No. 24-1046

In the Supreme Court of the United States

JASON WOLFORD, et al.,
Petitioner,

v.

ANNE E. LOPEZ, Attorney General of Hawaii,
Respondent.

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

BRIEF FOR THE STATES OF MONTANA, IDAHO, 23 OTHER STATES, AND THE ARIZONA LEGISLATURE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND REVERSAL

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STATEMENT OF INTEREST AND INTRODUCTION[1]

Just a few years ago, this Court reminded lower courts that the right to keep and bear arms "is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U.S. 1, 70 (2022) (quoting *McDonald* v. *City of Chi.*, 561 U.S. 742, 780 (2010) (plurality op.)). Yet courts across the country continue to defer to legislative "judgments regarding firearm regulations" despite *Bruen*'s declaration that "judicial deference to legislative interest balancing … is not [the] deference that the [Second Amendment] demands." *Id.* at 26. But the district court deferred to the balance struck by the American people—"'the right of law-abiding, responsible citizens to use arms' for self-defense." *Id.* (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 635 (2008)). The Ninth Circuit charted a different course: "blessing" Hawaii's efforts to ban "law-abiding and licensed citizens … from carrying firearms in most public and private spaces." Pet'rs' App. ("Pet.App.") at 170a (VanDyke, J., dissenting from denial of rehearing en banc).

To address concerns about public safety and gun violence, the Hawaii legislature banned the public carry of firearms in certain "sensitive places," including parks, beaches, and bars and restaurants serving

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[1] As required by Rule 37.2, counsel for *amici* timely notified counsel of record its intent to file this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel contributed money intended to fund the preparation or submission of this brief.

alcohol. Not only that, but the Hawaii legislature flipped the default rule for public carry on private property held open to the public. Rather than presuming that public carry was permissible unless expressly forbidden, public carry is now presumptively forbidden in Hawaii unless expressly permitted.

No doubt courts may use analogies to "historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Id.* at 30. But *Bruen*'s analogical inquiry requires courts to determine whether a modern and historical regulation are "relevantly similar"—that is, whether they impose a comparable burden and are comparably justified. *See United States* v. *Rahimi*, 602 U.S. 680, 692 (2024). States may not "expand[] the category of 'sensitive places' [too broadly]—*i.e.*, to "all places of public congregation"—as that would "exempt cities from the Second Amendment" and "eviscerate the general right to publicly carry arms for self-defense." *Bruen*, 597 U.S. at 31. Nor can states flip the default rule as subterfuge for banning law-abiding and licensed citizens from the public-carry right *Bruen* secured. *See* Pet.App.178a-180a. To ensure that courts properly employ the "nuanced approach" that *Bruen*'s analogical inquiry requires, the States of Montana, Idaho, Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wyoming, and the Arizona Legislature ("Amici States") submit this

amicus brief in support of petitioner and urge this Court to grant the petition.

STATEMENT OF THE CASE

In June 2023, Hawaii's legislature acted to address concerns about public safety and gun violence by enacting Act 52 (codified at Haw. Rev. Stat., ch. 134), which prohibits the carry or possession of firearms in designated sensitive places. Act 52 prohibits public carry in, as relevant here, bars and restaurants serving alcohol, *see* Haw. Rev. Stat. §134-9.1(a)(4), parks and beaches, *id.* §134-9.1(a)(9), and adjacent parking areas. Act 52's so-called "default rule" prohibits carrying a firearm on another's property without express authorization. *Id.* §134-9.5. Act 52's sweeping restrictions seek to convert many traditional public spaces into "sensitive places" where firearms "could be prohibited consistent with the Second Amendment." *See Bruen*, 597 U.S. at 30.

Plaintiffs Jason Wolford, Alison Wolford, Atom Kasprzycki, and the Hawaii Firearms Coalition allege that these sensitive-place restrictions violate their "constitutional right to bear arms in public for self-defense."[2] *Bruen*, 597 U.S. at 70. Wolford sought a temporary restraining order ("TRO") and preliminary injunction ("PI") to enjoin Hawaii from enforcing the above provisions of Act 52. Pet.App.83a-84a & n.2. The district court considered only Plaintiffs' request for a TRO, and as relevant here it enjoined: §134-9.1(a)(4) (bars and restaurants serving alcohol), §134-9.1(a)(9)

[2] This brief refers to Petitioner as "Wolford" and Respondent as "Hawaii" unless otherwise indicated.

(parks and beaches), and §134-9.5 (private property held open to the public). Pet.App.83a-85a & n.2. By stipulation, the district court converted the TRO into a PI, Pet.App.215a-218a, and Hawaii appealed, Pet.App.10a. The Ninth Circuit reversed the district court's grant of the preliminary injunction as to Haw. Rev. Stat. §§134-9.1(a)(4), (9), and 134-9.5. Pet.App.79a. The full court denied Wolford's petition for hearing en banc. Pet.App.169a.

SUMMARY OF THE ARGUMENT

1. By reversing the injunction on Hawaii's default rule, the Ninth Circuit created a circuit split. Relying on the same precedent and the same historical regulations as the Ninth Circuit, the Second Circuit upheld an injunction on a nearly identical New York law.

2. Hawaii's laws addressed problems that have existed since the Founding, yet Hawaii failed to produce any "distinctly similar," Founding-era laws supporting its public-carry bans in public parks and beaches or in bars and restaurants serving alcohol. Hawaii's "failure to do so should be dispositive." Pet.App.195a. And even if Reconstruction-era analogues could establish a historical tradition of firearm regulation, the panel erred in concluding that Hawaii's proposed analogues were "relevantly similar." *Rahimi*, 602 U.S. at 692.

3. *Bruen* reassured law-abiding gun owners that the Second Amendment was no longer a "second-class right." 597 U.S. at 70. But lower courts have largely failed to follow through on that promise, resorting to manipulative en banc practices, ahistorical interpretations of covered "arms," and improperly calibrating

the level of generality for *Bruen*'s inquiry. These incursions on citizens' public-carry rights will continue to grow unless this Court intervenes.

REASONS TO GRANT THE PETITION

I. The Ninth Circuit's "default rule" holding created a circuit split.

The rights embedded in the Constitution generally protect against state action—not private action. *See, e.g.*, *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977). This means that Hawaii cannot prohibit its citizens from bearing arms in public, *Bruen*, 597 U.S. at 9, but private property owners are generally free to do so within the boundaries of their property. By changing the default rule—decreeing that firearms are prohibited on private property unless the owner expressly consents in advance—Hawaii coopts the owners' power to restrict Hawaiians' exercise of their right to bear arms.

But the Second Amendment is not the only constitutional right that property owners can interfere with. They can restrict speech on their property, or association, or religious exercise. *See, e.g.*, *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 570 (1972). Unless they are public accommodations, they can exclude people on the basis of race, sex, or another protected characteristic. *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 624 (1984).

In any of those contexts, a law like Hawaii's would be unconstitutional. Imagine an anti-abortion state banning abortion discussions on private property without the owner's prior express consent. Or imagine a state requiring express consent before visitors to a property could pray, or read *White Fragility*, or hold hands with a same-sex spouse. No doubt the owners

could overrule the state and tell visitors that the forbidden conduct was permitted, but most visitors to stores and restaurants and such would never ask—compliance with the state's unconstitutional wishes would be easier.

The only reason a court would reach the opposite conclusion here is because it continues to treat the Second Amendment as a "second-class" right. *McDonald*, 561 U.S. at 780. Since this Nation's founding, a citizen could enter a business open to the public with a firearm unless informed otherwise by the owner. Pet.App.173a. In explicit response to this Court's decision in *Bruen* and flipping this presumption, Hawaii enacted a new "default rule"—prohibiting a citizen from carrying a firearm on another's property without advance permission—whether or not the property is open to the public. Office of the Governor – News Release – *Gov. Green Signs Firearms Legislation*, https://tinyurl.com/2vrysv73; Haw. Rev. Stat. §134-9.5(b). As the Ninth Circuit noted, it did this knowing that few (if any) businesses will expressly provide this consent—narrowing the public's right to carry was a feature of the law, not a bug. Pet.App.57a.

The Ninth Circuit allowed this de facto public-carry ban to go forward and, in so doing, created a circuit split between it and the Second Circuit. *Compare* Pet.App.57a *with Antonyuk* v. *James*, 120 F.4th 941 (2d Cir. 2024), *cert. denied*, No. 24-795 (U.S. Apr. 7, 2025); Pet.App.200a. Ruling on nearly identical laws, the circuits came to opposite conclusions about the legality of the legislative ruse. And they reached their contrary holdings based on the same historical data. The result: New Yorkers may exercise their

constitutional rights while Hawaiians may not. This case provides an ideal vehicle to remind courts that the Second Amendment requires no less from a state government than a "demonstrat[ion] that the regulation is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

A. The Second Circuit rightly held that there was no historical tradition for flipping the presumption.

As the Second Circuit recognized when analyzing a law nearly identical to Hawaii's, the *Bruen* analysis here is straightforward. At step one, the court had "little difficulty" concluding that the "plain text of the Second Amendment" covers the individual's conduct. *Id.* at 32. The Second Amendment protects the right to bear arms in public. *Id.* at 33. And that right does not distinguish between public property or private property held open to the public. *Antonyuk*, 120 F.4th at 1044.

At step two, to determine whether the regulation was "consistent with the Nation's historical tradition of firearm regulation," the court asked whether the unprecedented inversion of the default rule was "relevantly similar" to historical regulations based on "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 964 (citation omitted) (first quote); *id.* at 1046 (citation omitted) (second quote). And the court could not find a single relevantly similar law in the annals of history. *Id.*

The court reviewed a 1771 New Jersey statute and an 1865 Louisiana statute that, at the highest level of

generality, prohibited the carriage of firearms on private property without the owner's consent. *Id.* at 1043.

The court started by observing that it was unclear how a few historical regulations could establish a historical tradition. *Id.* at 1046. But more troubling, these statutes did not share the same "how" and "why" as the regulation at issue—making them poor analogues. *Id.*

Starting with the why, the court found that the proffered analogues "were explicitly motivated by a substantially different reason (deterring unlicensed hunting) than the restricted location regulation (preventing gun violence)." *Id.* at 1046. As to the how, "none of the State's proffered analogues burdened Second Amendment rights in the same way as [the provision at issue]. All of the State's analogues appear to, by their own terms, have created a default presumption against carriage only on private lands *not open to the public*." *Id.* at 1046.

Because "the State's analogues fail[ed] to establish a national tradition motivated by a similar 'how' or 'why' of regulating firearms in property open to the public," the law violated the Second Amendment. *Id.* at 1047.

This makes sense. Reversing the traditional presumption that carrying firearms into businesses open to the public would effectively "exempt [states] from the Second Amendment" and "eviscerate the general right to publicly carry arms for self-defense." *Bruen*, 597 U.S. at 31. By doing so, New York's law would have "practically accomplish[ed] close to the same thing rejected in *Bruen*." Pet.App.171a.

B. Considering a similar law and identical historical regulations, the Ninth Circuit's decision explicitly creates a circuit split.

Around the same time, the Ninth Circuit decided this case, reviewing a nearly identical Hawaii law. *See* Pet.App.5a. To its credit, it correctly held that if a law falls within the plain text of the Second Amendment, then it falls within the plain text of the Second Amendment, Pet.App.58a—a notion that has not commanded the universal judicial assent one would hope for. *See, e.g.*, *Bianchi* v. *Brown*, 111 F.4th 438 (4th Cir. 2024) (holding that arms are not necessarily arms under the Second Amendment); *Bevis* v. *City of Naperville, Ill.,* 85 F.4th 1175 (7th Cir. 2023), *cert. denied sub nom. Harrel* v. *Raoul*, 144 S. Ct. 2491 (2024) (same); *Duncan* v. *Bonta*, No. 23-55805, 2025 WL 867583 (9th Cir. Mar. 20, 2025) (holding that necessary parts of a firearm are not necessarily protected by the plain text Second Amendment). But as *Bruen* requires, the Ninth Circuit correctly held that "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." Pet.App.20a (citation omitted).

But after that the Ninth Circuit split with the Second Circuit (and *Bruen*). While it rightly discounted a smattering of anti-poaching laws, the Ninth Circuit upheld the law on the basis of two historical regulations the Second Circuit considered and rejected: the 1771 New Jersey law and the 1865 Louisiana law. Pet.App.61a. The court found that these laws purportedly "bann[ed] the carrying of firearms onto any

private property without the owner's consent"—just like Hawaii's law. Pet.App.61a. And that was enough.

As both the Second Circuit and Judge VanDyke's dissent from the Ninth Circuit denial of rehearing en banc noted, New Jersey's law "was an antipoaching and antitrespassing ordinance—not a broad disarmament statute." Pet.App.186a; *Antonyuk*, 120 F.4th at 1046. And Judge VanDyke observed that Louisiana's law "was enacted as part of Louisiana's notorious Black Codes that sought to deprive African Americans of their rights, including the right to keep and bear arms." Pet.App.187a. In short, neither law's purpose remotely resembled the "why" of Hawaii's law: a general reduction in gun violence.

Beyond missing the laws' purpose, the Ninth Circuit also split with the Second Circuit on whether the relevant laws even covered the same acts. The Second Circuit found that both Louisiana's and New Jersey's law only prohibited carrying firearms on private lands *not open to the public*. *Antonyuk*, 120 F.4th at 1046. But that prohibition is materially different from restricting *public* carrying of firearms. *Id*. at 1047.

Finally, contrary to the Second Circuit and Judge VanDyke's dissental and the dictates of this Court, the Ninth Circuit did not consider that these two laws, passed nearly a century apart, could be anything but idiosyncratic "outliers that our founders would never have accepted." *Bruen*, 597 U.S. at 30 (cleaned up); PetApp.182a; *Antonyuk*, 120 F.4th at 1044.

The Ninth Circuit just ignored these issues. Pet.App.61a-62a. After skipping most of the inquiry *Bruen* demanded, the court was able to not only find

that the historical regulations are "relevantly similar" to Hawaii's law, but that they were "dead ringers." Pet.App.62a. With this, the court found an established historical tradition directly at odds with the text of the Second Amendment and upheld the law. Pet.App.62a.

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Despite relying on the same precedent, the same historical regulations, and interpreting nearly identical laws as the Second Circuit, the Ninth Circuit reached the wrong conclusion. Even if a "historical twin" isn't required, the historical regulations the Ninth Circuit relied on aren't even distant relatives to relevantly similar analogues.

The Court should reject this latest attempt to give a critical constitutional right "second-class" status. *McDonald*, 561 U.S. at 780. Without swift correction, the Ninth Circuit's decision will muddle the clear Second Amendment standards this Court has adopted. And its decision will encourage other states to erode Americans' essential right to keep and bear arms.

II. The Ninth Circuit's "sensitive places" analysis deepens an existing split on the relevant historical era and improperly applied *Bruen*'s analogical inquiry.

On top of creating a split on the default rule, the Ninth Circuit deepened an existing split over the relevant era (*i.e.*, Founding or Reconstruction) to rely on for *Bruen*'s historical inquiry, *see* Pet.20-27, an independent basis for this Court to grant Wolford's petition. Rather than retreading that ground, Amici

States instead focus on the analogical inquiry the Ninth Circuit *should* have conducted below.

After *Bruen*, courts must determine whether "the Second Amendment's plain text covers an individual's conduct." 597 U.S. at 17. If it does, "the Constitution presumptively protects that conduct." *Id.* And here, the Amendment's plain text "protects [Wolford's] proposed course of conduct—carrying handguns publicly for self-defense." *Id.* at 32. To justify its sensitive-place restrictions, Hawaii must show that its regulations are "consistent with this Nation's historical tradition of firearm regulation"—only then "may a court conclude that [Wolford's proposed] conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* at 17 (quoting *Konigsberg* v. *State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

Bruen's historical inquiry varies based on whether a challenged regulation addresses a longstanding or new "societal problem." *Id.* at 27-28. Whether the "societal problem" is old or new, courts must compare modern regulations with similar historical regulations. the only difference is the fit necessary to show that a modern regulation aligns with our Nation's historical tradition of firearm regulation. *See id.* When a modern regulation addresses a longstanding issue that traces back to the Founding era or earlier, the modern and historical regulations should be a close fit. *See id.* at 26-27 (in "straightforward" cases, the "lack of … distinctly similar historical regulation[s]" addressing the same problem or regulations addressing

it "through materially different means" is evidence that the modern regulation is unconstitutional).

When evaluating modern regulations addressing new problems "that were unimaginable at the founding," courts must employ "a more nuanced approach." *See id.* at 27-28. In these cases, the fit need not be so close: the government must identify a "well-established and representative historical *analogue*, not a historical *twin*." *Id.* at 30. *Bruen*'s analogical inquiry requires courts to determine that a modern regulation is "relevantly similar" to a proposed historical analogue—that is, that the "modern and historical regulations impose a *comparable burden* on the right of armed self-defense and … [are] *comparably justified*." *Id.* at 29 (emphasis added). Whether the modern regulation addresses longstanding or new societal problems, discerning "the *original meaning* of the Constitution" remains the guiding light of *Bruen*'s analogical inquiry. *See id.* at 81 (Barrett, J., concurring); *see also id.* at 83 ("[T]oday's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights.").

Bruen assumed that "it [was] settled" that certain locations—including schools, government buildings, and polling places—were "sensitive places" where carrying a firearm "could be prohibited consistent with the Second Amendment." *Id.* at 30. But *Bruen*'s list of "settled" sensitive places *omits* public parks, beaches, and bars and restaurants serving alcohol, so Hawaii must show that its modern sensitive-place regulations are sufficiently analogous to the locations *Bruen* and *Heller* assumed were settled. And *Bruen*'s (and

Heller's) omission of these locations from the list of "settled" sensitive places strongly suggests that they haven't historically been viewed as sensitive places.

Bruen cautioned courts "against giving postenactment history more weight than it can rightly bear." *Id.* at 35. A regular course of conduct *can* sometimes "liquidate and settle the meaning of disputed or indeterminate terms and phrases in the Constitution," *id.* (cleaned up), but "postratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text," *id.* at 36 (quoting *Heller* v. *District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)); *see also* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13-14 (2019).

Viewed through the proper lens—both in timing and fit—Hawaii failed to carry its burden to show that its restrictions on public carry in public parks and beaches and bars and restaurants serving alcohol are "part of the historical tradition that delimits the outer bounds of the right to keep and bear arms," *Bruen*, 597 U.S. at 19. Yet "the panel distorted *Bruen*'s text-history-and-tradition analysis" by "extracting overbroad principles from strained analogies to unrelated laws" and blessed Hawaii's laws. Pet.App.171a.

A. Hawaii's late-nineteenth century analogues fail to show a historical tradition of public-carry bans in public parks and beaches.

1. *Heller* found that the Second Amendment, ratified in 1791, "codified a preexisting right" that is "rooted in 'the natural right of resistance and self-

preservation.'" *Bruen*, 597 U.S. at 71 (Alito, J., concurring) (quoting *Heller*, 554 U.S. at 594). So historical evidence close in time to the Amendment's adoption provides the most relevant insight into its original meaning. *Id.* at 36 (quoting *Heller*, 554 U.S. at 614). Yet Hawaii offers *only limited evidence* of historical regulations of public parks between 1791 and 1868. Because Hawaii bears the burden to rebut Wolford's constitutional right to bear arms in public, including at public parks and beaches, its failure to produce adequate evidence of relevantly similar laws during this period strongly suggests no such tradition existed. *Cf. id.* at 60 (not courts' burden "to sift the historical materials for evidence to sustain" the regulation).

Hawaii only pointed to *two* pre-1868 local ordinances banning public carry in two New York public parks—Central Park in 1857 and Prospect Park in 1866. Pet.App.33a-34a. And it points to *one* 1868 Pennsylvania state law prohibiting public carry in Fairmont Park. Pet.App.34a But "the bare existence of [three] localized restrictions" between 1791 and 1868 "cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry." *Bruen*, 597 U.S. at 67. Hawaii's failure to point to more than three local restrictions during this time "should be dispositive." Pet.App.193a.

2. Even if Reconstruction-era historical evidence is as probative of the scope of the Second Amendment's right to bear arms as Founding-era evidence,[3] Hawaii

[3] This is a shaky proposition at best. *Bruen*, 597 U.S. at 36 (explaining that "because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of

still failed to show a historical tradition of relevantly similar public-park restrictions.[4] *Bruen* directs courts to canvas the period from the founding through Reconstruction for similar regulations, always with an eye to "what the Founders understood the Second Amendment to mean." *Atkinson* v. *Garland*, 70 F.4th 1018, 1020 (7th Cir. 2023). Because public parks have existed since the founding, *see Koons* v. *Platkin*, 673 F.Supp.3d 515 639-42 (D.N.J. 2023) (tracing historical evidence for parks, or their analogues, to the establishment of Boston Common in 1634), Hawaii must point to "distinctly similar regulation[s] addressing *that* problem." *Atkinson*, 70 F.4th at 1021 (emphasis added); *see also* Pet.App.193a ("When the same locations that existed at the Founding still exist today, and there is *no* historical tradition of banning carry in those locations at the Founding, that lack of historical regulation must count for something.").

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the Second Amendment, they do not provide as much insight into its original meaning as earlier sources'" (quoting *Heller*, 554 U.S. at 614)); *see also Atkinson* v. *Garland*, 70 F.4th 1018, 1020 (7th Cir. 2023) ("[T]he pertinent question … is what the Founders understood the Second Amendment to mean" and noting that *Bruen* "cautioned against giving too much weight to laws passed [long] before or after the Founding.").

[4] To sidestep this problem, the panel considered when historical "parks"—which "existed well before the Founding" and had no firearm bans during that time, *see* Pet.App.194—began to resemble "modern parks." Pet.App.33a. But that "historical detour" is highly "suspect." Pet.App.194. While parks may have been "use[d] … differently," there is ample evidence dating back to Boston Common in 1634 that parks have long been used for recreational purposes. Pet.App.194. This Court should reject the panel's "feint to ignore the lack of [analogous] historical regulations." Pet.App.193.

Hawaii's post-1868 evidence fails to establish a historical tradition of "relevantly similar regulations for at least two reasons. *First*, Hawaii's evidence isn't entitled to much weight because nearly all of the local ordinances and state laws it identifies were enacted well after Reconstruction. It identified only a handful of local ordinances passed in the decade after 1868—Golden Gate and Buena Vista Parks (San Francisco, 1872), and all public parks in Chicago (1872), South Park, Illinois (1875), and Phoenixville, Pennsylvania (1878). Pet.App.34a. Beyond those laws, Hawaii identified 19 more local ordinances enacted between 1881 and 1899. *See* Pet.App.34a. But three pre-1868 and five more pre-1878 local ordinances are insufficient to show a national historical tradition of regulating firearms in public parks. *See Bruen*, 597 U.S. at 27-28. And the 19 local ordinances between 1881 and 1899 fare no better—indeed, this court rejected "freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights." *Bruen*, 597 U.S. at 83 (Barrett, J., concurring); *see also id.* at 35.

Second, many of these state laws and local ordinances either didn't impose a comparable burden on the public-carry right or weren't comparably justified. *See Bruen*, 597 U.S. at 29. Start with the burden. Some restrictions allowed citizens to carry firearms in parks if they obtained permission beforehand. *See, e.g.*, 2-Add-389 (1891 Springfield, Massachusetts ordinance banning public carry in public parks "except with prior consent of the Board"); 2-Add-417 (1895 Michigan law banning public carry in Detroit parks "without the permission of said commissioners"); 2-Add-423–24 (1896 Rochester, New York ordinance

banning public carry in parks "without the consent of [the] Board").[5] So these restrictions imposed less of burden than §134-9.1(a)(9)'s complete ban.

Consider the justifications. Many of the other restrictions were justified on different grounds than the public safety interest that §134-9.1(a)(9) targets. For example, some restrictions appear tailored to prevent unlawful hunting in public parks or to protect wildlife. *See, e.g.*, 1-Add-300 (1881 St. Louis ordinance) (section entitled "protection of birds" prohibits the use or possession of "air gun[s] or other contrivance[s] for ejecting" certain items capable of inflicting injury); 2-Add-379 (1888 St. Paul, Minnesota ordinance) (shall not "carry firearms or shoot birds in any Park" or "kill any animal kept by the direction of the Board"); 2-Add-398 (1893 Pittsburgh ordinance) (shall not "carry firearms," "shoot or … set snares for birds, rabbits, squirrels, or fish"); 2-Add-400 (1893 Wilmington, Delaware ordinance) (shall not "carry fire-arms or shoot birds or other animals within the Park").

Other restrictions were tailored to preserving the physical condition of the public parks. *See, e.g.*, 2-Add-398 (1893 Pittsburgh ordinance) (ordinance providing for the "control, maintenance, supervision and preservation of the public parks"); 2-Add-368 (1878 Phoenixville ordinance) (prohibition appears alongside restrictions that prohibit defacing trees, plants, property, signs, and that otherwise preserve or protect the

[5] Citations to "Add" are to the addendum included in Respondent's opening brief before the Ninth Circuit. Addendum, Dkt. 6-2, *Wolford, et al.* v. *Lopez*, No. 23-16164 (9th Cir. Oct. 5, 2023).

park's physical condition). These distinct justifications diminish the weight of Hawaii's evidence.

All told, Hawaii identifies three arguably similar pre-1868 restrictions that *may* help clarify the Second Amendment's original meaning. *Atkinson*, 70 F.4th at 1020; *but see* Pet.App.195a ("Despite the undeniable presence of recreational-use parks at the Founding," the panel failed to provide "any Founding-era laws prohibiting firearms in those places"—"their failure to do so should be dispositive."). But Hawaii's remaining evidence warrants little weight in *Bruen*'s inquiry, so the Ninth Circuit should have held that Hawaii failed to meet its burden. This Court should grant the petition and demonstrate the proper inquiry.

B. Hawaii's historical evidence fails to show a historical tradition of public-carry bans in bars and restaurants serving alcohol.

1. Taverns and firearms have existed since the Founding, Pet.App.191—Hawaii even identified several pre-Founding laws that regulated militia members and taverns. 1-Add-90 (1746 New Jersey law); 1-Add-97 (1756 Delaware law); 1-Add-112 (1756 Maryland law); 1-Add-151, -154 (1780 Pennsylvania law). So the panel should have required a close fit between §134-9.1(a)(4) and Hawaii's proposed analogues. *Bruen*, 597 U.S. at 26-27; *see also* Pet.App.193 ("lack of historical regulations must count for something").

2. Hawaii identified some similar historical regulations, but it still failed to show a *national* historical tradition of regulating public-carry in bars or restaurants that serve alcohol. *See Bruen*, 597 U.S. at 67. To start, Hawaii identified three state laws, enacted

between 1853 and 1890 in Louisiana and New Mexico, banning firearms in places where alcohol was sold—restrictions that largely mirror §134-9.1(a)(4). Even if these laws are "relevantly similar" to §134-9.1(a)(4)—and they at least facially appear to be[6]—three local restrictions cannot, on their own, "overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry." *Id.*

To bolster its deficient historical record, Hawaii proposed four more categories of historical analogues, but each category fails to support a tradition of regulation similar to §134-9.1(a)(4). *First*, Hawaii identified four state laws that it claimed broadly restricted public carry in places where people regularly assembled for commercial or social purposes. Those four state laws—passed between 1817 and 1889—banned firearms in ballrooms, social gatherings, or similar places of public assembly. 1-Add-316 (1817 New Orleans law); 1-Add-325 (1870 Texas law); 1-Add-327 (1875 Missouri law); 1-Add-333 (1889 Arizona law). Only the New Orleans law pre-dates Reconstruction. And the "panel's principle of banning firearms in 'crowded places' … runs squarely into *Bruen*'s rejection of Manhattan's designation as a sensitive place 'simply because it is crowded and protected'" by the police. Pet.App.193a (citation omitted).

Second, Hawaii leaned on several laws regulating the use of and access to alcohol by members of the

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[6] 1-Add-262 (1853 New Orleans law prohibiting firearms in "Ball or Fandango … or room adjoining said ball where Liquors are sold"); 1-Add-265 (1879 New Orleans ordinance banning firearms in taverns); 1-Add-253 (1890 Oklahoma territorial law banning firearms in "any place where intoxicating liquors are sold").

militia. Some of these laws forbid the sale of alcohol to members of the militia or prohibited militia members from getting drunk. *See, e.g.*, 1-Add-90 (1746 New Jersey law forbidding sale of "any strong Liquor" to militia members); 1-Add-112 (1756 Maryland law prohibiting militia members from getting "drunk on any Muster-day"). Others prohibited setting meeting locations near taverns or other locations that sold alcohol. *See, e.g.*, 1-Add-97 (1756 Delaware law). And others excluded "common drunkards" from the militia. *See, e.g.*, 1-Add-191 (1837 Massachusetts law providing measures to exclude "common drunkards" from the militia). The most that can be said about these laws is that they support a historical tradition of regulating the use of or access to alcohol by militia members. But they don't support the existence of a historical tradition of regulating members of the public from carrying firearms in bars and restaurants, without regard for whether they are consuming alcohol. Pet.App.192a-193a (quoting *United States* v. *Connelly*, 117 F.4th 269, 282 (5th Cir. 2024) (analogues "support, at most, a ban on carrying firearms while an individual is *presently* under the influence")).

Third, Hawaii identified other state laws that regulated the interaction of firearms and alcohol. But these other laws are not remotely analogous to §134-9.1(a)(4). Hawaii pointed to an 1851 Chicago law and an 1858 St. Paul ordinance that forbid granting liquor retailers permits to keep or sell gunpowder. *See* 1-Add-237 (Chicago law); 1-Add-242 (St. Paul ordinance).

Regulating permits for liquor retailers to store gunpowder is not similar *at all* to §134-9.1(a)(4).

Fourth, Hawaii identified state laws prohibiting public carry *while intoxicated* and selling firearms to *intoxicated persons*. *See* 1-Add-244 (1867 Kansas law prohibiting carry of firearms while intoxicated); 1-Add-246 (1883 Missouri law) (same); 1-Add-248 (1883 Wisconsin law) (same); 1-Add-255 (1878 Mississippi law banning sale of firearms to intoxicated persons). But §134-9.1(a)(4) completely restricts the public-carry right in bars and restaurants that serve alcohol, even if the person isn't consuming alcohol. so §134-9.1(a)(4) doesn't impose a comparable burden to Hawaii's proposed analogues. *Bruen*, 597 U.S. at 29.

All told, Hawaii identified three arguably similar state laws, but the remaining laws it relies on either imposed different burdens or were justified on different grounds. When states address an issue that has persisted since the Founding, like the public carry of firearms in bars and restaurants serving alcohol, three state laws of questionable relevance fail to establish the *national* historical tradition Hawaii needs to meet its burden. *Bruen*, 597 U.S. at 26-27; *see also* Pet.App.193a ("[P]anel stretched to draw principles from unrelated laws that simply do not support its stated regulatory principle."). Given the absence of arguably similar restrictions, "panel should not have felt licensed to extract principles from these unrelated laws in the first place." Pet.App.193a.

* * *

Bruen explained that "when it comes to interpreting the Constitution, not all history is created equal."

597 U.S. at 34. Rather, "[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*." *Id.* (quoting *Heller*, 554 U.S. at 634-35). So evidence closer in time to the Second Amendment's adoption is most relevant for understanding the Amendment's scope. Of course, evidence of historical regulations through the end of the nineteenth century *could* be relevant, but only to the extent that it confirms what prior evidence "already … established." *Id.* at 37 (quoting *Gamble* v. *United States*, 139 S. Ct. 1960, 1976 (2019)).

The Second Amendment protects the right to possess handguns—at home and in public—for self-defense. *McDonald*, 561 U.S. at 767; *Bruen*, 597 U.S. at 70-71. With few exceptions, Hawaii relies on out-of-date historical analogues passed well after Reconstruction—"surely too slender a reed on which to hang a historical tradition of restricting the right to public carry" in the locations challenged here. *See Bruen*, 597 U.S. at 58. Even if Reconstruction-era statutes and local ordinances can provide probative evidence of the Second Amendment's original meaning, Hawaii's evidence *still fails* to identify relevantly similar historical analogues for Act 52's sensitive-place restrictions discussed above. Sweeping aside Hawaii's irrelevant evidence leaves little remaining historical support for Act 52's sensitive-place restrictions, but the Ninth Circuit instead "bless[ed] Hawaii's "creative" attempt to strip away the public carry right *Bruen* secured "on 96.4% of the publicly accessible land in Maui County." Pet.App.171a, 174a.

III. Given the lower courts' active resistance to *Bruen*, this Court's review is sorely needed.

Bruen reassured law-abiding and licensed gun owners that the Second Amendment was no longer a "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." 597 U.S. at 70 (citation omitted).

But lower courts have largely failed to follow through on that promise, resorting to manipulative en banc practices, *see, e.g.*, *Duncan* v. *Bonta*, No. 23-55805, 2025 WL 866011, at *41 (9th Cir. Mar. 20, 2025) (Bumatay, J., dissenting) (arguing that original en banc panel's decision to retake possession of the case—despite a new district court decision under new Supreme Court precedent, eight new judges, and five new senior judges on the en banc panel—violated 28 U.S.C. §46(c)), ahistorical interpretations of covered "arms," *see, e.g.*, *Bevis*, 85 F.4th at 1220-21, 1222 (Brennan, J., dissenting) (finding AR-15s weren't "Arms" by relying on abrogated precedent and holding that *Heller* limited covered "Arms" to "those not 'dedicated to military use'" (citation omitted)), and improper calibration of the level of generality for *Bruen*'s analogical inquiry, *see, e.g.*, Pet.App.197a ("panel extracted very broad principles from the historical record that could support the constitutionality of almost any firearms restriction"). Each of these ploys chips away at the scope of citizens' Second Amendment rights, and if unchecked by this Court, *Bruen*'s reassurance will be little more than an empty promise.

CONCLUSION

This Court should grant the petition.

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