

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

**AMICUS CURIAE BRIEF OF
THE BUCKEYE INSTITUTE
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

1. Whether the Ninth Circuit erred in holding, in direct conflict with the Second Circuit, that Hawaii may presumptively prohibit the carry of handguns by licensed concealed carry permit holders on private property open to the public unless the property owner affirmatively gives express permission to the handgun carrier.

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INTEREST OF AMICUS CURIAE¹

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes its mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute also files lawsuits and submits amicus briefs to fulfill its mission. The Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. Section 501(c)(3).

SUMMARY OF THE ARGUMENTS

Imagine a law: “No person shall speak in a private place of business without explicit permission or signage at the entrance granting such permission.” Such a law would be indefensible. But such is Hawaii’s new law. Hawaii changed the status quo of people allowed to exercise a constitutional right on private property open to the public—subject to the disapproval of a private property owner—to a government-imposed prohibition of the exercise pending express private approval. Enacted in response to the Court’s decisions in *Bruen*, Haw. Rev. Stat. § 134-9.5 criminalizes carrying a firearm on

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

private property unless the landowner expressly consents. The Second Amendment prohibits this criminalization when applied to private property otherwise open to the public.

The Court's history and tradition analysis of encroachments on the right to keep and bear arms is different than the Court's approach to encroachments on other constitutional rights, but it is instructive to look at the default rule of free exercise of other constitutional rights on properties open to the public. While this brief does not address the history and tradition analysis, this Court's jurisprudence protecting constitutional rights suggests that the default rule of protecting those rights absent property owners' denial of the same is consistent with the history and tradition of all our individual rights.

And although firearms can be misused by criminals to harm others, the right to keep and bear arms deserves no less respect than the First Amendment or any other constitutional rights. The Court should reverse the Ninth Circuit's decision upholding Hawaii's law.

ARGUMENTS

The Second Amendment to the United States Constitution provides that a "well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. As the Court recently affirmed in *Bruen*, the Second Amendment "refers to the right to 'wear, bear, or carry . . . for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another

person.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 32 (2022) (quoting *D.C. v. Heller*, 554 U.S. 570, 584 (2008)). And “confrontation can surely take place outside the home.” *Id.* at 33.

Accordingly, Hawaii’s regulation of where an individual may carry a firearm is covered by the plain text of the Second Amendment, and thus, regulates presumptively protected activity. See generally *id.* Yet Hawaii has attempted to regulate this presumptively protected conduct in an unconstitutional way in pursuit of its own interests.

I. Hawaii’s new default rule exemplifies a troubling trend of state overreach with remarkable indifference to Second Amendment rights.

When a government considers taking an action, it must assess whether the action implicates a fundamental right. If it does, the government lacks the power to act in conflict with that fundamental right. Hawaii’s new law—along with similarly restrictive laws of some other states—undermines Second Amendment rights and suggests those states’ disdain towards the Court’s Second Amendment jurisprudence. See *Br. in Op.* at 1 (noting that in response to *Bruen*, many states, including Hawaii, revised their firearms laws, ostensibly to satisfy *Bruen*).

In defiance of *Bruen*’s warning that large areas may not be sealed off to firearms owners as “sensitive places,” see *Bruen*, 597 U.S. at 31, Hawaii’s new restrictive default rule seals off all otherwise open private property from members of the public that are

exercising their Second Amendment rights. See Haw. Rev. Stat. § 134-9.5. The law creates an exception where the property owner has given express permission to carry a firearm on the property. *Id.* Hawaii has also prohibited carrying firearms on fifteen other types of property. See Haw. Rev. Stat. § 134-9.1(a). Alone, each of these prohibitions is questionable under *Bruen*. Together, they prohibit the exercise of a fundamental right almost anywhere in the state.

Hawaii is not alone in its attempts to circumvent *Bruen*. California likewise implemented a law flipping the default rule on all private property that is open to the public, Cal. Penal Code § 26230(a)(26), and generally prohibited a concealed-carry permit holder from carrying a firearm onto more than two dozen types of property, Cal. Penal Code § 26230(a). The Ninth Circuit below noted that “California’s statute is stricter than Hawaii’s,” as California property owners may consent only by “‘clearly and conspicuously post[ing] a sign at the entrance of the building or on the premises indicating that license holders are permitted to carry firearms on the property.’ Other forms of permission, such as oral or written consent, do not suffice.” Pet. App. 11a.

New York implemented its *Bruen* response laws just a week after the Court decided to hold unconstitutional the state’s previous restrictions on carrying firearms in public. Andrew Willinger, *New York’s Response to Bruen: The Outer Limits of the “Sensitive Places” Doctrine*, Duke Center for Firearms

Law (July 13, 2022).² Like Hawaii and California, New York’s new law targets the carrying of firearms on almost all property in the state—including private property otherwise open to the public. See *Antonyuk v. James*, 120 F.4th 941, 958 (2d Cir. 2024) (discussing N.Y. Penal L. § 265.01-d(1)). When asked in what public places a permit holder could carry a firearm, New York Governor Hochul replied, “probably some streets.” Marcia Kramer & Dick Brennan, *Fresh off primary win, Gov. Kathy Hochul dives right into guns—who can get them and where they can take them*, CBS N.Y. (June 29, 2022).³

New Jersey soon followed with its own law. See *Koons v. Att’y Gen. New Jersey*, No. 23-1900, 2025 WL 2612055, at *25 (3d Cir. Sept. 10, 2025), as amended (Sept. 17, 2025) (discussing N.J. Stat. § 2C:58-4.6).

All of these laws violate *Bruen*’s admonitions.

II. Hawaii’s new default rule unconstitutionally encroaches on the right to bear arms in a way that would be repugnant to other constitutional rights.

Hawaii’s new default rule presumptively deems exercising a constitutional right as illegal and places the burden on the property owner to know about the restriction and expressly authorize the exercise of the right. Hawaii’s new rule is not a conduit for private decision-making, but a government-imposed restriction on the right to bear arms. See *Koons*, No. 23-1900, 2025 WL 2612055, at *25 (finding New

² <https://tinyurl.com/NY-Bruen-Response>.

³ <https://tinyurl.com/SomeNYStreets>.

Jersey's similar restriction was not a "conduit for private decision-making"). It seems plain that states cannot restrict the free exercise of other non-Second Amendment constitutional rights on private property open to the public, absent a property owner's permission. Substituting those rights into Hawaii's law manifests the unconstitutionality of the law. For example, it is highly unlikely that any legislature would dare to pass any of the following laws:

- A prohibition on an individual who does not identify as Jewish from visiting a synagogue during worship, unless the rabbi posts a notice expressly allowing individuals of other faiths to enter.
- A prohibition on wearing a hijab in grocery stores unless the grocer puts up a sign saying, "hijabs welcome."
- A law prohibiting customers from holding Bible studies or other religious study groups at tables in coffee shops open to the public, unless the shop posts a sign specifically allowing religious gatherings on the premises.
- A law prohibiting customers from wearing political buttons, shirts, or hats inside any retail store open to the public, unless the store owner posts a notice expressly permitting political attire.
- A law prohibiting the peaceful distribution of political leaflets in shopping centers open to the public, or the discussion of political issues in a

bookstore, or the interviewing of patrons in malls open to the public, unless the property owner expressly consents to each activity.

- A law prohibiting a union representative from entering an otherwise open store to discuss unionization with the employees, unless the employer expressly permits the speech and association.
- An Ohio law prohibiting cars with University of Michigan bumper stickers from filling up at Ohio gas stations during game week unless the station posts a sign explicitly permitting Michigan fans.⁴

Each of the above scenarios restricts the exercise of a constitutional right—speech, association, free exercise, equal protection—unless the owner of property otherwise open to the public expressly allows the activity. The Second Amendment is entitled to at least the same deference as all other constitutional rights.

Property owners generally can maintain control over their property, even restricting the exercise of constitutional rights on their property. But the government cannot restrict people’s rights as a default. See *Project 80s v. Pocatello*, 942 F.2d 635, 639 (9th Cir. 1991) (finding a requirement that “residents who wish to receive uninvited door-to-door solicitors

⁴ Buckeye Coach Woody Hayes once refused to stop at a Michigan gas station, preferring to run out. Nicholas Gialdini, *Tales of Woody: Running Out of Gas in Michigan*, *Buckeyes Wire* (Dec. 21, 2018), <https://tinyurl.com/bdhda92j>.

must post a ‘Solicitors Welcome’ sign” an impermissible “imposition of affirmative obligations on the residents’ first amendment rights to receive speech”); *Thomas v. Collins*, 323 U.S. 516 (1945) (holding unconstitutional a law requiring pro-union advocates to obtain a license before giving paid speeches).

Moreover, holding Hawaii’s new default rule unconstitutional does not undermine property rights because property owners are still free to prohibit the carrying of firearms on their property. Returning the law to the old default allows property owners—instead of the state—to determine who may enter their property. And allowing property owners to decide who may enter their property is not the same as compelling the owner to grant access. See generally *303 Creative LLC v. Elenis*, 600 U.S. 570, 590 (2023) (discussing state nondiscrimination and public accommodation laws that mandate equal access); *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021) (finding law requiring access to private property violates the right to exclude). Instead, the state takes a hands-off approach until the property owner decides what to do. And no party has suggested that a private property owner’s use of state trespass laws to enforce the property owner’s ban of firearms on their property would be impermissible. See generally *Bell v. State of Md.*, 378 U.S. 226, 326–333 (1964) (Black, J., with whom Harlan and White, JJ., join, dissenting) (arguing that, standing alone, private use of trespass laws for a discriminatory purpose is not state action under the Fourteenth Amendment).

The old default rule promoted private control of property and the exercise of a constitutional right. Hawaii's new default rule flips the script, restricting the exercise of a constitutional right under the guise of protecting private property and public safety. See Br. in Op. at 1. Rather than a calligraphy carefully written to honor Hawaiians' right to bear arms, Hawaii's law scribbles out significant rights embedded within the Constitution. The Court should hold Hawaii's erasure of the right to carry in public unconstitutional.

III. Although criminals may misuse firearms, that does not reduce the rights of lawful bearers of firearms.

It is certainly true that some people may abuse the right to bear arms and use firearms in crime. But that does not diminish law-abiding citizens' constitutional right to bear arms. What Hawaii fears as a weapon of offense, millions of Americans value as a tool for defense. See *Heller*, 554 U.S. at 581 (partially defining "arms" as "[w]eapons of offence, or armour of defence") (quoting 1 Samuel Johnson, *Dictionary of the English Language* 106 (4th ed.)). But Hawaii's declaration that a wide swath of the state constitutes a sensitive place seals off many places that are precisely those where people may be the most concerned about protecting themselves from lawless armed criminals. For example, black American churches have historically been—and shockingly still are—targeted by those seeking to harm black Americans. Conor Friedersdorf, *Thugs and Terrorists Have Attacked Black Churches*

for Generations, The Atlantic (June 18, 2015)⁵; Jason Crosby, *Targeting Black Churches Isn't Stuff of Distant History*, Courier Journal (Nov. 1, 2018)⁶. And good guys with a firearm can stop bad guys with a weapon and thereby prevent or mitigate a tragedy. Frank Heinz, *'Good Guy With a Gun' Who Stopped Church Gunman Receives Texas' Highest Honor*, NBCDFW (Jan. 14, 2020).⁷ Indeed, Justice Alito recognized in *Bruen* that “[o]rdinary citizens frequently use firearms to protect themselves from criminal attack. According to survey data, defensive firearm use occurs up to 2.5 million times per year.” *Bruen*, 597 U.S. 74 (Alito, J., concurring) (citation omitted).

The Framers of the Second Amendment were not naive. There were criminals in those days who misused firearms, and yet, the Framers still incorporated a strong protection of the right to bear arms in the Bill of Rights.

Similarly, the Framers enumerated the Fourth Amendment, which requires probable cause to obtain a warrant, even though that requirement may facilitate the commission of otherwise preventable crimes and even allow some criminals to go free. The inevitability of allowing some unpunished crime “must have been very well known to the framers of our constitution; but they thought it better that the guilty should sometimes escape, than that every individual should be subject to vexation and oppression.”

⁵ <https://tinyurl.com/AtlanticChurches>.

⁶ <https://tinyurl.com/CourierChurches>.

⁷ <https://tinyurl.com/GoodGuyChurch>.

Conner v. Com., 1810 WL 1342 (Pa. 1810) (analyzing the Pennsylvania Constitution). See also U.S. Const. amend. V (protecting a person from twice being put in jeopardy of life or limb for the same offence).

The Framers also enumerated the First Amendment, which protects an individual's right to speak his mind regardless of whether the government considers the speech deeply "misguided, or even hurtful," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995), and likely to cause "anguish" or "incalculable grief," *Snyder v. Phelps*, 562 U.S. 443, 456 (2011). See also *303 Creative LLC*, 600 U.S. at 586 (noting these principles). And in *Brandenburg*, the Court went so far as to note that the freedoms of speech and press "do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

Although individual misuse of firearms can inflict more harm than harmful words, the Framers chose to protect the exercise of keeping and bearing arms no less than the freedom of speech. Hawaii may still regulate firearm usage consistent with *Bruen*, but placing the onus on the bearer of firearms to obtain permission before exercising that right is inconsistent with the country's constitutional scheme and is unconstitutional.

CONCLUSION

The scope of the Second Amendment's protection is determined by law, not by fear. Hawaii's new default firearms prohibition is just as constitutionally indefensible as would be a prohibition of the exercise of other fundamental constitutional rights. For that reason, and the reasons in Petitioners' brief, the lower court's decision should be reversed.

Respectfully submitted,

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