

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
J. JOEL ALICEA IN SUPPORT
OF PETITIONERS AND REVERSAL**

JOHN D. OHLENDORF
Counsel of Record
COOPER & KIRK, PLLC
1523 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
johlendorf@cooperkirk.com
Counsel for Amicus Curiae

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INTEREST OF AMICUS¹

J. Joel Alicea is the St. Robert Bellarmine Professor of Law and Director of the Center for the Constitution and the Catholic Intellectual Tradition at Catholic University of America's Columbus School of Law.² Professor Alicea's scholarship focuses on constitutional theory, and his articles have appeared, or are forthcoming, in the *Yale Law Journal*, the *University of Pennsylvania Law Review*, the *Virginia Law Review*, and the *Notre Dame Law Review*, among other journals. Professor Alicea's article *Bruen Was Right*, 174 U. PA. L. REV. 13 (2025), extensively discusses the selection of the appropriate level of generality in conducting *Bruen*'s historical analysis, and he has written widely and spoken in multiple public fora on the Second Amendment, including in his forthcoming article *Bruen and the Founding-Era Conception of Rights*, 101 NOTRE DAME L. REV. (forthcoming 2026), <https://perma.cc/87H5-RAWS>. This brief is based on ideas and arguments set forth in *Bruen Was Right*. Professor Alicea has a strong interest in this case because it depends in part on this level-of-generality issue, and on the correct application of *Bruen* in general.

¹ Pursuant to SUP. CT. R. 37.6, Amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than Amicus or his counsel made such a monetary contribution.

² Professor Alicea appears in his personal capacity. His institutional affiliation is provided for identification purposes only.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The “level of generality” problem pervades many areas of constitutional law. Often the result of a constitutional test will turn on whether some critical element is described at a higher or lower level of generality. The text-and-history framework established by this Court in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), is no exception. The second stage of the Second Amendment analysis articulated in that decision calls upon courts to assess whether the firearm restriction being challenged is “analogous enough” to a “historical tradition of firearm regulation,” *id.* at 24, 30, and the answer to that question will often turn on the level of abstraction at which the historical tradition is described. Describe a historical law at a specific enough level—as including every incidental feature imaginable, from the day on which it was enacted to the page upon which it appears in the code book—and no modern law may appear analogous enough; describe it at a very abstract level—“regulating the use of arms in the public interest”—and every modern law might seem constitutional.

Determining the correct level-of-generality is important to resolving the historical dispute presented in this case. Respondents and the Ninth Circuit have identified a historical tradition that can be described at differing levels of generality. Described relatively specifically, the tradition is as follows: the government may bar the carrying of arms on private land not open to the public, absent the landowner’s affirmative consent, for the purpose of preventing unauthorized hunting on that land. And described in this way, this

historical tradition bears little relationship to the Hawaii law at issue here, because that law requires affirmative consent in advance of carrying arms on *any* private property—including all private property generally held open to the public—for reasons that quite obviously have nothing to do with preventing poaching. Only if the historical tradition is described at a higher level of generality that strips away these limiting features can it be made to appear analogous to Hawaii’s law. Whether Hawaii’s law satisfies the second stage of the *Bruen* analysis thus turns on whether those limiting features are properly included when describing the tradition—that is, it turns on which level of generality is the correct one.

Amicus proposes that the right way of thinking about this question is one that returns to first principles: the principles that motivated the *Bruen* Court to embrace the text-and-history test to begin with. In particular, the *Bruen* framework requires courts to look to the nation’s historical tradition of firearms regulation because *Bruen* assumes (correctly) that such a tradition can illuminate the original contours of the pre-existing right that the ratifiers codified when they adopted the Second Amendment. Accordingly, whether a particular feature of a historical law should be included when describing it—or put differently, whether the law should be described at a level of generality that accounts for that feature rather than abstracts away from it—depends on whether the ratifiers would have understood that feature to be part of the substance of the right to keep and bear arms itself.

That question cannot be answered mechanically; it requires judgment and normative reasoning. But unlike the normative reasoning involved in the tiers

of scrutiny analysis that *Bruen* rightly rejected, the normative reasoning involved in determining the right level of generality is not unbounded. Rather, it requires proceeding from the historically given normative principles and premises that *the ratifying generation* held. We must immerse ourselves in and bind ourselves to, so far as we can, the ratifiers' legal, moral, and intellectual framework. Among other things, this limitation means that a court cannot describe a historical tradition of firearms regulation in a way that would eviscerate one normative commitment we know the ratifying generation held deeply: that the right to keep and bear arms should be protected.

That guiderail is not the only one that applies to the process of determining the appropriate level of generality, but it is sufficient to resolve this case. For Respondents' attempt to draw support for their law from the tradition of anti-poaching statutes depends on abstracting away from the very features that the ratifying generation would have understood prevented those statutes from *nullifying* the right to bear arms. A law against unauthorized hunting on private land not open to the public may be enforced without meaningfully impeding the general right to carry arms in public for self-defense; a law requiring affirmative consent to carry arms on private property held open to the public would eviscerate that right. Any description of this historical tradition that does not include those features thus cannot be said to be faithful to "the balance struck by the founding generation." *Id.* at 29 n.7.

The approach to the level-of-generality problem presented here demonstrates that while the problem is not an imaginary one, it is also far from fatal. And

of critical importance, this approach indicates that the level-of-generality problem may be resolved in this context in a way that does not call upon courts to exercise unbounded normative judgment. For while judgment is certainly necessary in sorting out those features of a historical tradition that go to the substance of the right, it is judgment constrained by the given normative principles and premises of the ratifiers themselves. In this way, the level of generality remains the “product of an interest balancing by the people, not the evolving product of federal judges.” *Id.* (cleaned up).

ARGUMENT

I. The Level-of-Generality Problem Embedded in *Bruen*’s Analogical Reasoning Inquiry.

A. In *Bruen*, this Court clarified that Second Amendment challenges are governed by the following framework: “When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* at 24. The historical inquiry called for by the second stage of this framework, the Court explained, “will often involve reasoning by analogy”—“determining whether a historical regulation is a proper analogue” by asking “whether the two regulations are ‘relevantly similar’ ” in terms of “how and why the regulations burden a law-abiding citizen’s right to armed self-defense.” *Id.* at 28–29 (citation omitted). As *Bruen* recognized, this analogical reasoning “can be difficult; it sometimes requires resolving

threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.” *Id.* at 25 (citation omitted). Once such nuanced judgment concerns discerning the appropriate level of generality at which the historical tradition should be described.

Analogical reasoning under *Bruen*, in fact, faces two such level-of-generality problems, one for each of the metrics the Court identified: determining at what level to describe the “how” of the historical tradition and determining at what level to describe the “why” of the tradition. Consider the historical tradition recognized in *Bruen* of States prohibiting arms in legislative assemblies, polling places, and courthouses. *Id.* at 30. The “burden on the right of armed self-defense” imposed by that historical limitation, *id.* at 29, could be described at several different levels:

- restricting the carrying of arms in legislative assemblies, polling places, and courthouses;
- restricting the carrying of arms in “sensitive places”;
- restricting the carrying of arms in public; or
- restricting the use of arms.

Likewise, the justification for these laws could be described as:

- protecting against the safety risk posed by the presence of arms in legislative assemblies, polling places, and courthouses, due to the specific nature or function of those places;

- protecting sensitive places from the risk to public safety posed by the presence of arms there;
- protecting against the risk to public safety posed by the carrying of arms in public; or
- protecting the public safety.

The difficulty is that all of the descriptions in each of these two groups are in a sense factually accurate, and yet it is likely that some would lead to the constitutionality of certain modern firearm restrictions, under *Bruen*'s analogical-reasoning inquiry, while others would not. In order to choose between the alternative descriptions of the “how” and “why” of the historical tradition, one must discern which features of the tradition are legally relevant and which are legally irrelevant. The more features that are deemed relevant—and the less-general of a description is thus adopted—the more difficult it will be for the government to defend modern laws as analogous, since the modern and historical laws will need to match on more (and more specific) dimensions.

Determining the appropriate level of generality is of course not the only question that arises in Second Amendment challenges. Courts are often confronted with competing principles allegedly undergirding a historical tradition, each of which is cast at roughly the same level of generality. In those circumstances, courts must assess which principle best fits the historical evidence. But arriving at the correct level of generality will be dispositive in many cases.

In *Bruen*, for example, the Court rightly determined that the limitation of the historical “sensitive

places” tradition to three specific places—legislative assemblies, polling places, and courthouses—was not a relevant feature, since it concluded that “courts can use analogies to those 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; William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1508 (2024). At the same time, the Court determined that the limitation of these laws to the particular category of *sensitive* places, however defined, *was* legally relevant, since it rejected New York’s attempt to use the tradition to justify barring arms in “all places of public congregation” as sweeping “far too broadly.” *Bruen*, 597 U.S. at 31. The question remains, however, what principled reasons there are for deeming the latter feature legally relevant but the former legally irrelevant for purposes of reasoning by analogy.

Amicus proposes that the answer to this question may be found by resorting to the purpose of the *Bruen* stage two inquiry: determining the original contours of “the pre-existing right codified in the Second Amendment.” *Id.* at 34. Given this purpose, the features of a historical tradition of firearm regulation that are legally relevant—and that accordingly should be included in the description of the tradition—are those that were likely understood by the ratifiers of the Second Amendment to be part of “the contours of the right.” *United States v. Rahimi*, 602 U.S. 680, 691 (2024). These features may be referred to as “substantive features” of the regulatory tradition. Substantive features, by definition, are fixed and not subject to

change—they have been baked into the pre-existing right from the beginning. By contrast, features unlikely to be originally understood as part of the contours of the pre-existing Second Amendment right may be referred to as “incidental features.” Incidental features of a regulatory tradition are contingent, and the ratifiers would have understood that they would be subject to change by future generations.

Sifting the substantive features of a historical regulatory tradition from the merely incidental ones requires historically bounded normative reasoning. The task calls for judicial judgment, not the mechanical application of an algorithm. The determination requires normative reasoning because a court is assessing whether there is a *good reason* to see a particular feature as a salient part of the historical regulation in question and thus as part of the original contours of the right to keep and bear arms. That is, it requires asking whether the inclusion of that feature in a description of the regulation *makes normative sense*. The fact that a particular historical law was enacted on a Tuesday, for instance, is obviously not a normatively salient feature of the law, because there is no good reason to think that this feature is relevant to the contours of the preexisting Second Amendment right.

The normative reasoning required by this analysis is, however, historically bounded. The question before a court is not whether *judges today* believe that a feature is a normatively salient part of the regulatory tradition but whether *the ratifiers* would have believed it to be so. For under our constitutional system, it is the “balance . . . struck by the traditions of the American people . . . that demands our unqualified

deference,” *Bruen*, 597 U.S. at 26, “whether or not future legislatures or (yes) even future judges think” that this balance is wrongheaded or normatively undesirable, *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Determining which features of a historical regulation are substantive and which incidental thus requires that we adopt the normative perspective of our forebears—as best we can and after immersing ourselves in their legal, moral, and intellectual worldview—and evaluate the features of a historical tradition in light of *their* normative premises and principles, even if we disagree with those premises or principles. The ratifiers supply the premises and principles, and we assess the normative salience of a feature of a historical tradition given those premises and principles.

While a full explication of the task of sorting the substantive and incidental features of a regulatory tradition is beyond the scope of this brief, Amicus does offer two guiding principles. First, a court assessing whether a particular feature is substantive or incidental must take account of the text of the Second Amendment. The constitutional text, of course, is the principal focus of the first stage of *Bruen*’s framework rather than the second. But it remains relevant to the second stage’s analogical reasoning inquiry because no tradition of firearms regulation should be defined to include features that would essentially nullify part of the Second Amendment’s plain text. This is a consequence of the historically bounded nature of the normative judgment required in the analogical reasoning process. As just explained, in determining which features of a historical law are substantive rather than incidental, we must bind ourselves to the normative

frame of the ratifying generation; and given that this generation also *codified the Second Amendment as part of their highest law*, “the right of the people to keep and bear Arms,” U.S. CONST. amend. II, was a critically salient part of their moral, legal, and intellectual worldview, *see* Alicea, *Bruen and the Founding-Era Conception of Rights*, *supra*, at 15–20.

Bruen’s discussion of “sensitive places” provides an instructive example of this first principle. As noted, *Bruen* rejected New York’s attempt to cast the historical tradition of regulating arms in sensitive places at so high a level of generality that it would “effectively declare the island of Manhattan a ‘sensitive place’ simply because it is crowded and protected generally by the New York City Police Department.” 597 U.S. at 31. Defining the tradition at that level—and thus discarding the limitation of the historical tradition to particular, geographically limited places as purportedly incidental rather than substantive—would, the Court explained, “in effect exempt cities from the Second Amendment and eviscerate the general right to publicly carry arms for self-defense” that is codified in the constitutional text. *Id.* Put in the terms used in this brief, because we know from the Second Amendment’s text that the right to “bear Arms” was normatively salient to the ratifiers, U.S. CONST. amend. II, the feature of the historical “sensitive places” regulatory tradition that bound that tradition to specific and narrowly defined locations *must* have been substantive, not incidental, because it was that limitation that prevented the regulatory tradition from completely nullifying the “right . . . to . . . bear Arms.”

A second, closely related principle that guides the process of sifting the substantive from incidental

features of a historical regulation is that neither the “why” nor the “how” of the regulatory tradition can be described from a normative perspective that includes values antithetical to the very nature of the right to keep and bear arms. Again, in judging whether a particular feature is normatively salient a court must, so far as possible, adopt the ratifiers’ own legal and moral framework. We know from *Heller* and *Bruen*, for example, that the Second Amendment presupposes that peaceable Americans “presumptively” may possess and carry firearms for self-defense. *Bruen*, 597 U.S. at 33. Judges attempting to appropriately describe a historical tradition must adopt that presupposition as their own—they must assess our traditions from a point of view that is internal to and supportive of our traditions, rather than from the critical point of view held by opponents of the right to keep and bear arms today. And that means that they cannot, when describing a historical tradition, do so in a way that will either ensure that most people *will not* be able to possess or carry firearms (“why”), or that imposes burdens that effectively deprive most people of that right (“how”).

Indeed, there is substantial historical evidence for this principle in the Second Amendment context, in particular. The Founders were highly critical of England’s game laws, for example, because they served as a “specious pretext” under which “the people have been disarmed, generally.” 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES App.300 (1803). And case law from the first half of the nineteenth century likewise made clear that the Second Amendment could not countenance “[a] statute which, under the pretence of regulating, amounts to a

destruction of the right.” *State v. Reid*, 1 Ala. 612, 616 (1840).

An analogy to the First and Fourteenth Amendments helps to illustrate this point. The Court would obviously never adopt a description of our historical tradition under those provisions that would justify the assertion of thought control as a basis for restricting speech, see *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 578–79 (1995), or the assertion of white supremacy as a basis for racial discrimination, see *Loving v. Virginia*, 388 U.S. 1, 11 (1967). So too under the Second Amendment. Those who codified that Amendment in our basic charter did so because they believed that guaranteeing a presumptively and widely available right to keep and carry firearms for lawful purposes was normatively desirable. An account of the “why” or “how” of a historical tradition that in design or in effect reflects antipathy to the very nature of that right cannot be correct, and that means that it likely is counting merely incidental features as substantive or dismissing truly substantive features as incidental.

Sorting the substantive from the incidental features of a historical regulatory tradition is key to *Bruen*’s analogical reasoning inquiry in at least two respects. First, as already suggested, it helps ensure that a regulatory tradition has been described at the appropriate level of generality when determining whether it is sufficiently analogous to a modern firearm regulation. A description of the tradition that elides one or more substantive features is likely cast at too high a level of generality; by contrast, a description that includes one or more incidental features is likely not general enough. Second, the distinction

between substantive and incidental features also helps us to identify and define the regulatory tradition itself. A collection of historical laws that share only incidental features is merely a disjointed collection of laws. A collection of laws that share substantive features and differ only on incidental ones may be part of the same tradition of firearm regulation.

B. The Court’s recent decision in *Rahimi* provides an important illustration—and confirmation—of Amicus’s account of the analogical reasoning process called for at the second stage in *Bruen*’s framework. In *Rahimi*, the Court held that 18 U.S.C. § 922(g)(8)’s prohibition on the possession of arms by an individual who is subject to a restraining order “finding that [he] represents a credible threat to the physical safety” of another could constitutionally be applied to the respondent in that case. 602 U.S. at 688. The majority based that determination on “two distinct legal regimes” from the Founding Era: “surety laws” and affray laws that barred “going armed” “to the Terror of the People.” *Id.* at 694, 695, 697 (cleaned up). The majority in *Rahimi* read these two sets of laws as together establishing a historical regulatory tradition pursuant to which, “[w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed.” *Id.* at 698. Justice Thomas, by contrast, argued in dissent that the Government had failed to “identify even a single regulation with an analogous burden and justification” to Section 922(g)(8). *Id.* at 752 (Thomas, J., dissenting). And at root, the critical disagreement between the majority and Justice Thomas was over the appropriate level of generality at which the surety and “going armed” laws should be described.

The *Rahimi* majority concluded that the appropriate level of generality for viewing the surety and affray laws was one at which they formed part of the same historical tradition of regulation, and that tradition was one of “permit[ting] the disarmament of individuals who pose a credible threat to the physical safety of others.” *Id.* at 693 (majority). Justice Thomas, by contrast, maintained that both sets of laws should be viewed at a lower level of generality. In the terminology of this amicus brief, Justice Thomas argued that additional specific features of both the surety and affray laws should be viewed as substantive, while the majority had effectively dismissed them as incidental.

Specifically, Justice Thomas pointed to three features of the surety and affray regimes that he believed were substantive rather than incidental: (1) affray laws were aimed at “conduct that injured the entire community” while surety laws sought to address “the societal problem of interpersonal violence,” *id.* at 762, 68 (Thomas, J., dissenting); (2) affray laws penalized violence “in some public place” while surety laws could provide protection against interpersonal violence that “happens in a private Place,” *id.* at 768, 769 (cleaned up); and (3) affray laws “penalized past behavior” while surety laws “applied to the threat of future interpersonal violence,” *id.* at 763, 770.

Taking these three features in turn, there is no good reason why enjoyment of the right to keep and bear arms should depend on whether an individual poses a threat of violence to another *specific* person or to a group of people generally. In both cases, the normatively salient aspect of these laws is that they are justified by the desire to protect *the safety of persons*,

not whether the persons being protected are specific and identifiable or general and diffuse. The incidental, contingent nature of the second feature highlighted by Justice Thomas—*where* the threat of violence exists—is equally apparent. On what basis would such a happenstance be viewed as baked into the ratifiers’ conception of the right? In short, absent further historical evidence, there do not appear to be any normatively good reasons, by the ratifiers’ lights, for treating these two features of the surety and affray traditions as bearing on the original contours of the Second Amendment right.

The strongest case for Justice Thomas’s narrower description of the surety and affray regulatory traditions thus rests on his third distinction. Justice Thomas emphasized that “surety laws were a preventative mechanism for ensuring an individual’s future peaceable conduct,” while affray laws were backward-looking measures “that penalized past behavior.” *Id.* at 762, 770. This is a real distinction between the two sets of laws and a plausible argument in favor of Justice Thomas’s narrower interpretation of them. It remains the case, however, that both historical regimes shared the same aim: preventing “physical violence to another” by one whom the government has determined poses a present threat of dangerousness. *Id.* at 698 (majority). The difference in the “how” of the two regimes is essentially one of risk assessment: surety laws reflect the judgment that *in advance* of conduct threatening physical violence, merely requiring a bond suffices to address the future risk of that violence, while *after* such threatening conduct has already occurred, greater, criminal restrictions—including temporary disarmament, possibly through

imprisonment—are called for to prevent the risk of future violence.

That comparative assessment of risks is certainly reasonable, but absent further historical evidence, there is no reason to believe that the ratifiers would have viewed that risk assessment as a substantive feature of these laws rather than a contingent one—and thus as permanently constituting the contours of the Second Amendment right. What types of past or future conduct demonstrate a greater risk of violence, and what restrictions are necessary to address those comparative risks, are all contingent empirical judgments that (within the historical limits on the “how” metric) may change over time. The “how” of both the surety and affray regimes lie on a continuum of restrictions, ranging from the less onerous bond requirement to the more onerous measure of imprisonment. Viewed from the ratifiers’ legal and moral perspective, there is no normatively good reason for califying a particular adjustment of risks and restrictions for all time, rather than leaving different legislatures from different times free to make their own assessments of the comparative risks of *ex ante* and *ex post* threats of violence and (again, within historical limits) the appropriate regulatory response. We are bound by the principles the ratifiers adopted when they elevated the Second Amendment into the Constitution, but—absent historical evidence to the contrary—we are not bound by their contingent empirical judgments about how best to effectuate those principles.³

³ That is not to say that the “how” element of the analogical inquiry is always contingent and subject to change by future

The majority’s account of the surety and affray regulatory regimes is thus best read as based on the conclusion that none of the features identified by Justice Thomas’s dissent—the individualized versus diffuse nature of the threat, the public versus private location of the threat, and whether the threat occurred *ex post* or *ex ante*—were substantive, as opposed to incidental, and accordingly none were properly included in describing those regimes. Both legal regimes thus constituted the same historical tradition; and described at the appropriate level of generality, that tradition was sufficiently analogous, in terms of both the “how” and the “why,” to Section 922(g)(8). For the reasons just articulated, this interpretation of the historical evidence is a reasonable and compelling one. And the fact that the account of the level-of-generality problem offered in this amicus brief fits the Court’s analysis in *Rahimi*, provides a deeper explanation of the difference between the majority and dissenting opinions in the case, and offers a satisfying justification of the result, confirms the soundness of Amicus’s account.

C. Before turning to the application of this approach to the historical dispute in the present case, it is important to emphasize a critical distinction between it and the “tiers of scrutiny” framework. The tiers-of-scrutiny approach to Second Amendment

legislatures. The complete absence, for example, of any regulatory tradition supporting bans on firearms in common use is dispositive evidence that such bans are contrary to the Second Amendment. *See, e.g., Snope v. Brown*, 145 S. Ct. 1534 (2025) (mem.) (statement of Kavanaugh, J., respecting the denial of certiorari); David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before, 1900*, 50 J. LEGIS. 223, 369 (2024).

challenges that prevailed in the lower courts prior to this Court’s decision in *Bruen* likewise suffered from a well-known level-of-generality problem. The “governmental interest” so crucial to any scrutiny analysis can be stated at a variety of levels of abstraction, and this manipulability infects both the assessment of whether that interest is sufficiently important or compelling and the determination of whether the means the government is defending are appropriately tailored to that interest. Joel Alicea and John D. Ohlen-dorf, *Against the Tiers of Constitutional Scrutiny*, NAT’L AFFAIRS 72, 79–81 (2019). That level-of-generality problem, too, can be solved only by offering some normative reason for adopting a description at one level rather than another. But the critical difference between the tiers-of-scrutiny balancing tests and the analogical reasoning approach called for by *Bruen*, under the account offered here, lies in the *nature* of the normative reasoning that is necessary.

Under the tiers of scrutiny, the only normative reasons that can be offered for adopting one description of the governmental interest rather than another must come from the *court’s own normative judgment*. The court could, in theory, simply defer to either the government’s statement of the interest or to the challenger’s, but either attempt to escape normative judgment would simply reflect a higher-level normative judgment about how best to implement the tiers-of-scrutiny methodology that, again, is attributable to no one but the court itself, since nothing in the tiers of scrutiny methodology mandates a particular approach to the level-of-generality issue. By contrast, sorting the substantive from the incidental features of a historical tradition of regulation, on the account offered

here, demands adhering to *the ratifiers'* normative judgments. As the Court put it in *Bruen*, “[a]nalogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances.” 597 U.S. at 29 n.7. It is these *historically given* normative principles and premises “that demand[] [courts’] unqualified deference.” *Id.* at 26. That is a real constraint, and it is what prevents courts from “engag[ing] in independent means-end scrutiny under the guise of an analogical inquiry.” *Id.* at 29 n.7.

II. Applying the Solution to the Historical Tradition of Regulating Poaching on Private Lands.

This brief now turns to the task of applying the approach to analogical reasoning articulated above to the specific historical dispute in this case: whether there is a historical tradition of firearms regulation justifying Hawaii’s no-carry private property default rule.⁴ The court below put forward a total of six “pertinent colonial and state laws,” which it organized into “two sets”: (A) four laws, enacted between 1721 and 1893, that “prohibited the carry of firearms onto subsets of private land, such as plantations or enclosed lands,” Pet.App.60a, and (B) two laws, one enacted by New Jersey in 1771 and one from Louisiana in 1865, that the court viewed as “historical ‘dead ringers’” for Hawaii’s law, *id.* at 62a. Properly understood within the framework laid out above, neither set of laws

⁴ This analysis assumes that the Ninth Circuit correctly concluded that “the conduct proscribed by the state law[] falls within the text of the Second Amendment at the first step of the *Bruen* analysis.” Pet.App.58a.

provides a justification for the challenged no-carry default.

A. The first set of historical laws cited by the court below is comprised of statutes from four States: Pennsylvania (1721), New Jersey (1722), New York (1763), and Oregon (1893). As the Ninth Circuit acknowledged, all four laws were “limited to only a subset of private property”—a subset not “generally open to the public”—and their primary aim “was to prevent poaching.” Pet.App.61a. That is particularly apparent with respect to the Pennsylvania, New Jersey, and New York laws: Pennsylvania and New Jersey’s statutes both expressly targeted “carrying any gun or hunting,” *id.* at 60a (cleaned up), and New York’s 1763 law likewise was explicitly enacted to “more effectually punish and prevent the Practice of Great Numbers of idle and disorderly persons to hunt with Fire-Arms,” *Antonyuk v. James*, 120 F.4th 941, 1046 (2d Cir. 2024) (cleaned up). Moreover, all three of these laws were expressly limited to the carrying of firearms on “improved” or “inclosed” lands, and “the historical record indicates” that these technical terms “would have been understood to refer to private land not open to the public.” *Id.* at 1047.

The two limiting features of these historical laws map onto the two metrics of analogical reasoning identified in *Bruen*: the “why” of these laws was to prevent poaching, and the “how” was by requiring authorization before carrying arms on private lands not open to the public. 597 U.S. at 29. Moreover, these two features fit together as a single unit. Given that unauthorized hunting would generally occur on lands not held open to the public, that limitation on the “burden on the right of armed self-defense” imposed by these

laws follows quite naturally from the purpose that “justified” them. *Id.*

There are textual indications that Oregon’s much-later 1893 law was likewise aimed at unauthorized hunting.⁵ Section 3 of that statute declared it unlawful for anyone “armed with a gun or other firearm, to cause, permit or suffer any dog, accompanying such person, to go or enter upon any enclosed premises without the consent of the owner” except “dogs in pursuit of deer or varmints.” 1893 Or. Laws 79, § 3. And in any event, that law was likewise limited to “enclosed premises or lands,” *id.*, not property open to the public.

B.1 The Ninth Circuit placed the most significant weight on New Jersey’s 1771 law prohibiting “any person or persons . . . to carry any gun on any lands not his own, and for which the owner pays taxes, or is in his lawful possession, unless he hath license for permission in writing from the owner.” 1771 N.J. Laws, ch. 540, § 1. The panel insisted that the limitations of the first set of laws “did *not* apply” to New Jersey’s 1771 statute, which it claimed “applied to *all* private property” and was not an anti-poaching measure. Pet.App.61a. The historical record contradicts both assertions.

⁵ Amicus assumes for the sake of analysis that this law is relevant to the historical inquiry despite its late date, just as it assumes that the colonial laws described above are probative despite their distance in time from either 1791 or 1868. This analysis also sets aside the important questions concerning how widespread and established a set of historical laws must be to constitute a historical tradition of firearms regulation that informs the contours of the Second Amendment.

It is plain from the text of the New Jersey law that it, too, was concerned with unauthorized hunting. The very title of the statute is “AN ACT for the preservation of deer and other game, and to prevent trespassing with guns.” 1771 N.J. Laws, ch. 540. The Ninth Circuit attempted to cabin this anti-poaching purpose to “Section 2 of the Act,” Pet.App.62a, but that is not plausible. In addition to the law’s title—which obviously covered the entirety of the statute, not just the second section—the statute also contained a prologue explaining the reason the whole statute was enacted: “the laws heretofore passed in this colony for the preservation of deer and other game, and to prevent trespassing with guns, traps and dogs, have, by experience, been found insufficient to answer the salutary Purposes thereby intended.” 1771 N.J. Laws, ch. 540. *That*, accordingly to the statute’s own text, was why New Jersey forbade “any person . . . to carry any gun on any lands not his own.” *Id.* Moreover, of the statute’s eighteen sections, thirteen clearly refer to hunting-related activities (Sections 2, 4–9, 12–14, and 16–18), further reinforcing the notion that the remaining sections should be understood in the hunting context. The Second Circuit was therefore likely correct in *Antonyuk* in concluding that “the historical record indicates that ‘land,’” in this context, also “would have been understood to refer to private land not open to the public.” 120 F.4th at 1047. And the anti-poaching justification for the 1771 law also supplies further confirmation that it was in fact limited to land not held open to the public—for as explained above, that “how” follows naturally from the anti-poaching “why.”

If New Jersey’s law had not been limited in these ways, it would have been contrary to the preexisting right to keep and bear arms. For as explained in more detail below, a general prohibition on carrying arms on private property—one not limited to preventing poaching on lands not open to the public—would eviscerate the right to carry arms. Such a regulatory tradition would strip the right to bear arms from everyone except “those who aimlessly wander streets and sidewalks without ever planning to enter a store, park, or other private or public establishment.” App.180a (VanDyke, J., dissenting from the denial of rehearing en banc). As set forth above, the fundamental right to armed self-defense has *never* been understood to sanction “[a] statute which, under the pretence of regulating, amounts to a destruction of the right.” *Reid*, 1 Ala. at 616. Thus, even if the text of the New Jersey law can plausibly be interpreted as applying more broadly than the Second Circuit did, “[t]o the extent there are multiple plausible interpretations” of the historical evidence, we should “favor the one that is more consistent with the Second Amendment’s command.” *Bruen*, 597 U.S. at 44 n.11.

2. The final historical law relied upon below is Louisiana’s 1865 law making it unlawful for anyone “to carry fire-arms on the premises or plantations of any citizen, without the consent of the owner.” Act of Dec. 20, 1865, No. 10, § 1, 1865 La. Acts 14. This law, however, provides no support for Hawaii’s no-carry default rule because it is from an entirely different (and sinister) historical tradition of regulation: the tradition of suppressing the constitutional rights of

newly freed slaves.⁶ The Second Amendment's contours must be informed by "the history that the Constitution actually incorporated and not [by] the history that the Constitution left behind." *Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring).

Louisiana's 1865 law was part of the infamous "Black Codes" enacted in the immediate aftermath of the Civil War, which sought to entrench "the continued disarmament of blacks in the South" and to perpetuate their condition of servitude. *McDonald v. City of Chicago*, 561 U.S. 742, 776 (2010). Indeed, Louisiana had not yet even been readmitted to the Union when it enacted this law. And the State's Reconstruction Governor ultimately explained that "[t]his [law], of course, was aimed at the freedmen." HENRY CLAY WARMOTH, *WAR, POLITICS AND RECONSTRUCTION: STORMY DAYS IN LOUISIANA* 278 (1930).

The "why" of this 1865 Louisiana law was, accordingly, dramatically different both from the other historical laws discussed above and from Hawaii's current law: its purpose was to invidiously strip the Second Amendment right away from an entire class of citizens. That "justification" not only renders this law disanalogous to Hawaii's under the second stage of *Bruen*'s framework; it makes it categorically ineligible for analogical reasoning under the Second Amendment. That is not because the men who enacted it were bigots, though their bigotry deserves unqualified condemnation. No, Louisiana's 1865 Black Code is incapable of illuminating the principles behind the

⁶ Amicus sets aside, again, the question whether historical evidence from the Reconstruction Era is relevant to the *Bruen* analysis.

Second Amendment right because it self-consciously *set itself against* those very principles. The purpose of this law was not to enforce regulatory limits traditionally understood to form part of the preexisting right to keep and bear arms, it was to *nullify that right in its entirety* for black Americans. Such an anti-constitutional law no more illuminates our historical traditions than the antebellum laws barring slaves from keeping and bearing arms, voting, or holding property.

C. Accordingly, the five historical laws eligible for analogical reasoning under *Bruen* all shared two closely intertwined features: they were justified as anti-poaching measures, and the burden they imposed on the right to carry arms was limited to private property not held open to the public. Of course, these laws could be described at a more abstract level of generality that omits these features and that would conceivably justify Hawaii’s law: something like “laws barring the carrying of arms on private property without the owner’s affirmative consent.” The question is thus whether the features of the historical tradition described above are substantive or incidental.

Amicus respectfully submits that these features were clearly substantive. That follows from one of the guiding principles of analogical reasoning articulated above: a tradition of regulation cannot be described at a level of generality that would effectively nullify a portion of the Second Amendment right. Our historical traditions have never been understood to embrace “[a] statute which, under the pretence of regulating, amounts to a destruction of the right.” *Reid*, 1 Ala. at 616.

A provision generally requiring affirmative consent before carrying arms on private property open to the public would amount to just such a statute. The vast majority of public places people visit in their ordinary lives—supermarkets, coffee shops, restaurants, bars, movie theaters, gas stations, clothing stores, banks, gyms, bowling alleys, big-box stores—are privately owned. No one doubts that these establishments can affirmatively *refuse* consent to those who would enter bearing arms, but establishing “no carry” as the default rule for all of these places, and many more, would eviscerate the right to bear arms in public. Few property owners will grant such affirmative permission. Some because they are unaware of the default rule created by Hawaii’s law; some because granting express permission will alienate other members of the public or bring some measure of public opprobrium on the owners; and some because they do not deem the effort of making their permission known worthwhile in light of the many other things they must do on any given day. Such a rule would thus come markedly close to scratching the words “bear Arms” out of the Second Amendment altogether.

The five historical laws at issue did not have this sweeping effect, we have seen, because they were limited to preventing poachers from carrying arms on private lands *not* held open to all comers. Because those limiting features prevented this historical tradition of regulation from eviscerating the right to bear arms, it necessarily follows that they are substantive features of the tradition, not incidental ones, and that the tradition cannot be cast at a level of generality that omits them. That is to say, the historical tradition identified by Respondents and the Ninth Circuit recognizes that

the original contours of the right to keep and bear arms did not include the right to go onto land not otherwise open to the public for purposes of poaching—a narrow limitation on the right that seems rather obvious once it is described.⁷ This historical tradition of firearm regulation accordingly cannot justify Hawaii’s novel no-carry default rule. The Ninth Circuit was wrong to uphold that portion of Hawaii’s law, and this Court should reverse.

⁷ It is possible that, just as the surety and affray laws in *Rahimi* were part of the same regulatory tradition despite incidental differences, there are other laws that could be deemed part of the same tradition as the anti-poaching laws and that could affect the description of the “why” and the “how” of the anti-poaching tradition. Hawaii did not satisfy its burden of coming forward with any other laws that should be deemed part of the same tradition, nor did the Ninth Circuit identify such laws. In any event, the key point is that no such tradition could permissibly be described at a level of generality that would efface the substantive features of the anti-poaching tradition, and such effacement is required to sustain Hawaii’s law.

CONCLUSION

For these reasons, the Court should reverse the judgment of the Ninth Circuit.

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Respectfully submitted,

JOHN D. OHLENDORF
Counsel of Record
COOPER & KIRK, PLLC
1523 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
johlendorf@cooperkirk.com

Counsel for Amicus Curiae