

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 FOR *AMICUS CURIAE* NATIONAL
SHOOTING SPORTS FOUNDATION IN
SUPPORT OF PETITIONERS**

LAWRENCE G. KEANE
SHELBY BAIRD SMITH
NATIONAL
SHOOTING SPORTS
FOUNDATION, INC.
400 N. Capital St., NW
Washington, DC 20001
(202) 220-1340

ERIN E. MURPHY
Counsel of Record
MATTHEW D. ROWEN
JULIA R. GRANT*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
erin.murphy@clementmurphy.com

* Supervised by principals of the firm
who are members of the Virginia bar

Counsel for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Amicus is a Connecticut non-profit, tax-exempt, non-stock corporation with its principal place of business in Connecticut. *Amicus* certifies that it has no parent corporation and no publicly traded entity owns 10% or more of its stock.

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STATEMENT OF INTEREST¹

The National Shooting Sports Foundation (“NSSF”) is the firearm industry’s trade association. Founded in 1961, NSSF’s mission is to promote, protect, and preserve hunting and shooting sports. NSSF has over 10,000 members—including thousands of federally licensed manufacturers, distributors, and sellers of firearms, ammunition, and related products. NSSF has a clear interest in this case. Its members engage in the lawful production, distribution, and sale of constitutionally protected arms. When a state like Hawaii makes it a crime to carry a firearm on private property unless proprietors provide express authorization, that action not only threatens NSSF members’ businesses, but infringes on their and their customers’ constitutional rights. Under Hawaii Revised Statute §134-9.5, a Hawaiian exercising her right to carry a firearm for self-defense cannot enter any privately owned establishment without fear of criminal sanction. That is not a modest curtailment of the right to bear arms; it is a defiant nullification of the fundamental constitutional right to publicly carry arms for self-defense that the Framers enshrined in the Second Amendment.

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

In *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), this Court articulated and refined a methodology for evaluating Second Amendment challenges that focuses on constitutional text and historical tradition. The threshold question in a Second Amendment challenge is whether “the Government [has] regulate[d] arms-bearing conduct.” *Rahimi*, 602 U.S. at 691. If it has, then “the Second Amendment’s plain text” “covers” the “conduct” in which the challengers would otherwise engage, and the government must “demonstrat[e]” that its effort to restrict that “presumptively protected” conduct “is consistent with the Nation’s historical tradition of firearm regulation.” *Bruen*, 597 U.S. at 24. “Only if” the government proves that its “firearm regulation is consistent with this Nation’s historical tradition may a court conclude that the individual’s conduct falls outside the Second Amendment’s ‘unqualified command.’” *Id.* at 17.

Under any faithful application of that methodology, Hawaii’s effort to ban carrying firearms on private property without first securing permission is plainly unconstitutional. That law unquestionably restricts conduct covered by the plain text of the Second Amendment—namely, bearing arms. And it does so in a way that is fundamentally at odds with this Nation’s historical tradition of firearm regulation, which has long respected the right of law-abiding Americans to carry arms in places open to the public. Indeed, Hawaii’s law flips the tradition of limited and well-defined restrictions on the carry right on its head,

creating a default rule that law-abiding citizens *cannot* carry firearms as they go about their daily lives unless private property owners expressly override that state-imposed preference. That kind of blatant effort to frustrate the exercise of Second Amendment rights has never been part of our Nation’s historical tradition—as even two courts that otherwise largely *rejected* challenges to other carry restrictions recognized.

I. There can be no serious dispute that Section 134-9.5 implicates the Second Amendment, as its whole and sole point is to restrict the bearing of arms. Plaintiffs wish to bring their firearms with them as they go about their daily lives—shopping for groceries, grabbing a cup of coffee, picking up the drycleaning—so they may be “armed and ready for offensive or defensive action in a case of conflict with another person.” *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008). *Bruen* already recognized that the Second Amendment draws no private/public distinction when it comes to bearing arms. *See Bruen*, 597 U.S. at 32-33. This Court has therefore already (correctly) answered the threshold question: Section 134-9.5 restricts the ability of law-abiding citizens to carry arms in public, turning large swaths of the state into presumptively gun-free zones. That is a restriction of arms-bearing conduct, full stop.

While Section 134-9.5 effectuates this curtailment on the right to public carry by default-setting rather than by outright prohibition, that does not make it any less of a restriction on arms-bearing conduct. Before Section 134-9.5 was enacted, petitioners and other law-abiding Hawaiians could carry their lawful and

licensed firearms on all manner of private property open to the public. After Section 134-9.5 was enacted, it is now a crime for them to carry their firearms on any private property they are permitted to enter (whether open to the public or otherwise) unless the proprietor expressly overrides the state's no-carry preference. A law making it a crime for invitees to discuss politics or wear religious garb on private property without first securing the owner's permission would plainly implicate the First Amendment. To hold that Section 134-9.5 does not implicate the Second Amendment not only would make nonsense of *Bruen's* burden-shifting framework, but would relegate the right it protects to second-class status.

II. Because the conduct Section 134-9.5 restricts is “presumptively protect[ed]” by the Constitution, Hawaii bears the burden to “affirmatively prove” that its restriction on that conduct is “consistent with this Nation’s historical tradition of firearm regulation.” *Bruen*, 597 U.S. at 17, 19, 28, 33-34. That, in turn, means that Hawaii must prove that Section 134-9.5 “impos[es] similar restrictions” on the right to keep and bear arms “for similar reasons” as “laws that our tradition is understood to permit.” *Rahimi*, 602 U.S. at 692. Hawaii cannot do so, or even come close. Section 134-9.5 plainly does not fit into any historical tradition this Court has recognized, as it has nothing to do with who may carry, how they may carry, or the intent with which they may do so. Nor does it have anything to do with identifying any “sensitive places” where firearms can be banned entirely. Indeed, the Ninth Circuit did not even try to suggest otherwise.

The court instead purported to divine—from a grand total of two laws, separated by nearly a century that encompassed the Civil War—an entirely different “tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property.” Pet.App.62. But even accepting the dubious proposition that one 1771 law and one 1865 law could suffice to establish “an enduring American tradition,” *Bruen*, 597 U.S. at 69, those two laws self-evidently had nothing to do with restricting carrying firearms on private property that is open the public. They were instead trespassing laws—one aimed at quelling the threat poachers posed to “the Preservation of Deer,” and the other enacted as part of Black Codes designed to strip Black Americans of the rights they had just secured. So, too, with the rest of the laws Hawaii invoked below; all were either anti-poaching measures or part of ignominious Black Codes gerrymandered to impose special trespass and carry restrictions on Black Americans alone. Those laws share neither a “how” nor a “why” with Section 134-9.5, as they restricted carry in fundamentally different ways and for fundamentally different—and, in some cases, virulently racist—reasons.

In short, Hawaii’s effort to impose a default no-carry rule throughout the bulk of the state is both a historical and even a modern-day outlier, and so is the Ninth Circuit’s decision sanctioning it. This Court should reverse.

ARGUMENT

I. Hawaii’s Sweeping Prohibition On Carrying Firearms On Private Property Plainly Regulates Arms-Bearing Conduct.

A. The Threshold Textual Analysis Looks to the Text—and Nothing But the Text.

Under *Bruen* and *Rahimi*, the threshold question for purposes of determining whether a law implicates the Second Amendment is whether “the Second Amendment’s plain text covers an individual’s conduct.” *Bruen*, 597 U.S. at 17. All a citizen must do to make that threshold showing is demonstrate that “the Second Amendment’s plain text covers” the “conduct” in which she would engage but for the challenged law. *Id.* So long as the challenger is among “the people,” and the challenged law restricts her ability to “keep” or “bear” an “Arm[],” U.S. Const. amend. II—i.e., the law “regulates arms-bearing conduct,” *Rahimi*, 602 U.S. at 691—“the Constitution presumptively protects” what the government has restricted, and the burden shifts to the government to “demonstrate that the regulation is consistent with this Nation’s historical tradition,” *Bruen*, 597 U.S. 17.

To answer whether “the Second Amendment’s plain text covers” the conduct at issue, courts need not divine the full historical scope of *the right* that it protects. All they must do is look to the ordinary understanding of *the words* the Second Amendment uses at the time they were used. That much is clear from *Heller*. “In *Heller*, [the Court] began with a ‘textual analysis’ focused on the ‘normal and ordinary’ meaning of the Second Amendment’s language.” *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 576-

77). Consistent with that focus, *Heller* examined historical dictionaries, thesauruses, and other sources to determine how the specific words the Second Amendment uses were defined and understood at the time. See 554 U.S. at 581. The Court did not incorporate into its textual analysis evidence about what kinds of regulations of keeping and bearing arms did or did not exist at the Founding; it instead focused only on how the words the Second Amendment uses were commonly understood and used at that time.

To the extent there were any doubt that the plain-text analysis is focused on the plain text alone, *Bruen* eliminated it. *Bruen* used the phrase “plain text” three times to describe the threshold inquiry into whether conduct is presumptively protected. 597 U.S. at 17, 32, 33. And it dispensed with that inquiry in just a few short paragraphs. The Court invoked the definition of “bear” that *Heller* set forth—i.e., “to ‘wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person’”—observed that “[n]othing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms,” and noted that “confrontation can surely take place outside the home.” *Id.* at 32-33 (quoting *Heller*, 554 U.S. at 584). The Court did not ask whether the historical understanding of the right to bear arms might nonetheless tolerate restrictions on carrying arms outside the home; that was a question for the historical-tradition stage. The only question at the threshold stage is whether a law implicates the Second Amendment *at all*.

Rahimi dispensed with the threshold textual inquiry even more expeditiously. All that mattered there was that Rahimi was one of “the people,” that he wanted to keep some sort of firearm, and that 18 U.S.C. §922(g)(8) prohibited him from doing so. *See Rahimi*, 602 U.S. at 690-91. Again, whether the historical understanding of the right might permit the challenged law was a question for the historical-tradition stage. For purposes of the threshold inquiry, it was enough that the law plainly “regulate[d] arms-bearing conduct.” *Id.* at 691.

B. Section 134-9.5 Plainly Regulates Conduct Covered by the Plain Text.

The threshold textual inquiry is just as simple here as it was in those cases, and as it will be in most. Hawaii has never disputed that Section 134-9.5 covers “the people” to whom the Second Amendment refers. Nor could it: Section 134-9.5 applies to nearly all private citizens,² and this Court has made clear that “the term [‘the people’] unambiguously refers to all members of the political community, not an unspecified subset.” *Heller*, 554 U.S. at 580. Hawaii likewise has not disputed that Section 134-9.5 applies to “Arms” that fall within the plain text of the Second Amendment. That, too, is wise, as Section 134-9.5 applies to all firearms, “whether ... operable or not.” Haw. Rev. Stat. §134-9.5(a).

² Specifically, it applies to all “person[s],” Haw. Rev. Stat. §134-9.5(a), except “state and county law enforcement officers” and various other “persons employed by the State, or subdivisions thereof, or the United States ... if th[eir] duties require them to be armed,” *id.* §134-11(a); *see id.* §134-9.5(d).

The only question, then, is whether Section 134-9.5 restricts petitioners' ability to "keep" or "bear" those arms. It plainly does. As *Heller* explained, "the most natural reading of 'keep Arms' ... is to 'have weapons,'" and "the natural meaning of 'bear arms' ... implies ... the carrying of [a] weapon ... for the purpose of 'offensive or defensive action.'" 554 U.S. at 582-83. While Section 134-9.5 may not restrict individuals' ability to keep (i.e., have) firearms, it plainly restricts their ability to bear (i.e., carry) them. Indeed, *Bruen* already decided that laws that preclude the people from carrying firearms in public implicate the Second Amendment. See *Bruen*, 597 U.S. at 32-33. The same conclusion necessarily follows here.

C. The Fact That Hawaiians Can Carry If Proprietors Grant Express Permission Does Not Absolve the State of Its Historical-Tradition Burden.

The state and its amici argued below that Section 134-9.5 does not implicate the Second Amendment *at all* because it merely vindicates the traditional right of property owners to exclude by preventing people from carrying firearms onto private property without consent. That is both wrong and irrelevant.

At the outset, it strains credulity to suggest that Section 134-9.5 is about protecting private property rights. Hawaii does not require its residents to obtain the owner's permission before they can engage in *other* constitutionally protected conduct on private property that is open to the public. People can discuss politics, display their faith, or wear clothes with provocative messages in grocery stores, coffee shops, and restaurants without having to call up the owner first

and ask permission. It is only when they want to engage in conduct protected by the Second Amendment that the state's newfound concern for the prerogatives of private property owners kicks in. Even then, moreover, the state's respect for what it presumes to be the preference of private property owners only goes so far, as Hawaii exempts from its default rule all manner of state employees (not just police officers) who may continue to enter all manner of private property while armed without securing the proprietor's advance consent. All of that raises "serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring" the exercise of a constitutional right. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011).

It also dooms any claim that the state can evade Second Amendment scrutiny by labeling this law a regulation of private property rights. Petitioners are not claiming "a constitutional right to carry onto another owner's property over their objection." *Contra* CA9.Dkt.11 at 11. Petitioners have no problem respecting rules that private property owners themselves impose on those invited onto their property. Petitioners' issue is with Hawaii's decision to impose a default rule that prohibits the carrying of firearms on private property even when owners have *not* imposed any such rule. No one would seriously think that a state could make it a crime to wear religious garb on private property open to the public without first confirming that the proprietor is comfortable with outward displays of faith—let alone think that such a law would not even implicate the First Amendment.

To the contrary, this Court has long held that “a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment.” *Speiser v. Randall*, 357 U.S. 513, 526 (1958). And it has already held that efforts to “impose *governmental* authority” to restrict the exercise of constitutional rights, “subject only to a [private party’s] veto,” cannot be justified “in the absence of any precedent for [such] state control.” *Brown*, 564 U.S. at 795 n.3. That rule applies with every bit as much force when a state uses its governmental authority to impose a default preference barring the exercise of Second Amendment rights.

In short, Hawaii’s “attempt to equate the activities of [petitioners] with common-law [trespass], and to outlaw them accordingly, cannot obscure the serious encroachment worked by [Section 134-9.5] upon protected freedoms” under the Second Amendment. *NAACP v. Button*, 371 U.S. 415, 438 (1963). Section 134-9.5 shrinks the number of places in which people can exercise their right to bear arms. Whether Hawaii purports to be doing so in service of protecting private property owners, or public safety, or whatever other excuse it may try to conjure up, does not change the fact that it has singled out the carrying of arms for a special, disfavored rule that does not apply to *any* other conduct on private property. That alone should suffice to demonstrate that Section 134-9.5 is unconstitutional, but at the very least it plainly suffices to show that Section 134-9.5 restricts arms-bearing conduct. Indeed, any suggestion that the Second Amendment has nothing to say about such a law would run head-on into this Court’s repeated

admonition that the Second Amendment “is not a second-class right.” *Bruen*, 597 U.S. at 70 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality op.)).

D. Whether a Restriction on Arms-Bearing Imposes a “Meaningful” Constraint Makes No Difference at the Threshold.

Some lower courts, including the Ninth Circuit, have held that a restriction on arms-bearing conduct need not be proven consistent with historical tradition unless it imposes a “meaningful” constraint on the exercise of the right. While Section 134-9.5 would implicate the Second Amendment even under that deeply misguided view, this Court should take the opportunity to make clear—again—that this sort of judicial interest-balancing has no role to play in Second Amendment analysis, and certainly no role to play in the threshold *textual* analysis.

The Ninth Circuit “ha[s] interpreted” “the text of the Second Amendment” to cover only “meaningful constraints” on the right to keep and bear arms, and it “appl[ies] the meaningful-constraint test at step one of the *Bruen* analysis to determine whether the conduct at issue is presumptively protected.” *United States v. Vlha*, 142 F.4th 1194, 1198 (9th Cir. 2025) (quoting *B & L Prods., Inc. v. Newsom*, 104 F.4th 108, 118 (9th Cir. 2024)). The Second Circuit has likewise held that, while laws that *directly* restrict keeping or bearing arms always require historical scrutiny, “regulations on the means of acquiring, transporting, and storing firearms only implicate the text of the Second Amendment if they *meaningfully constrain* the right to possess and carry arms.” *N.Y. State Firearms Ass’n*

v. James, 157 F.4th 232, 244 (2d Cir. 2025) (quoting *United States v. Vereen*, 152 F.4th 89, 94 (2d Cir. 2025)).

None of that is consistent with *Heller*, *Bruen*, or *Rahimi*. First and foremost, considerations that find no purchase in the plain text have no role in the plain-text analysis. To be sure, “how [a law] burdens the Second Amendment right” certainly matters—at the historical-tradition stage. See *Rahimi*, 602 U.S. at 698; *Bruen*, 597 U.S. at 29. Even then, however, what matters is whether that burden is comparable to the burdens imposed by historical laws directed at the same concerns, not whether a modern-day court considers the burden sufficiently “meaningful.” But *none* of that matters at the plain-text stage. “[T]he threshold inquiry is whether the Second Amendment covers the conduct curtailed by the Act, not a qualitative assessment of how modest the imposition on the right happens to be.” *Ortega v. Grisham*, 148 F.4th 1134, 1144 (10th Cir. 2025) (quoting *Beckwith v. Frey*, 766 F.Supp.3d 123, 129 (D. Me. 2025)).

These courts’ contrary view—that laws restricting arms-bearing conduct escape scrutiny unless they are so burdensome as to effectively prohibit the keeping or carrying of arms entirely—would leave the threshold, plain-text inquiry covering virtually nothing, as nearly all laws restricting arms-bearing conduct (save a blanket prohibition) will regulate something more specific than keeping and bearing arms simpliciter. And their view conversely would leave the historical-tradition analysis with virtually no work to do, as the challenger would essentially have to prove that a law *violates* the Second Amendment just to shift the

burden to the state to justify it. This Court should make clear that states cannot evade their historical-tradition burden by insisting that the restrictions they impose on arms-bearing conduct are insufficiently “meaningful” to count.

* * *

In short, it is little wonder that “courts unanimously have concluded that a law changing the default rule on private property falls within the text of the Second Amendment.” Pet.App.58. This Court should erase any doubt: Section 134-5 restricts arms-bearing conduct. Hawaii must therefore demonstrate that it is consistent with our Nation’s historical tradition of firearms regulations.

II. Hawaii’s Sweeping Default Prohibition On Carrying Firearms On Private Property Is Irreconcilable With Historical Tradition.

A. Our Nation’s Historical Tradition Broadly Protects the Carrying of Firearms in Places Open to the Public.

As this Court held in *Bruen*, this Nation’s historical tradition is one of broadly protecting, not broadly prohibiting, the carrying of firearms in public. Indeed, *Bruen* exhaustively examined the historical record in search of evidence of “a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense,” *Bruen*, 597 U.S. at 38, and it came up far short. As the Court explained, “[t]hroughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which

one could not carry arms,” such as in certain narrowly defined “sensitive places” where firearms historically have been off-limits. *Id.* at 30, 38; *see also id.* at 50-59. “None of these historical limitations on the right to bear arms,” however, “operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.” *Id.* at 60. In fact, “apart from a handful of late-19th-century jurisdictions”—which were largely designed to deprive newly freed Black Americans of their constitutional rights—“the historical record” simply “does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms.” *Id.* at 38.

Hawaii’s sweeping default rule banning the carrying of firearms on *any* private property without advance consent plainly cannot be shoehorned into any of the narrow limits on the carry right that this Court recognized in *Bruen*. Section 134-9.5 does not make it unlawful to carry a firearm with “evil intent or malice,” *id.* at 44, or to carry a firearm in one manner (i.e., concealed) while leaving another one (i.e., openly) available, *id.* at 47-49. And its default rule is not confined to individuals who have been found to “pose[] a clear threat of physical violence to another.” *Rahimi*, 602 U.S. at 698. Section 134-9.5 instead broadly prohibits *anyone* from carrying *any* firearm in *any* manner on private property without first securing the owner’s express permission.

Nor does Section 134-9.5 purport to identify some narrow set of “sensitive places” where the “carrying of firearms” may be “altogether prohibited.” *Bruen*, 597 U.S. at 30. Unlike a “sensitive places” law, which bans carrying in certain places as an *exception* to the

normal rule that public carry is the default right, Section 134-9.5 not only bans carrying on *all* private property by default, but leaves permit holders free to carry firearms in all those same places if they *do* secure such consent. In effect, then, Section 134-9.5 turns the sensitive-places tradition on its head. That tradition is premised on the understanding that public carry is the default, and that “sensitive” (i.e., gun-free) places are the exception. But under Section 134-9.5, Hawaiians may *not* exercise their Second Amendment rights while going about their daily lives unless they first get an untold number of their fellow citizens to expressly override the state’s default rule.

That is no small matter; as the Ninth Circuit acknowledged, “many property owners will not post signs of any sort ..., regardless of the default rule.” Pet.App.57. So unless one calls up every business owner in the neighborhood to solicit their views on the carrying of firearms, the right to “public” carry in Hawaii is now effectively confined to “streets and sidewalks.” Pet.App.38 n.4. Hawaiians who want to have a firearm at the ready for self-defense while they shop, grab lunch, or run a load at the laundromat are not just out of luck; they face criminal penalties and even imprisonment if they carry arms anywhere without first securing express permission. Even Hawaiians “taking [their] dog out for a walk on a city sidewalk” can confidently carry a firearm only if they have no intention of entering any convenience store, coffee shop, or other establishment along the way. Pet.App.170 (VanDyke, J. dissenting from the denial of rehearing en banc).

That result is impossible to reconcile with *Bruen*, which held in no uncertain terms that individuals (and especially those who, as Hawaii separately requires to carry *anywhere*, have passed a background check and obtained a permit under a shall-issue regime) have a “right to carry a handgun for self-defense outside the home,” and that states cannot ban carrying in areas broad as the entire “island of Manhattan.” *Bruen*, 597 U.S. at 10. Simply put, our historical tradition does not countenance efforts to “broadly restrict arms use by the public generally.” *Rahimi*, 602 U.S. at 698.

B. There Is No Exception to That Broad Carry Right for Public Places That Are Privately Owned.

1. The Ninth Circuit did not even try to situate Section 134-9.5 in any historical tradition this Court has recognized. It instead purported to derive a *new* tradition that empowers states to impose sweeping no-carry default rules, under the guise of protecting the prerogatives of property owners. According to the Ninth Circuit, history reveals that “colonies and states freely arranged the relevant default rules” for carrying firearms on private property, including by “ban[ning] the carrying of firearms onto *any* private property without the owner’s consent.” Pet.App.61. Remarkably, the court purported to derive that novel tradition from a grand total of two laws—one enacted by New Jersey in 1771 before it entered the Union, and one enacted by Louisiana in 1865 before it was readmitted to the union—which the court described as “dead ringers” for Section 134-9.5. Pet.App.62. That novel theory fails from top to bottom.

At the outset, it is hard to see how two singular laws enacted nearly a century apart could suffice to establish “an enduring American tradition.” *Bruen*, 597 U.S. at 69; *see, e.g., id.* at 46 (“[W]e doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation.”); *id.* at 65-66 (“[W]e will not give disproportionate weight to a single state statute and a pair of state-court decisions.”); *id.* at 67-68 (“[W]e will not stake our interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment’s adoption” and “governed less than 1% of the American population.”). The Ninth Circuit tried to excuse the paucity of its historical evidence by positing that “only one or two colonial laws provided sufficient justification for the [*Bruen*] Court to designate several places as sensitive.” Pet.App.27. That is neither a fair characterization of *Bruen* nor a fair comparator to an effort to divine an entirely new tradition from two laws separated by both the Revolutionary War and the Civil War. After all, what it takes to establish *which things fell within* an established historical tradition may not necessarily be the same as what it takes to establish *the existence of* a historical tradition in the first place—especially one at direct odds with *Bruen*’s conclusion that “American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense.” 597 U.S. at 70.

It is even harder to see how a mere two laws could suffice to override the well-established tradition of implied-license law, which confirms that people generally *could* carry arms on private property held open to the public unless the owner forbade it. The

scope of permission to enter private property has long been determined by a combination of custom and express allowances given by the owner. Thomas M. Cooley, *A Treatise on the Law of Torts* 302-04 (Chicago, Callaghan & Co. 1879). Custom—i.e., the implied part of the license—is “implied from the habits of the country.” *McKee v. Gratz*, 260 U.S. 127, 136 (1922); *see also Florida v. Jardines*, 569 U.S. 1, 8 (2013). And in the United States, there is a longstanding custom of carrying firearms at places open to the public unless the owner prohibits it. *See* Pet.App.173 (VanDyke, J., dissenting from the denial of rehearing en banc). Indeed, the state’s own amici have acknowledged in academic writings that “[a]n implied condition of every invitation [onto another’s property] is that the invitee is welcome to bring a firearm.” Ian Ayres & Frederick E. Vars, *Weapon of Choice: Fighting Gun Violence While Respecting Gun Rights* 84 (2020).

It should come as little surprise, then, that the two laws on which the Ninth Circuit relied had nothing to do with those *invited* onto private property. They instead dealt only with trespassers—and with trespassers on only a subset of private property, at that. Indeed, almost all of the laws Hawaii invoked below were self-described anti-poaching measures, not efforts to “arrange[] the default rules” for what *invitees* could do on private property. Pet.App.62. And the few that were not anti-poaching measures were part of Black Codes designed to keep newly freed Black Americans from bringing firearms onto their former enslavers’ private property. A proper understanding of these laws, informed by both their full text and the historical context surrounding them, thus confirms

that they do not begin to establish any historical tradition that could justify Hawaii's effort to impose a broad no-carry default rule.

2. To start with the 1771 New Jersey law, this law was indeed part of a historical tradition—just not the one the Ninth Circuit claimed to have identified. It was instead part of a tradition of laws designed to prevent *uninvited* individuals from *hunting* on private grounds without the proprietors' permission. In other words, it was an anti-poaching measure aimed at trespassers, not an anti-carry measure aimed at law-abiding citizens frequenting establishments open to the public (or any other private property onto which they were invited).

Take, for instance, the 1721 Pennsylvania statute entitled “An Act to Prevent the Killing of Deer Out of Season, and Against Carrying of Guns or Hunting Not Qualified.” 1721 Pa. Laws, ch.246, §3, *reprinted in 3 The Statutes at Large of Pennsylvania from 1682-1801*, at 254-55 (James T. Mitchell & Henry Flanders, eds. 1896) (“1721 Pa. Laws”). To respond to “divers[e] abuses, damages and inconveniences” that “ha[d] ar[i]se[n] by persons carrying guns and presuming to hunt on other people's lands,” that statute made it unlawful to “carry any gun or hunt on the improved or inclosed lands of any plantation other than his own.” *Id.* By its terms, it applied only to “lands,” not commercial establishments where no one was worried about the unauthorized “Killing of Deer.” And as the Second Circuit explained in holding New York's private-property-default law unconstitutional, at the time, “‘land,’ ‘improved or inclosed land,’ and ‘premises or plantations’ would have been understood to refer to

private land not open to the public.” *Antonyuk v. James*, 120 F.4th 941, 1047 (2d Cir. 2024).³

The 1722 New Jersey law Hawaii cited below used nearly identical language, confining its scope to those trespassing on private hunting grounds. *See* An Act to prevent the Killing of Deer out of Season, and against Carrying of Guns or Hunting by Persons not Qualified, 1722 N.J. Laws 141 (no person shall “carry any [g]un, or [h]unt on the [i]mproved or [i]nclosed [l]ands in any [p]lantation[] ... other than his own”). Other colonial laws Hawaii cited, including a 1715 Maryland statute⁴ and an 1763 New York statute,⁵

³ *See also, e.g., State v. Hopping*, 18 N.J.L. 423, 424 (N.J. 1842) (“improvements is a legal and technical word, and means inclosures, or inclosed fields: lands fenced in, and thus withdrawn and separated from the wastes or common lands”); *Plantation*, Nathan Bailey, *Dictionary Britannicum* (1736) (“a spot of ground, which some planter or person, arrived in a new colony, pitches on to cultivate and till for his own use”); *Premises*, *Webster’s American Dictionary of the English Language* (1828), <https://tinyurl.com/psm7954j> (“In law, land or other things mentioned in the preceding part of a deed.”); *Land*, 2 Samuel Johnson, *A Dictionary of the English Language* 18 (1756) (“An estate real and immoveable.”).

⁴ An Act for the Speedy Trial of Criminals, and Ascertaining their Punishment, in the County-courts, when Prosecuted there; and for Payment of Fees due from Criminal persons, 1715 Md. Laws 90, ch.26, §7 (forbidding convicted criminals and those “of evil fame, or a vagrant, or dissolute liver” from “shoot[ing], kill[ing] or hunt[ing], or ... carry[ing] a gun, upon any person’s land, whereon there shall be a seated plantation,” in order “to prevent the abusing, hurting[,] or worrying of any stock of hogs, cattle or horses”).

⁵ An Act to Prevent Hunting with Fire-Arms in the City of New-York, and the Liberties Thereof, 1763 N.Y. Laws, ch.1233, §1 (making it unlawful to “carry, shoot, or discharge any Musket,

likewise were focused on preventing and punishing poaching on private lands not open to the public. In addition to banning trespassing with guns on such lands, several of these laws made it unlawful to hunt and sell venison out of season,⁶ and imposed restrictions on the use of trap guns for hunting,⁷ confirming their game-protection focus.⁸

The Ninth Circuit acknowledged (albeit with considerable understatement) that “the primary aim of some of those laws was to prevent poaching,” and that they “likely did not apply to property that was generally open to the public.” Pet.App.61. But it posited that New Jersey’s 1771 anti-poaching measure reached much, much further, prohibiting the carrying of guns on “*all* private property”—be it hunting lands reserved for private use or commercial establishments held open to the public—without the owner’s advance permission. Pet.App.61.

Fowling-Piece, or other Firearm whatsoever, into, upon, or through any Orchard, Garden, Cornfield, or other inclosed Land whatsoever”).

⁶ See 1721 Pa. Laws 255, §2 (“[E]very person in whose custody shall be found, or who shall expose to sale any green deer skins, fresh venison, or deer’s flesh, at any other time of the year than what is before excepted ... shall be deemed guilty of the said offense.”); 1722 N.J. Laws 141 (similar); 1771 N.J. Laws 344-45, ch.540, §1 (similar); see *also* 1715 Md. Laws 89, §6 (forbidding persons from “kill[ing] any unmarked swine”).

⁷ 1771 N.J. Laws 345, §7.

⁸ While Hawaii also cited an 1893 law from Oregon that was not as obviously aimed at curtailing poaching, this provision was similarly limited to “enclosed premises or lands” and in any event comes too late in history to establish any meaningful tradition. See 1893 Or. Laws 79.

In reality, far from reflecting some sharp break with the anti-poaching restrictions of the time, New Jersey's 1771 law is entirely of a piece with them. After earlier measures had "been found insufficient to answer" the problems, New Jersey enacted a new "Act for the Preservation of Deer and other Game, and to prevent Trespassing with Guns." 1771 N.J. Laws 343-44. But that updated law did not extend New Jersey's anti-poaching measures to cover "*any* private property," Pet.App.61, let alone to cover commercial establishments having nothing to do with the general assembly's deer-preservation aims. The law instead remained sensibly focused on the kinds of lands where deer were likely be found, making it unlawful to "carry any Gun on any Lands not his own, and for which the Owner pays Taxes, or is in his lawful Possession." 1771 N.J. Laws 344, §1.

Like the term "improved or inclosed lands," that phrase would have been understood at the time as confined to "Lands" (not commercial premises) that were *not* open to the public. *Antonyuk*, 120 F.4th at 1047; *see also Land*, 2 Samuel Johnson, *A Dictionary of the English Language* 18 (1756) ("An estate real and immoveable."). That is evident from the facts that the law continued to describe its aim as preventing "[t]respassing with [g]uns," and to separately address hunting on private lands *not* closed to the public. *See* 1771 N.J. Laws 344, 345, §§1, 6 (emphasis added). It is also evident from how the law was enforced. *See, e.g.,* 1 William Horace Corbin, *A Book of Forms of Contracts and Conveyancing; and of Legal Proceedings under the Laws of the State of New Jersey* 374 (1882) (enforcement suit where defendant "hunt[ed] with a

gun and dog for birds, and did kill and take three quail” and “carr[ied] a gun” “on the farm of G.H.”).

Just as with the other anti-poaching measure that came before (and after) it, then, nothing in New Jersey’s 1771 law even hints at the notion that the colony sought to address “the Preservation of Deer” and “Trespassing with Guns” through the nonsensical approach of barring people from carrying guns when they frequented commercial establishments open to the public or other private property onto which they were invited. To the contrary, the law made clear that it was *not* designed to interfere with the carrying of guns outside the narrow context of trespassing on hunting grounds, as it included an express caveat that “nothing herein contained shall be construed to extend to prevent any Person carrying a gun upon the King’s Highway in this Colony.” 1771 N.J. Laws 344, §2.

In short, neither the “how” nor the “[w]hy” of New Jersey’s 1771 law is “relevantly”—or even remotely—“similar” to Section 134-9.5. *See Rahimi*, 602 U.S. at 692. One need not search hard for the “why”; the law says on its face (twice) that it was designed to address “the Preservation of Deer” and “Trespassing with Guns.” Consistent with that purpose, the relevant restrictions applied only to trespassers on potential hunting grounds *not* open to the public. Hawaii’s law evinces no such restraint—because Hawaii is not trying to prevent poaching or trespassing. It is trying to stymie the carrying of firearms at commercial establishments by those invited to frequent them. Neither New Jersey’s 1771 law nor any of the other anti-poaching measures it invoked below provides any

historical support for the state’s effort to make virtually all of Hawaii a default no-carry zone.

3. The Ninth Circuit’s effort to convert an 1865 Louisiana statute⁹ into a law “arrang[ing] the relevant default rules” for carrying firearms on private property, Pet.App.62, suffers from the same basic defects—and more.

At the outset, that law was not part of any historical tradition that our Constitution tolerates. It was instead part of the ignominious Black Codes that pervaded southern states in the wake of the Civil War. As freedmen obtained firearms, “[t]he former states of the Confederacy, many of which had recognized the right to carry arms openly before the Civil War, developed a greater willingness to qualify that right.” Clayton E. Cramer, *The Racist Roots of Gun Control*, Kan. J.L. & Pub. Pol’y 17, 20 (1995). This led to curtailments of the right to keep and bear arms that were largely inconsistent with the way those same states had treated the right before it was shared by Black Americans. Compare *Cockrum v. State*, 24 Tex. 394, 401 (1859) (“The right of a citizen to bear arms, in the lawful defense of himself or the state, is absolute.”), with *English v. State*, 35 Tex. 473, 478 (1872) (“Our constitution ... confers upon the legislature the power to regulate the privilege” of “keep[ing] and bear[ing] arms.”); see also Cramer, *supra*, at 20 (describing *English* as an “especially

⁹ An Act to prohibit the carrying of fire-arms on premises or plantations of any citizens, without the consent of the owner, 1865 La. Acts 14, No.10.

absurd example of how far a state was willing to go to qualify the right to bear arms” after the Civil War.).

The 1865 Louisiana statute on which the Ninth Circuit relied was part of that reprehensible effort to deprive Black Americans of their Second Amendment rights. Indeed, the racist origins of the law are well-documented. It “was enacted right after the Civil War, by a former Confederate State, *before* Louisiana was even readmitted to the Union,” and was “*invidiously designed to undermine civil rights.*” Pet.App.188 (VanDyke, J., dissenting from the denial of rehearing en banc); *see also* Bill Quigley, *The Continuing Significance of Race: Official Legislative Racial Discrimination in Louisiana 1861 to 1974*, 47 S.U. L. Rev. 1, 12 (2019) (acknowledging that the 1865 Louisiana statute was part of the Black Codes). The law’s carve-outs hint toward its racist origins, too, as it excused from its prohibitions those acting “in lawful discharge of a civil or military order.” 1865 La. Acts 14; *see McDonald*, 561 U.S. at 779 (plurality op.).¹⁰ Laws enacted in the immediate wake of the Civil War to *strip* Black Americans of the rights they had newly secured say little, if anything, about the scope of the rights they sought to strip.

At any rate, Louisiana’s law is not analogous to Hawaii’s even on its own terms, as it too did not apply to private property open to the public, let alone to all

¹⁰ The same discriminatory purpose motivated and infected the operation of the Texas law Hawaii invoked below. *See* An Act to Prohibit the Carrying of Fire-Arms on Premises or Plantations of Any Citizen Without the Consent of the Owner, 1866 Tex. L. 90, ch.91, §1; Barry A. Crouch, “*All the Vile Passions*”: *The Texas Black Code of 1866*, 97 Sw. Hist. Q. 13, 22 (1993).

the commercial establishments law-abiding citizens frequent in their daily lives. It instead just prohibited carrying firearms on “the premises and plantations of any citizen,” 1865 La. Acts 14—a group of landowners that Louisiana at the time still would not have recognized to include Black Americans. And that provision was accompanied by “An Act To Prevent Trespassing,” which made it unlawful to “enter upon any plantation without the permission of the owner or agent.” An Act To Prevent Trespassing, 1865 La. Acts 16, No.11. So, like New Jersey’s law, this law applied only to (certain) trespassers on (certain) private lands, not to invitees into commercial establishments or any other private property held open to the public. *See Koons v. Att’y Gen. N.J.*, 156 F.4th 210, 252-53 (3d Cir. 2025); *Antonyuk*, 120 F.4th at 1046-47.

Hawaii thus failed to identify even a *single* historical law that broadly restricted carrying on any and all private property open to the public. That suffices to doom any claim to a tradition that could justify Section 134-9.5. Hawaii may not need “a historical twin,” *Rahimi*, 602 U.S. at 692, but it has not even managed to identify a distant cousin. To be sure, business proprietors and other private property owners have always been free to condition access on willingness to leave one’s constitutional rights at the door. But just as with any other constitutional right, the custom in our country is that they must actually do so; the government cannot preemptively restrict the exercise of constitutional rights just because it thinks that may be the preference of most private property owners. And it certainly cannot restrict constitutional rights because it thinks that *should* be the preference of private property owners.

In short, there *is* a pronounced historical tradition at play here: Americans do not leave their constitutional rights at the door when entering private property open to the public, unless the proprietor makes clear that doing so is a condition of entry. Section 134-9.5 flouts that “enduring American tradition.” *Bruen*, 597 U.S. at 69. Historical tradition makes clear that it simply is not for the government to declare all the many public places people frequent in their daily lives default no-carry zones.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

LAWRENCE G. KEANE	ERIN E. MURPHY
SHELBY BAIRD SMITH	<i>Counsel of Record</i>
NATIONAL	MATTHEW D. ROWEN
SHOOTING SPORTS	JULIA R. GRANT*
FOUNDATION, INC.	CLEMENT & MURPHY, PLLC
400 N. Capital St., NW	706 Duke Street
Washington, DC 20001	Alexandria, VA 22314
(202) 220-1340	(202) 742-8900
	erin.murphy@clementmurphy.com

* Supervised by principals of the firm who are members of the Virginia bar

Counsel for Amicus Curiae

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