

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

**BRIEF OF *AMICUS CURIAE*
THE CLAREMONT INSTITUTE'S CENTER
FOR CONSTITUTIONAL JURISPRUDENCE
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE¹

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. The Center advances this mission through strategic litigation and the filing of amicus curiae briefs in cases of constitutional significance, including cases involving the Second Amendment right to keep and bear arms.

The Center has previously participated in nearly every major recent Second Amendment case before this Court, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022). The Center has a particular interest in this case because the Ninth Circuit’s decision below not only defies this Court’s precedents but fundamentally misunderstands the nature of the right to keep and bear arms as a pre-existing natural right—one that cannot be negated by a state-imposed presumption against its exercise on private property held open to the public.

SUMMARY OF ARGUMENT

The Second Amendment does not confer a discretionary benefit that States may withhold or condition

¹ In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

on private permission. Rather, it “codified a pre-existing right” of armed self-defense that follows the individual as he goes about his life. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 748 (2010). For centuries, Anglo-American law has understood the right of self-preservation as a natural, pre-political liberty and has treated the right to “bear” arms as the right to carry them for that purpose in public as well as in the home. The Founding generation thus took for granted that the Constitution secures, rather than creates, the right to keep and bear arms, and that government may not invert the hierarchy by making that right dependent on the permission of others.

Hawaii’s private-property “default rule,” Haw. Rev. Stat. § 134-9.5, repudiates that understanding. At common law, proprietors who opened their premises to the public conferred an implied license to enter, subject to the owner’s case-by-case right to exclude. Hawaii flips that baseline for one class of visitors alone: those seeking to exercise a federal constitutional right. It presumptively extinguishes the right to bear arms on every parcel of private property open to the public unless the proprietor posts an invitation or personally grants express permission.

As the Ninth Circuit acknowledged, this “flips the default rule on all private property,” and, in practice, “many property owners will not post signs of any sort or give specialized permission.” *Wolford v. Lopez*, 116 F.4th 959, 974, 993 (9th Cir. 2024). The predictable result – illustrated by the record from Maui County, where 96.4% of publicly accessible land is presumptively or categorically off-limits – is *de facto* disarmament across most public and quasi-public spaces and

the confinement of public carry to bare passage along streets and sidewalks. That is the very “Manhattan-as-sensitive-place” regime *Bruen* condemned. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 31 (2022).

The Ninth Circuit attempted to justify this inversion by invoking *Bruen*’s text-and-history test, but it did so only by draining that test of its content. Rather than “affirmatively prov[ing]” a representative national tradition, 597 U.S. at 24, the court relied on two statutes that are constitutionally and historically disqualified: an 1865 Louisiana Black Code aimed at disarming freedmen, and a 1771 New Jersey anti-poaching law addressed to hunting trespass on enclosed land. Both are outliers. The former is part of the very pattern of racial oppression the Fourteenth Amendment was adopted to eradicate; the latter regulates long-gun poaching, not the peaceable carriage of sidearms by patrons and invitees in places open to the public. Treating such enactments as the “tradition” that supports Hawaii’s default rule ignores *Bruen*’s insistence that isolated, late, and discriminatory measures cannot define the scope of an enumerated right. It has also produced doctrinal and geographic incoherence: the Ninth Circuit struck down California’s signage-only version of the same default rule while upholding Hawaii’s, and it placed itself in direct conflict with the Second and Third Circuits, which have invalidated materially identical private-property defaults.

The panel then compounded its error by expanding the “sensitive places” doctrine far beyond the narrow, historically grounded categories this Court has recog-

nized. *Bruen* identified a “few” such places—legislative assemblies, polling places, courthouses, and schools—and warned that extending the label to crowded urban locations would “eviscerate” the general right to carry. 597 U.S. at 30–31. Yet the Ninth Circuit upheld Hawaii’s designation of parks, beaches, all places serving alcohol, a wide range of “places of public amusement,” and their surrounding parking areas as sensitive, based on a thin scattering of late-nineteenth-century ordinances and event-specific restrictions on balls, circuses, and exhibitions. Those sources do not establish a founding-era tradition of disarming the citizenry in ordinary civic spaces. To elevate them into a roving license to prohibit carry wherever people gather is to adopt exactly the loose analogical reasoning and “interest-balancing” *Heller*, *McDonald*, and *Bruen* forbid.

Hawaii’s final refuge—that its regime reflects the “preferences” of property owners—is equally untenable. Section 134-9.5 does not vindicate private autonomy; it replaces it. The right to exclude is exercised by the owner on concrete facts; it is not lawfully exercised by the State in advance for every owner in the jurisdiction. A proprietor who welcomes armed patrons must now overcome a legislatively imposed presumption of disarmament. That is state control of property, not its protection.

Even if the Court were to momentarily set aside *Bruen*’s controlling framework and revert to traditional means-end scrutiny—which it should not—Hawaii’s regime would still fail. A law that criminalizes public carry across most of the State, that burdens vast amounts of constitutionally protected conduct, and that is supported by no particularized evidence

that licensed carriers pose a unique risk in ordinary civic spaces, could not be deemed sufficiently tailored under any meaningful form of scrutiny. Every less restrictive alternative remains available to Hawaii; it has simply chosen the most restrictive one.

This Court should reverse. It should reaffirm that States may not hollow out a natural right by rewriting common-law presumptions, that Reconstruction-era Black Codes and topic-specific game laws cannot be stitched into a national tradition, and that the sensitive-places doctrine remains a limited, historically grounded exception, not a tool for rendering ordinary civic life a gun-free zone.

ARGUMENT

I. The Right to Bear Arms Is a Codification of the Natural Right to Self-Defense that Follows the Individual.

This Court has held, consistently, that the Second Amendment protects an “individual right to keep and bear arms for the purpose of self-defense.” *McDonald v. City of Chicago*, 561 U.S. 742, 748 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008). This right is not a grant from the government but a codification of a pre-existing natural right. *Heller*, 554 U.S. at 592 (“it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right”).

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A. The Founding Generation Understood Self-Defense as the Primary Law of Nature.

The Founders did not originate the concept of a right to bear arms in self-defense; they inherited it as a necessary condition of a free society. The Second Amendment reflects a philosophy that views the right to self-defense not as a privilege bestowed by the state, but as the “fundamental, sacred, and unalterable law of self-preservation.” John Locke, *Second Treatise of Civil Government* § 149 (1690). This Court has already recognized that armed self-defense is a fundamental natural right and that the Second Amendment “codified a pre-existing right,” not one “granted” by Congress or the ratifying States. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 748 (2010); see also *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). *Bruen* confirms the same understanding, holding that the Second Amendment’s “plain text” protects the right of “ordinary, law-abiding citizens” to carry handguns publicly for self-defense and that the State may restrict that right only by reference to a historical tradition of regulation. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 24, 29–31 (2022).

This understanding finds its roots in classical antiquity, from which the Framers drew heavy inspiration. Aristotle, for example, recounted how the tyrant Pisistratus took over Athens in the sixth century B.C. by disarming the people through trickery. Aristotle, *The Athenian Constitution* ch. 15 (Sir Frederic G. Kenyon trans., 1901). Aristotle recognized that “arms bearing” was an essential aspect of each citizen’s proper role. Stephen P. Halbrook, *That Every Man Be*

Armed 11 (1994). Cicero likewise argued that the right to use force in self-defense is a dictate of natural law: “[Natural law lays] down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right.” Marcus Tullius Cicero, *Selected Speeches of Cicero* 222, 234 (Michael Grant ed. & trans., 1969). Hugo Grotius similarly explained that “[w]hen our lives are threatened with immediate danger, it is lawful to kill the aggressor.” Hugo Grotius, *The Rights of War and Peace* 76–77, 83 (A.C. Campbell trans., 1901). These writers all presupposed what the same philosophy embedded in the Second Amendment: that self-preservation is prior to positive law and that the right to employ arms for that purpose is inherent. See David Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 *BYU J. Pub. Law* 43, 58–92 (2007–2008).

The great modern theorists most influential for the Founding generation expressly treated self-defense as a pre-political right. Locke described the natural right of self-defense as the “fundamental, sacred, and unalterable law of self-preservation” and emphasized that the right to use force in defense of one’s life is a necessity, not a matter of grace. John Locke, *Second Treatise of Civil Government* §§ 149, 207 (1690). Thomas Hobbes likewise recognized that the right to self-defense is so basic that “[a] covenant not to defend my selfe from force, by force, is always voyd.” Thomas Hobbes, *Leviathan* 98 (Richard Tuck ed., 1991).

This natural right was cemented in the Anglo-American legal tradition through the hard lessons of history. As *Heller* recognized, the Founders were

acutely aware of the abuses of the Stuart Kings in seventeenth-century England, who “succeeded in using select militias loyal to them to suppress political dissidents, in part by disarming their opponents.” *Heller*, 554 U.S. at 592–93. The 1671 Game Act and subsequent royal disarmaments of regions hostile to James II were notorious examples. *Id.* at 592–93. It was in response to these abuses that the 1689 English Bill of Rights explicitly codified the right of subjects to have arms for their defense. *Id.* at 593. By 1765, Blackstone could therefore describe the right to keep and bear arms as “one of the fundamental rights of Englishmen,” calling it “the natural right of resistance and self-preservation.” 1 William Blackstone, *Commentaries on the Laws of England* 139–40 (1765); see also *Heller*, 554 U.S. at 594. These principles were not unique to England; “Blackstone’s assessment was shared by the American colonists.” *Id.*; see *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2013).

The Founding generation thus understood the right to keep and bear arms as a natural right that predated and limited government. This Court in *Cruikshank* captured that understanding succinctly: “[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.” 92 U.S. at 553. *Heller* and *McDonald* expressly reaffirmed that principle, holding that the Second Amendment—like the First and Fourth—“codified a pre-existing right.” *Heller*, 554 U.S. at 592; *McDonald*, 561 U.S. at 754. *Bruen* then applied that same premise to public carry, recognizing that “the right to ‘bear’ arms” means the right to “carry” them for self-defense beyond the home, and that “ordinary, law-abiding citizens” have a presump-

tive right to do so absent a historically grounded exception. 597 U.S. at 29–31 (quoting *Heller*, 554 U.S. at 584–85).

The debates over ratification confirm that the Framers and ratifiers regarded this natural right of armed self-defense as self-evident and in need of express protection. The absence of an explicit right to keep and bear arms in the original Constitution was a point of contention at several state ratifying conventions. There is no doubt that the Founders also believed in a natural right to armed self-defense. Samuel Adams proposed an amendment to the Massachusetts ratification resolution declaring that “Congress should not infringe the ... right of peaceable citizens to bear arms.” Letter from Jeremy Belknap to Ebenezer Hazard, reprinted in 7 *The Documentary History of the Ratification of the Constitution, Massachusetts* No. 4, at 1583 (John P. Kaminski *et al.* eds., 2009).

A number of advocates for the Constitution assured skeptics that Congress would have no authority to interfere with the “rights of bearing arms for defence.” Alexander White, *Winchester Virginia Gazette*, Feb. 22, 1788, reprinted in 8 *The Documentary History of the Ratification of the Constitution, Virginia* No. 1, at 404. Nonetheless, a number of state conventions and dissenting minorities proposed amendments specifically to recognize the right to bear arms for defense. See, e.g., Convention Debates, reprinted in 2 *The Documentary History of the Ratification of the Constitution, Pennsylvania*, at 597–98; The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents, reprinted in 2 *id.* at 623–24; Convention Debates, reprinted in 10 *The Documentary History of the*

Ratification of the Constitution, Virginia No. 3, at 1553; North Carolina Convention Amendments, reprinted in 18 *The Documentary History of the Ratification of the Constitution*, Commentaries on the Constitution No. 6, at 316; Declaration of Rights and Form of Ratification, Poughkeepsie Country Journal, reprinted in 18 *id.* at 298. This general unease with how the new federal government might exercise power led directly to the adoption of the Bill of Rights, including the Second Amendment’s textual guarantee.

Leading early commentators were explicit about the connection between this natural right and constitutional structure. James Wilson tied the right to “carry” arms directly to the individual’s right of self-defense. See 2 *Collected Works of James Wilson* 1142 & n.x (K. Hall & M. Hall eds., 2007) (citing Pa. Const. art. IX, § 21 (1790)); *Heller*, 554 U.S. at 585. Justice Story later described “the right of the citizens to keep and bear arms” as “the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers.” 3 Joseph Story, *Commentaries on the Constitution* § 1890 (1833). Indeed, the early state constitutions of Pennsylvania, Vermont, Indiana, Mississippi, Connecticut, Alabama, Missouri, and Ohio explicitly protect the right to bear arms for this purpose.² In short, for the

² *Heller*, 554 U.S. at 585 and n.8, 602, cites the early state constitutional provisions confirming that the right to bear arms was universally understood as an individual right of self-defense. Pennsylvania’s 1776 Declaration of Rights provided that “the people have a right to bear arms for the defence of themselves and the state.” Vermont’s Declaration of Rights stated that “the people have a right to bear arms for the defence of themselves and the State.” Kentucky’s 1792 Constitution guaranteed that “the right of the citizens to bear arms in defence of themselves

Founders the right to keep and bear arms was both a manifestation of the natural law of self-preservation and a structural safeguard against tyranny.

Because this right is inherent to the human person and grounded in the natural law of self-preservation, it cannot be spatially limited to the interior of one's home or to government-owned streets. The "fundamental" and "sacred" nature of the right demands that it follow the individual wherever he confronts "the dangers of the world," including in ordinary places of public accommodation and on private property held open to the public. See *Heller*, 554 U.S. at 659. A regime that presumes this pre-existing right is extinguished whenever a citizen steps from a public sidewalk onto privately owned premises held open to the public is therefore not a mere regulation at the margins of the right; it is a repudiation of the very natural-rights understanding the Founders codified.

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and the State shall not be questioned." Ohio's 1802 Constitution declared that "the people have a right to bear arms for the defence of themselves and the State." Indiana's 1816 Constitution provided that "the people have a right to bear arms for the defence of themselves and the State." Mississippi's 1817 Constitution stated that "every citizen has a right to bear arms, in defence of himself and the State." Connecticut's 1818 Constitution provided that "every citizen has a right to bear arms in defence of himself and the state." Alabama's 1819 Constitution provided that "every citizen has a right to bear arms in defence of himself and the State." Missouri's 1820 Constitution stated that the people's "right to bear arms in defence of themselves and of the State cannot be questioned."

B. Hawaii’s “Default Rule” Extinguishes the Natural Right by Presuming Non-Exercise.

Hawaii’s Haw. Rev. Stat. § 134-9.5 flips the long-settled common law baseline for peaceable entrants on property held open to the public. Where the Founding-era rule recognized an implied license to enter businesses and other places open to the public—and left it to individual owners to exclude particular conduct—the State now presumes the right to bear arms does not exist on any private property unless the owner re-creates it by express permission. That inversion treats the Second Amendment as a revocable privilege administered by private gatekeepers, not a constitutional guarantee that “follows the person.” See *Heller*, 554 U.S. at 592; cf. 3 Blackstone, *Commentaries* *212. The Ninth Circuit acknowledged that Hawaii “flips the default rule on all private property,” *Wolford v. Lopez*, 116 F.4th 959, 971 (9th Cir. 2024), yet allowed it to stand, even as it admitted the practical reality that “many property owners will not post signs of any sort or give specialized permission.” *Id.* at 993. The result is broad *de facto* disarmament in ordinary places of public accommodation.

That outcome is no abstraction. Under Hawaii’s regime, “law-abiding and licensed citizens ... can now be banned from carrying firearms in most public and private spaces,” with the new defaults “prohibit[ing], presumptively or outright, the carrying of a handgun on 96.4% of the publicly accessible land in Maui County.” *Wolford v. Lopez*, 125 F.4th 1230, 1235 (9th Cir. 2025) (VanDyke, J., dissenting from denial of rehearing en

banc). As Judge VanDyke explained, that is functionally the “Manhattan as sensitive place” theory *Bruen* rejected. *See Bruen*, 597 U.S. at 31.

This Court has already rejected interest-balancing that downgrades enumerated liberties. *Heller* foreclosed rational basis and “intermediate scrutiny” glosses that allow governments to dilute a textually protected right. *Heller*, 554 U.S. at 628 n.27. As discussed above in § I.A, the Second Amendment codifies a *pre-existing* right that cannot be subjected to ad hoc carve-outs or balancing tests. Hawaii’s default rule conflicts with those fundamentals in two independent ways. First, it imposes a presumption against the exercise of a constitutional right in the very places ordinary people move about and transact daily life, thereby burdening public carry more severely than any “time, place, and manner” analogue this Court has ever blessed. Second, it commandeers property owners as *de facto* licensing officials—conditioning others’ constitutional exercise on an owner’s prior, individualized permission—when the Constitution itself sets the baseline: peaceable carry in public and quasi-public places is protected unless the State can demonstrate a historically grounded categorical exception. *Bruen*, 597 U.S. at 24–31.

II. The Ninth Circuit’s Reliance on Discriminatory and Inapposite Laws Cannot Satisfy *Bruen*.

Bruen requires the government to “affirmatively prove” that its regulation fits within the Nation’s historical tradition of firearm regulation. 597 U.S. at 24. That standard is exacting. The Court must discount isolated, late, anomalous, or purposefully discriminatory enactments that contradict the “overwhelming

weight” of historical evidence. *Id.* at 66. Despite that clear command, the Ninth Circuit grounded Hawaii’s unprecedented private-property default rule in two enactments that do not remotely resemble a representative national tradition: a Reconstruction-era Louisiana Black Code and a colonial anti-poaching statute from New Jersey. Neither can bear the constitutional weight the panel placed upon them.

The 1865 Louisiana law is not merely an “outlier.” It is part of a corpus of statutes this Court has already recognized as instruments of racial domination—laws enacted by unreconstructed Confederate states to strip newly freed Black citizens of the civil rights guaranteed to them by the Thirteenth and Fourteenth Amendments. *McDonald*, 561 U.S. at 771; *Heller*, 554 U.S. at 614. The 39th Congress viewed these statutes not as valid exercises of the police power, but as “odious” violations of “fundamental rights” that necessitated federal intervention. *Id.* at 30–31. To cite a statute that the Fourteenth Amendment was ratified to *nullify* as proof of the Amendment’s original scope is logically incoherent. It treats the “poison” of the Reconstruction era as the “cure.”

Justice Kavanaugh recently underscored the constitutional irrelevance of such enactments, explaining that discriminatory measures from this era are “probative of what the Constitution does *not* mean.” *United States v. Rahimi*, 602 U.S. 680, 720 (2024) (Kavanaugh, J., concurring) (emphasis added). Judge VanDyke’s dissent below properly recognized that Louisiana’s statute was both aberrational in scope and invidious in purpose. *Wolford*, 125 F.4th at 1240 (VanDyke, J., dissenting). It cannot serve as evidence of a legitimate American firearm tradition any more

than literacy tests or segregated militia laws can serve as evidence of a legitimate voting or equal-protection tradition. *Bruen* warned against elevating “outliers” into a tradition. 597 U.S. at 30. The Ninth Circuit did exactly that.

The 1771 New Jersey anti-poaching law is equally inapposite. Properly understood, it was nothing more than a game-preservation measure addressed to trespassers on enclosed agricultural land. Its “why” was to prevent illicit hunting; its “how” was a narrow restriction on long guns used for that purpose. *See WOLFORD*, 125 F.4th at 1239 (VanDyke, J., dissenting) (detailing its limited scope). Nothing in the law addressed ordinary, peaceable carriage by customers and invitees on property open to the public. Nothing justified disarming members of the polity going about their daily business. And nothing about its purpose or scope remotely parallels a modern presumption that flips the default rule on *all* publicly accessible private property. Treating that single, topic-specific statute as if it contemplated anything of the sort is precisely the kind of “loose analogical reasoning” *Bruen* forbids. 597 U.S. at 30.

The Ninth Circuit’s embrace of these two outliers places it in direct and deepening conflict with the Second and Third Circuits, both of which have already struck down laws identical to Hawaii’s default rule. *See Antonyuk v. James*, 120 F.4th 941, 1048 (2d Cir. 2024); *Koons v. Platkin*, 673 F. Supp. 3d 515, 607 (D.N.J. 2023), *aff’d in part*, 156 F.4th 210 (3d Cir. 2025). Worse still, the Ninth Circuit generated an internal contradiction of its own: it invalidated California’s signage-only variant of the same default rule while sustaining Hawaii’s. *Wolford*, 116 F.4th at 996.

The relevant history is the same in both cases. The constitutional defect is the same in both cases. The panel’s attempt to draw a distinction is illusory. Such disarray is the inevitable consequence of building a “tradition” out of statutes that do not form one.

Finally, nothing in *Rahimi* rescues the panel’s approach. *Rahimi* reaffirmed the centrality of *Bruen*’s “how” and “why” framework and permitted courts to identify principles from historical analogues only when confronting genuinely novel problems—problems unlike anything the Founding generation could have anticipated. 602 U.S. at 693. But Hawaii’s law is not a response to a novel problem. Public carry has been an ordinary and expected exercise of a fundamental right since the Founding, and private property open to the public is not a new social or legal category. The Ninth Circuit’s self-described “more lenient” standard for identifying sensitive places, *Wolford*, 116 F.4th at 977, and its willingness to generalize historical analogues far beyond their legitimate context, has no foothold in *Bruen* or *Rahimi*. It is simply interest balancing under another name—precisely what *Bruen* forbids.

III. The “Sensitive Places” Doctrine Cannot Be Used to Nullify the General Right to Carry.

This Court has identified only a “few” historically grounded sensitive places—legislative assemblies, polling places, courthouses, and schools—and stressed that the category must remain narrow to avoid “eviscerat[ing] the general right to publicly carry.” *Bruen*, 597 U.S. at 30–31. Hawaii’s law does the opposite: it expands the doctrine so aggressively that it functionally replicates the Manhattan-wide prohibition this Court squarely rejected.

The Ninth Circuit treated a smattering of late-nineteenth-century municipal ordinances as sufficient to convert every park and beach in Hawaii into a sensitive place. *Wolford*, 116 F.4th at 983. But such ordinances are temporally remote, geographically thin, and conceptually distinct from Founding-era practices. They regulate newly urbanizing municipal parks—places fundamentally unlike the commons and open lands familiar to the Founders. As Judge VanDyke noted, elevating scattered local ordinances into a categorical statewide ban “exempts cities from the Second Amendment” by another name. *Wolford*, 125 F.4th at 1234 (VanDyke, J., dissenting). The panel’s assertion that this overbreadth cannot be challenged facially entirely misses the point. When a State asserts categorical authority to prohibit carry in an entire genus of ordinary public spaces, *Bruen* requires a categorical historical pedigree. None exists.

The panel’s treatment of bars and restaurants is no better. Hawaii relied on a few late nineteenth-century enactments—each tied to intoxication, disorderly balls, or particular social events—to justify disarming sober, licensed adults patronizing ordinary restaurants. *Id.* at 1242 (VanDyke, J., dissenting). That attenuated analogy fails *Bruen*’s “how” and “why” test. It also fails the common-sense test: restaurants and taverns existed at the Founding, yet there is no meaningful tradition of disarming citizens in them. Judge VanDyke rightly faulted the panel for relaxing *Bruen*’s requirements and converting thin evidence into sweeping exclusions.

The State’s invocation of nineteenth-century prohibitions at “public balls,” traveling shows, circuses, and certain exhibitions likewise cannot sustain its

modern attempt to treat stadiums, arenas, casinos, museums, zoos, libraries, and virtually any place where people gather as *per se* sensitive. Those earlier laws targeted specific temporary events characterized by disorder or heightened intimidation concerns. They are not remotely comparable to the day-to-day operations of ordinary civic institutions. Judge VanDyke persuasively explained that the panel’s approach “practically eliminates” the right to carry across most public and private spaces. *Id.* at 1234. That is constitutionally intolerable.

The Ninth Circuit’s own reasoning regarding banks proves the point. It correctly concluded that banks are not historically sensitive places and that Hawaii may not prohibit carry there absent owner consent. *Wolford*, 116 F.4th at 999. Yet this correct conclusion demonstrates the flaw in the panel’s broader methodology: *Bruen* requires concrete historical evidence of category-wide restrictions, not extrapolated generalities deployed to support sweeping modern prohibitions.

Finally, Hawaii’s effort to construct expansive buffer zones around all its newly defined sensitive places—parking areas, sidewalks, lots adjacent to parks, restaurants, beaches, and more—magnifies the constitutional injury. Such adjacency prohibitions attempt to achieve indirectly what the State cannot do directly: render ordinary public carry practically impossible by forbidding the approaches to every prohibited site. No historical analogue supports that maneuver, and courts have long recognized that constitutional rights cannot be suppressed through strategic buffer-zone design.

The Founders regarded the right of armed self-defense as a pre-political liberty, not a state-conferred benefit. A statutory regime that renders public carry possible only when a proprietor posts an invitation sign—or when a citizen confines himself to sidewalks—is an inversion of the constitutional order. It is not a regulation but a repudiation of the right itself.

The Ninth Circuit’s approach to “sensitive places” resurrects the interest-balancing tests this Court explicitly rejected in *Heller* and *Bruen*. By applying a “more lenient standard” to sensitive places, *Wolford*, 116 F.4th at 977, the panel below has essentially re-introduced intermediate scrutiny by another name. However, intermediate scrutiny does not work precisely because “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.” *Heller*, 554 U.S. at 634.

IV. Local Cultural Preferences Cannot Override the Supreme Law of the Land.

Underlying the State of Hawaii’s arguments, and the Ninth Circuit’s deference thereto, is the suggestion that Hawaii’s unique history and culture—often referred to as the “Spirit of Aloha”—justifies a departure from the national standard of the Second Amendment. *See Wilson v. Hawaii*, 154 Haw. 8 (2024) (claiming the Spirit of Aloha supersedes *Bruen*).

This Court has made clear, however, that the Second Amendment is not a second-class right subject to local variation. “The constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the

other Bill of Rights guarantees.” *Bruen*, 597 U.S. at 70 (quoting *McDonald*, 561 U.S. at 780). Just as a state cannot cite local tradition to justify segregating schools or banning unpopular speech, it cannot cite local tradition to extinguish the right to armed self-defense.

The Supremacy Clause ensures that the fundamental rights of American citizens do not vanish when they cross state lines. While states retain the police power to regulate for the general welfare, that power does not extend to the destruction of enumerated rights. Hawaii’s attempt to exempt itself from the Second Amendment through a “default rule” that closes 96% of the state to public carry is an affront to the Supremacy Clause and the principles of the Fourteenth Amendment.

V. Hawaii Cannot Justify Its Regime By Invoking Private Property Rights

Hawaii and the Ninth Circuit repeatedly suggest that § 134-9.5 is merely an exercise in “respecting” private property rights. That framing is wrong. The statute does not vindicate the right of individual owners to control their premises; it displaces that right and conscripts owners into a state-designed disarmament regime that they did not enact and may not want.

There is no dispute that a property owner may choose to exclude armed visitors from his land. This Court has described the right to exclude as “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150 (2021) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). But that right belongs to the owner, not to the

State. It is exercised by owners in concrete cases, not by a blanket legislative presumption that silently overrides their actual preferences.

Hawaii's law does the opposite of what it claims. Instead of leaving proprietors free to decide whom to admit and on what terms, the State makes that decision for them. A proprietor who is perfectly content to allow licensed carry must now either (a) conform to the State's disarmament default, or (b) take affirmative steps—in writing, orally, or through signage—to carve himself out of the statutory rule. That is not “respect” for property rights; it is state control over both the owner and his guests. The default rule does not enforce the owners' decisions; it dictates the default decision and then forces owners to speak or act if they wish to restore what the common law once assumed.

At common law, when a business opened its doors to the public, it conferred an implied license on customers to enter for ordinary, lawful purposes. See 3 William Blackstone, *Commentaries* *212. That implied license could be revoked by the owner if a particular entrant misbehaved, but the baseline was access, not exclusion. The public did not need an individualized invitation to enter a tavern, shop, or inn; the open door itself sufficed. Hawaii has inverted that structure and then insists that it is merely “protecting” the very property owners whose common-law rights it has displaced. A statute that tells owners, as a matter of positive law, that armed visitors are forbidden on their premises unless they publicly contradict the State cannot plausibly be characterized as a vindication of private autonomy.

That point is clearest if we analogize to other enumerated rights. Suppose a State enacted a statute

providing that no person may engage in political speech on any private property open to the public unless the owner posts a sign “affirmatively allowing political speech.” Or a statute providing that religious gatherings on such property are presumptively unlawful unless the owner gives advance, explicit permission. No one would treat such laws as mere background rules of trespass. They would correctly be understood as affirmative state action suppressing speech and religious exercise in the very places where citizens live and move. The fact that an owner could opt out through signage would not cure the law’s constitutional vice; it would simply add compelled speech on top of censorship.

Hawaii’s statute operates the same way with respect to the Second Amendment. The State has chosen a legal rule that presumes a disarmament policy for every gas station, grocery store, restaurant, or hardware store in the State and then shifts the burden to individual proprietors to override that presumption. Some may do so; many will not, for reasons that have nothing to do with their actual views about firearms. As the Ninth Circuit candidly admitted, “many property owners will not post signs of any sort or give specialized permission, regardless of the default rule.” *Wolford*, 116 F.4th at 993. That is precisely why Hawaii flipped the default in the first place. The State is making the effective choice, not the owner.

Equally important, the burden on the right to bear arms falls on the citizen, not on the proprietor. It is the license-holder who faces criminal prosecution for walking into a shop while armed; it is the citizen’s right that is extinguished on 96.4% of the publicly accessible land in Maui County; it is the citizen whom

the panel told he may carry only along “public streets and sidewalks.” *Wolford*, 125 F.4th at 1235 (VanDyke, J., dissenting). That is state action, and it is aimed at the exercise of a federal constitutional right. No amount of rhetoric about private property can transform a state-imposed presumption of disarmament into a mere reflection of owner preferences.

To be clear, nothing in Petitioners’ position or this brief threatens the ordinary right of a proprietor to exclude or to set conditions for entry. If an owner wishes to forbid firearms on his premises, he may do so today, without § 134-9.5. The statute is not necessary to protect that prerogative. What it does is allow the State to launder its hostility to public carry through the legal fiction of a “default rule,” while simultaneously burdening both the citizen’s right to bear arms and the owner’s right to decide for himself how his establishment will operate. The Second Amendment does not tolerate such indirection. A State that cannot ban public carry directly may not achieve the same result by re-writing the common law and pretending that millions of silent owners have “chosen” to disarm their customers.

VI. Even Under Traditional Means–End Scrutiny, Hawaii’s Scheme Would Fail.

After *Heller*, *McDonald*, and *Bruen*, courts should not be engaging in freestanding interest-balancing when the core of an enumerated right is at issue. *Bruen* expressly rejected the “two-step” tests lower courts had adopted and held that once the Second Amendment’s text covers the regulated conduct, “the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of

firearm regulation.” 597 U.S. at 24. That is the test, and Hawaii cannot satisfy it.

But even if the Court were to assess § 134-9.5 and Hawaii’s sensitive-place designations under traditional means-end scrutiny, the laws would still fail. For more than eight decades, this Court has held that infringements of fundamental, textually enumerated rights are subject to the most exacting review. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938). Under that framework, the State must demonstrate not only that it pursues a compelling interest, but also that its regulation is narrowly tailored and does not burden substantially more protected conduct than necessary. See, e.g., *McCullen v. Coakley*, 573 U.S. 464, 486 (2014).

Hawaii invokes a familiar catalog of public-safety concerns—prevention of crime, reduction of gun violence, reassurance of the public—as justification for its sweeping regime. No one disputes that the State has an important interest in preventing crime. But this Court has already rejected the notion that generalized safety concerns can justify obliterating the core of a right the Constitution singles out for special protection. In *McDonald*, Chicago defended its handgun ban with empirical studies and policy arguments about urban crime. The Court did not weigh those arguments against the value of armed self-defense; it held that “municipal respondents’ remaining arguments are nothing more than a rehashing of the Due Process Clause arguments we have already rejected” and that the Second Amendment “limits (but by no means eliminates) [state and local governments’] ability to devise solutions to social problems that suit local needs and values.” 561 U.S. at 784–85.

The same is true here. Hawaii’s asserted interests are at the highest level of generality, and they are not tied to evidence that licensed carriers pose a unique danger in restaurants, parks, beaches, or other ordinary venues. Rather than targeting the misuse of firearms—brandishing, assault, reckless discharge—the State has chosen to criminalize the simple act of carrying a handgun for self-defense in almost every place a citizen might reasonably wish to go. That kind of blanket prophylaxis is the antithesis of narrow tailoring. See *McCullen*, 573 U.S. at 495 (“[T]he government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government’s interests.”).

There are obvious less restrictive alternatives that Hawaii has not come close to exhausting. The State may prohibit possession by felons and the mentally ill; it may impose objective licensing and training requirements; it may enforce laws against public intoxication, assault, and disorderly conduct; it may punish misuse of firearms. *Bruen* expressly confirmed the continuing validity of such possession- and conduct-based regulations. 597 U.S. at 26–27. What Hawaii cannot do is take the additional step of presuming that even licensed, law-abiding citizens may not carry in the vast majority of public and quasi-public spaces and then demand that they either disarm or stay home.

The mismatch between Hawaii’s asserted interests and its chosen means is particularly stark with respect to the private-property default. If the State truly believed that proprietors wish to be gun-free but are somehow unable to act on that preference, it could, at most, provide them with simple tools—model signage,

outreach, and legal reinforcement of their existing right to exclude. Instead, Hawaii has chosen a rule that automatically criminalizes carry on every parcel of private property open to the public and then places the burden on each owner to opt out. That does not “assist” owners in exercising their rights; it supplants their judgment with the State’s and subjects citizens to a sweeping criminal prohibition that bears little connection to actual risk.

So too with sensitive places. Parks, beaches, ordinary restaurants, museums, zoos, and libraries are not *per se* more dangerous when a licensed citizen is present with a concealed handgun than when he is present unarmed. The State’s real concern is not that such places are inherently akin to courtrooms or polling places; it is that they are heavily trafficked and that the State would prefer to manage risk by suppressing constitutionally protected conduct. That is precisely the sort of “public safety” argument that, if accepted, would allow States to “exempt cities from the Second Amendment” by declaring any crowded place “sensitive.” *Bruen*, 597 U.S. at 31. It is no more appropriate in the guise of means–end scrutiny than it is in the guise of historical analogy.

Finally, the breadth of Hawaii’s regime itself is evidence of its unconstitutionality under any standard. As Judge Collins observed, by upholding Hawaii’s law the Ninth Circuit has “largely vitiated ‘the right to bear commonly used arms in public’ that the Supreme Court recognized in *Bruen*.” *Wolford*, 125 F.4th at 1231 (Collins, J., dissenting). A system that leaves only streets and sidewalks as reliable places for public carry, and that surrounds ordinary destinations with concentric circles of “sensitive” and “adjacent” zones,

is not a measured response to documented problems. It is a political judgment that the Second Amendment right is more trouble than it is worth. The whole point of enumerating rights, as *Heller* explained, is to withdraw that judgment from the hands of officials who might otherwise be tempted to make it. 554 U.S. at 634.

Thus, even if the Court were not inclined to apply the strict-scrutiny framework CCJ has long urged for infringements of enumerated rights, or even a properly rigorous form of intermediate scrutiny, Hawaii’s private-property default and its sensitive-place expansions would still fail. They are not narrowly tailored; they are not supported by particularized evidence of misuse by the class of persons they disarm; and they burden far more protected conduct than any legitimate public-safety interest can justify.

CONCLUSION

Hawaii’s private-property default rule and its sweeping sensitive-place expansions cannot be reconciled with *Bruen*’s text-and-history framework. They rest on discriminatory enactments, late-breaking anomalies, and strained analogies that—together—“largely vitiate” the right to bear commonly used arms in public. *Wolford*, 125 F.4th at 1231 (Collins, J., dissenting). This Court should reverse and make clear that: (1) States may not impose a presumption against public carry on private property open to the public; and (2) the sensitive-places doctrine remains a narrow, historically-cabined exception, not a pretext for extinguishing the general right to carry across most of civic life.

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