to be decided – to be litigated in this case?" Counsel for Hawaii responded that "we think that there isn't anything, we think at the end of the day these are not Second Amendment violations." Oral Argument at 12:02, *Wolford v. Lopez* (9th Cir. April 11, 2024) (No. 23-16164), available at https://youtu.be/iHVtW6Pfraw?t=721. Counsel's concession on this issue is a "judicial admission" which is binding and "conclusive." *Christian Legal Society Chapter of the University of California v. Martinez*, 561 U.S. 661, 678 (2010).

[2] At oral argument in the Ninth Circuit, Hawaii was represented by Neal Katyal, who is likewise counsel of record for Hawaii here.

That concession that there was nothing left to litigate was well taken. Hawaii submitted "expert" declarations of three historians and attached hundreds of pages of historical laws. See *Wolford v Lopez* 1:23-cv-00265-LEK-WRP Doc. No. [55]. And before this Court Hawaii touts the "expert testimony" it provided in the trial court to attempt to distinguish the Second Circuit repeated holdings in *Antonyuk* where the court has now twice struck down New York's default rule. See *Antonyuk v. Chiumento*, 89 F.4th 271 (2d Cir. 2023), *vacated and remanded sub nom., for further considerations in light of United States v. Rahimi*, 602 U.S. 680 (2024), *Antonyuk v. James*, 144 S.Ct. 2709 (2024) (*Antonyuk I*); *Antonyuk v. James*, 120 F.4th 941 (2d Cir. 2024) (*Antonyuk II*). BIO at 15. But the laws at issue in *Antonyuk* are identical to the laws at issue here. Whether a given law is a proper analogue under *Bruen* is a question of law. An expert report is not probative evidence on such matters. See, e.g., *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008).

In *Antonyuk II*, the Second Circuit did not identify any additional evidence sufficient to alter its decision in *Antonyuk I*. Hawaii argues that "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." BIO at 12. But Hawaii has not identified *any* additional "historical evidence" it would submit in such future proceedings. And the likelihood of such a change of

heart by the Ninth Circuit is vanishing small.[3] Hawaii makes no effort to dispute Judge VanDyke's discussion of the relevant historical evidence in his dissent from the denial of rehearing en banc.

Hawaii purports to rely on Justice Kavanaugh's statement respecting certiorari in *Snope v. Brown*, No. 24-203, 2025 WL 1550126 (U.S. June 2, 2025) (BIO 16), where he suggested the Court would likely benefit from decisions in additional pending cases where a petition for certiorari would likely be filed next Term or the 2026 Term. But *Snope* dealt with the constitutionality of Maryland's assault weapons ban, an issue quite distinct from the issues presented here. Unlike here, *Snope* did not present a circuit conflict or involve any question concerning the relevant historical period for evaluating restrictions on Second Amendment rights.

Hawaii correctly notes there are other cases pending in the lower courts dealing with the private property default rule. *Koons v. Platkin*, No. 231900 (3d Cir.) (argued October 25, 2023); *Kipke v. Moore*, No. 24-1799 (4th Cir.) (argued May 7, 2025). Those cases have already been argued and will likely be decided by the time this case is fully briefed and argued next Term, thus according this Court the benefit of such decisions. But any decision in these cases can only deepen the existing circuit splits identified in the Petition, not eliminate them. Private

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[3] The Ninth Circuit has an "undefeated, 50–0 record" in upholding gun laws in Second Amendment challenges. *United States v. Rahimi,* 602 U.S. 680, 712 (2024) (Gorsuch, J., concurring), quoting *Duncan v. Bonta*, 19 F.4th 1087, 1167 n. 8 (CA9 2021) (en banc) (VanDyke, J., dissenting).

property default rules like the one at issue here only exist in Hawaii, California, Maryland, New York and New Jersey, and decisions in *Koons* and *Kipke* will mean that all the circuits in which the issue can arise will have addressed the issue. Even in the unlikely event that New Jersey and Maryland prevail in *Koons* and *Kipke*, the circuit split with *Antonyuk* will remain and require this Court's resolution.

Hawaii faults petitioners for failing to appeal the aspect of Hawaii's default rule applicable to property *closed* to the public. BIO at 13-14. That argument erects a strawman. Petitioners have never claimed any right to trespass on such private property, much less do so while armed. The district court sustained the right to armed self-defense on private property otherwise open to the public. That holding was based on generally applicable principles of trespass law dating back to the Founding. App. 156a-157a. The State appealed the district court's decision on this point, not Petitioners.

The right to carry at such locations is obviously a tremendously important issue. Law-abiding Hawaiians go to private businesses, beaches, parks and restaurants and the like as part of their daily lives. The panel recognized that "many property owners will not post signs of any sort or give specialized permission, regardless of the default rule." App. 57a. As Judge VanDyke recognized, the panel's ruling turns the general right to carry recognized in *Bruen* into a right to carry on "streets and sidewalks" only. App. 180a. That result effectively eviscerates "the general right to publicly carry arms for self-

defense." *Bruen*, 597 U.S. at 31. Hawaii cannot reasonably deny it.

II. A CIRCUIT SPLIT EXISTS REGARDING THE CONSTITUTIONALITY OF PRIVATE PROPERTY DEFAULT RULES

Hawaii oddly argues that there is no circuit split on the default rule because both *Wolford* and *Antonyuk* were decided on preliminary injunction appeals. The New York law struck down in *Antonyuk* and the Hawaii law sustained below are functionally identical. After *Antonyuk,* New Yorkers may exercise Second Amendment rights in businesses open to the public. The Ninth Circuit has prohibited all such carry for self-defense. That is the definition of a circuit conflict.

Hawaii falsely argues *Antonyuk* was decided with an undeveloped historical record. New York State, aided by multiple amici, presented the same history in *Antonyuk* as Hawaii (also aided by amici) presented to the Ninth Circuit in *Wolford*. The Second Circuit relied on this historical record in *Antonyuk v. Chiumento*, 89 F.4th 271, 291 (2d Cir. 2023), *cert. granted, judgment vacated sub nom. Antonyuk v. James*, 144 S. Ct. 2709 (2024). On remand from this Court after *Rahimi*, New York had every opportunity to supplement the record. Yet, after renewed briefing and argument, the Second Circuit reached the same result. *Antonyuk v. James*, 120 F.4th 941 (2d Cir. 2024). The Ninth Circuit applied the same record to sustain Hawaii's law. As noted, counsel for Hawaii has conceded the State has nothing to add to that record.

In particular, *Antonyuk* reviewed and rejected the same 1865 Louisiana and 1771 New Jersey laws the Ninth Circuit found *dispositive* of Petitioners' challenge to Hawaii's default rule. App.62a; *Antonyuk*, 120 F.4th 1046–47. On that point alone there is a clear circuit split between the Ninth Circuit and Second Circuit. No other court has sustained such a default rule. As Judge VanDyke notes, in "upholding Hawaii's default private property law, our court once again becomes a Second Amendment outlier among the circuits." App. at 202a.

Hawaii argues Petitioners forfeited their right to argue the 1865 Louisiana statute was part of Louisiana's Black Codes because Petitioners did not "raise it before their petition for rehearing en banc." BIO at 22. Nonsense. The inapplicability of the 1865 Louisiana statute is not a new argument; it was raised and decided in the district court. See App. 153a. Petitioners *prevailed* in the trial court on this challenge to Hawaii's default rule and thus were *appellees* in the circuit court on this issue. Petitioners are "entitled to rely on any legal argument in support of the judgment below." *Schiro v. Farley*, 510 U.S. 222, 228–29 (1994).

That the Louisiana statute was a "Black Code law" simply supports Petitioners' argument and the district court's ruling that the statute was not a proper analogue. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that '[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below'"), quoting *Yee v. Escondido*, 503 U.S.

519, 534 (1992). The point was made in the petition for rehearing and Judge VanDyke properly addressed the point in his opinion dissenting from the denial of rehearing en banc. App. 187a.

Hawaii's reliance on D.E. Sickles, General Order No. 1, § 16, reprinted in *A Handbook of Politics for 1868* 37 (Edward McPherson ed., 1868) is misguided. This order says that people may not enter with arms the premises of another against their consent. Petitioners have no quarrel with that principle and fully respect the express exclusion of arms by private property owners. Here, Hawaii is barring access, not property owners.

Hawaii also errs in its reliance (BIO at 23) on *Breard v. City of Alexandria*, 341 U.S. 622 (1951), as support for the State's supposed right to establish default rules for access to private property. First, *Breard* merely held that a locality could prohibit door-to-door solicitation without the owner's consent. That holding was abrogated by *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980), which limited *Breard*'s holding to laws regulating commercial speech. See also *Project 80s v. Pocatello*, 942 F.2d 635, 639 (9th Cir. 1991) (distinguishing *Breard*). More to the point, First Amendment analysis applies tiers of scrutiny, the very type of inquiry that *Bruen* held to be inapplicable to "the Second Amendment context." *Bruen*, 597 U.S. at 19. And unlike solicitors, Petitioners' conduct here—carrying for self-defense—is implicated everywhere Petitioners may lawfully go in public. *Koons v. Platkin*, 673 F. Supp. 3d 515, 614–15 (D.N.J. 2023)

III. THE NINTH CIRCUIT'S OPINION DEEPENED AN ALREADY EXISTING CIRCUIT SPLIT AS TO THE USE OF NON-FOUNDING ERA ANALOGUES

There is a circuit split regarding whether Reconstruction Era laws can have equal weight to Founding Era law in deciding the constitutionality of a firearm regulation. Hawaii denies the split, asserting that other circuits have looked to Reconstruction era laws to decide the constitutionality of a sensitive places law, just as the Ninth Circuit panel did here. BIO at 18-19. That assertion misstates the conflict.

The Ninth Circuit held that the relevant historical period turns on whether the challenge is to a State law or a federal law. App.28a. In so holding, the panel expressly adopted the same approach taken by the Second Circuit in *Antonyuk I*. See Pet. 20. That approach conflicts with *Bruen* and *Rahimi* which direct that the courts must look to the "founding generation." 602 U.S. at 692. And *Bruen* squarely holds that "we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." 597 U.S. at 37. Hawaii does not even mention much less attempt to defend the holdings of the Second and Ninth Circuits that different rules are applicable to State law challenges.

The Ninth Circuit's approach conflicts with the holding of other circuits, which hold that the focus must be on the Founding. See Pet. at 20-22. These

circuits look to Reconstruction era statutes only for confirmation, not, as here, as the only source for analogues. See 191a-193a (VanDyke, J., dissenting from denial of rehearing en banc). And no other circuit has held that the analysis depends on whether the challenge is to a State law.

Hawaii argues there is no circuit split with the decisions of the Eighth, Fifth and Third Circuits in *Worth v. Jacobson*, 108 F.4th 677 (8th Cir. 2024), *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024), and *Lara v. Comm'r Pa. State Police*, 125 F.4th 428 (3d Cir. 2025), because those decisions did not "even concern sensitive places restrictions." BIO at 18. But the text, history and tradition test of *Bruen* is not dependent on the type of restriction at issue. Each of these cases focused on the Founding and relied on Reconstruction Era laws (if at all) only as confirmation of analogues from the Founding. Here, the Ninth Circuit and the Second Circuit in *Antonyuk I* ignored the absence of any Founding era analogues and gave Reconstruction Era statutes dispositive weight on the mistaken premise that State laws should be treated differently. That was error.

That reality also disposes of Hawaii's argument that the Ninth Circuit applied laws from both the founding and from the Reconstruction (and later) eras. BIO at 17. As the Petition makes clear (Pet. at 10-12), the Ninth Circuit did not purport to rely on *any* Founding era analogues with respect to the specific sensitive areas banned by Hawaii, such as parks and beaches. Instead, as Judge VanDyke explains, the panel "reconceptualized" the analogue inquiry "to derive its historical tradition from whatever time

period the panel concluded that such spaces started to exist in their 'modern' form." App. at 196a. Under that approach, "the original understanding of the Second Amendment . . . would not apply to any new types of public spaces that would develop in the future." *Id.* That approach made the panel's application of Reconstruction era and later analogues outcome-determinative. *Id*. at 191a-193a.

The Ninth Circuit's approach is wholly inconsistent with this Court's ruling in *Rahimi* and *Bruen* that "[a] court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" 602 U.S. at 692, quoting *Bruen*, 597 U.S. at 19. The methodological errors committed by the panel present fundamentally important questions of law on which the circuits are split.

IV. SECOND AMENDMENT RIGHTS ARE NOT DETERMINED BY AN INDIVIDUAL STATE'S TRADITION

Hawaii seriously errs in contending that because it has "limited the carrying of weapons in public spaces since at least 1852" its default rule is constitutional. BIO at 24. Effectively, Hawaii is claiming that its tradition trumps the Founding. That assertion is self-evidently frivolous.

By Hawaii's reasoning, a State without a history of regulating firearm carry could not enforce new restrictions on Second Amendment rights while States with a history of severe firearm regulation like Hawaii are free to disregard the text, history and

tradition of the rest of the United States. To state this proposition is to refute it. Whatever its history, Hawaii is part of the Union and is subject to the Supremacy Clause no less than other States. U.S. Constitution, Art. VI, cl. 2.

Heller and *Bruen* make clear that the government "must demonstrate that the regulation is consistent with *this Nation's* historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17 (emphasis added). The test is thus applied to reference to the historical traditions of "this Nation," not the traditions of a State. "Outlier" laws of a few jurisdictions or of territorial governments are to be disregarded. *Id*. at 30. Hawaii's historical "kingdom" traditions are precisely such outliers. Nothing in this Court's Second Amendment jurisprudence supports Hawaii's argument that a State's localized history can trump national traditions concerning firearms regulation.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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