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 THE U.S. SPORTSMEN'S ALLIANCE FOUNDATION IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The U.S. Sportsmen's Alliance Foundation is an Ohio-based organization, incorporated under § 501(c)(3) of the Internal Revenue Code. It is dedicated to promoting and educating the public about our hunting, fishing, and trapping heritage, and science-based wildlife management. Sportsmen's Alliance Foundation achieves its mission through public education and issue research, conducted both on its own and through partnerships with local sportsmen and conservation organizations. It also engages in litigation to protect hunting, trapping, fishing, and scientific wildlife management. Sportsmen's Alliance Foundation has organizational members, including its parallel entity, the U.S. Sportsmen's Alliance, an I.R.C. § 501(c)(4) nonprofit, whose membership consists of sportsmen from across the country, including the Aloha State.

Sportsmen have an interest in defending the Second Amendment. Firearms are part and parcel of our hunting heritage. Hunting is one of the core, lawful purposes for which arms can be kept under the Second Amendment, and many people place a higher value on hunting than some of the more-frequently cited purposes behind the Second Amendment. *D.C. v. Heller*, 554 U.S. 570, 583 n.7, 599 (2008). Sportsmen also have an interest in opposing the classist hunting-qualification laws that Hawaii and the Ninth Circuit relied on below.

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[1] In accordance with Rule 37.6, counsel for amicus curiae certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than amicus curiae, its members, or its counsel has made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Aloha State has continuously treated the right to bear arms outside the home as something less than a second-class right. "Hawaii counties appear to have issued only *four* concealed carry licenses in the past *eighteen years*." *Young v. Hawaii*, 896 F.3d 1044, 1071 n.21 (9th Cir. 2018), *on reh'g en banc*, 992 F.3d 765 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022) (emphasis in original). One would have thought that *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022) would have changed things. To an extent, it did. Hawaii went from a licensing regime under which it issued licenses to no one to a regime under which it issued licenses to carry nowhere. *Bruen* demands more.

The primary tool that Hawaii currently uses to restrict the fundamental right to carry is the default private-property rule. Haw. Rev. Stat. § 134-9.5. The default rule forbids licensed individuals from carrying firearms on private property that is open to the public unless they have received authorization personally or signs have been posted on the property "indicating that carrying or possessing a firearm is authorized." Haw. Rev. Stat. § 134-9.5(b). Section 134-9.5 cannot withstand *Bruen's* text, history, and tradition analysis.

At common law, both before and after the Revolution, establishments that held themselves out as open to serving the public had a legal obligation to serve anyone who came seeking their service. The law, in fact, imposed the burden on the establishment to show a good reason as to why it could not serve the customer. Carrying a firearm would not have been such

a reason. Carrying a firearm was customary practice at the time, so the common entities would have needed a better reason to deny service. Section 134-9.5 upends the common law and compels establishments that hold themselves out as open to the public to go a step further and say that they are open to individuals carrying firearms.

Moreover, the pre-Revolutionary poaching or "qualification" laws that Hawaii and the Ninth Circuit relied on below are not relevantly similar to § 134-9.5. On their face, they were enacted to preserve wildlife. But there was an ulterior, nefarious motivation behind them: protecting the wealthy gentleman's hunting hobby while controlling the lower classes. Banning the poor from hunting deprived them of a reason to keep arms and helped ensure the survival of the feudalist system. It also forced the poor to enter the labor force and earn money to buy food, thereby growing the economy. To that end, those laws never banned the "qualified" elites from entering and hunting on open lands that they did not own.

Those classist restrictions were also universally rejected after the Revolution, and a new American tradition was established. Ordinary people could enter and hunt on all open and uncultivated lands, despite trespass laws, provided they did not physically damage the land and they were not prohibited from entering by the owner.

Nothing about § 134-9.5 is relevantly similar to that tradition. Hawaii, however, would revive that classist tradition and apply it in an overly broad manner to water down the Second Amendment into a second-class right. The Founders rejected that tradition. This Court should, too.

ARGUMENT

"[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17. And "[o]nly if a 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.* (citation omitted).

Carrying a firearm outside the home is protected by the "Second Amendment's plain text." *Id*. at 33. Hawaii, therefore, "bears the burden to 'justify its regulation.'" *United States v. Rahimi*, 602 U.S. 680, 691 (2024) (quoting *Bruen*, 597 U.S. at 24). It must show that the regulations are "part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Bruen*, 597 U.S. at 19.

Hawaii cannot avoid this burden with a self-serving declaration that it merely enacted a "'sensitive-place' law." *Id*. at 30. To the contrary, "the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited—e.g., legislative assemblies, polling places, and courthouses." *Id*. The Court must "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*. (emphasis in original). Hawaii cannot meet this burden.

I. HAWAII'S DEFAULT BAN IS INCONSISTENT WITH PUBLIC ENTITIES' COMMON-LAW DUTY TO SERVE.

Modern precedents hold that "[t]he right to exclude is 'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) (citations omitted). But that was not always the case. "At common law, innkeepers, smiths, and others who 'made profession of a public employment,' were prohibited from refusing, without good reason, to serve a customer." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 571 (1995) (collecting authorities). Section 134-9.5 is irreconcilable with that tradition.

A. Entities who traditionally held themselves out as open to the public had an obligation to serve the public.

1. Start with English law during the Colonial era and Lord Holt's often cited dissent in *Lane v. Cotton,* 88 Eng. Rep. 1458, 1464 (K.B. 1701): "Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is eo ipso bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him." According to Lord Holt, occupations of the public trust included innkeepers, common carriers, smiths, and post masters. *Id*. at 1464–65. Those entities had an obligation to serve all who came unless, for example, the inn was full, or the carrier's horse was "laden." *Id*. at 1465. But Lord Holt was clear that "one that has made profession of a public employment, is bound to the utmost extent of that employment to serve the public." *Id*; *see*

also Bell v. State of Md., 378 U.S. 226, 297 n.17 (1964) (Goldberg, J., concurring) (quoting Lord Holt). Nine years later, in *Gisbourn v. Hurst,* 91 Eng. Rep. 220, 220 (KB 1710), the court held that a plaintiff who delivered cheese had become a common carrier because he had "undertak[en] for hire to carry the goods of all persons indifferently." Thus, a business of public trust was one that held itself out as open to serving the general public.

That was solidified decades later by Blackstone: "if an inn-keeper, or other victualer, hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveler." 3 William Blackstone Commentaries on the Laws of England *164 (1768).

That practice persisted on this side of the pond, too. Courts routinely ruled that businesses that held out general invitations to serve the public had corresponding obligations to serve the public. *Clute v. Wiggins*, 14 Johns. 175, 176 (N.Y. Sup. Ct. 1817) (innkeeper); *Dwight v. Brewster*, 18 Mass. 50, 53 (1822) (common carrier); *Markham v. Brown*, 8 N.H. 523, 528 (1837) (innkeeper); *Bamberg v. S.C. R. Co.*, 9 S.C. 61, 67 (1877) ("'Common carriers are those persons who undertake to carry goods generally, and for all people indifferently, for hire, and with or without a special agreement as to price.'") (Citation omitted).

Indeed, early American case law provides examples where businesses that held themselves open to the public could not exclude individuals. The New Hampshire Supreme Court ruled that an innkeeper

had an obligation to admit travelers, including individuals who may have business with travelers, but could refuse anyone who acted disorderly. *Markham,* 8 N.H. at 529–30. Justice Story also opined that a steamboat captain "was bound to take the plaintiff as a passenger on board, if he had suitable accommodations, and there was no reasonable objection to the character or conduct of the plaintiff." *Jencks v. Coleman*, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835).

2. It is a common misconception that the public-service companies' duty to serve is tied to travel because the cases tend to arise from incidents involving innkeepers and carriers. Delaware's high court expressly rejected that argument and held that an innkeeper must serve liquor on Sundays to all patrons "whether an inhabitant of the town or not." *Hall v. State*, 4 Del. 132, 133 (1844). Moreover, early twentieth-century scholars compiled authorities on public-service companies with obligations to serve. Not all involved travel. The unifying factor was that they were common, i.e., they held themselves out as open to the general public: innkeepers, victuallers, taverners, smiths, farriers, tailors, carriers, ferrymen, sheriffs, jailers, and surgeons. Joseph H. Beale, Jr., *The Carrier's Liability: Its History*, 11 Harv. L. Rev. 158, 163 (1897); Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies, Part I*, 11 Colum. L. Rev. 514, 522 (1911). Professor Burdick believed that the "primitive" nature of society at that time necessarily limited the types of businesses that held themselves out as open to serving all. Burdick, *The Origin of the Peculiar Duties of Public Service Companies,* at 522. But the expanding, competitive economy required most businesses to hold themselves

out as open to the public to the point that "holding-out lost any distinctive significance." *Id*. This coincided with a change in tort law that focused on "breach of legally-imposed rather than self-imposed dut[ies]," and rendered assumpsit tort actions obsolete. *Id*; ASSUMPSIT, Black's Law Dictionary (12th ed. 2024) (noting that assumpsit was originally a tort action that later became a contract action).

Others similarly misbelieve that only monopolies had a duty to serve their customers. But that "would require proof that the common carrier had some kind of a monopoly," and the precedents are devoid of any discussion on that point. Edward A. Adler, *Business Jurisprudence*, 28 Harv. L. Rev. 135, 156 (1914). Moreover, the fact that some monopolies received that franchise from the state on the condition that they serve all, *id*. at 141, does not negate the fact that other businesses that held themselves out as open to the public had a duty to serve. In fact, Lord Holt discussed the scenario of multiple inns existing, which negates the monopoly theory. *Lane,* 88 Eng. Rep. at 1468. It is also difficult to see what monopolistic powers taverns, smiths, surgeons, tailors, and cheese deliverers historically had. Instead, the true thread between them is that they were "common" businesses, and "the common was the public." Adler, *Business Jurisprudence*, at 156; Burdick, *The Origin of the Peculiar Duties of Public Service Companies,* at 522.

B. Hawaii's default ban defies the common-law duty to serve.

1. When the Second Amendment was ratified, the law clearly presumed that all who sought to enter an establishment open to the public had the right to do so. Indeed, the burden was on open businesses to ar-

ticulate a good and justifiable reason for exclusion. *Hurley*, 515 U.S. at 571. Modern trespass law likewise puts the burden on landowners to communicate who they are excluding: "'where a landowner wishes to assert his right to exclude from open land and to have the backing of the criminal law, it is not too much to ask him to give notice.'" *State v. Gibson*, 95 A.3d 110, 116 (N.J. 2014) (citation omitted).

This is further reflected in modern public accommodation laws. These laws promote openness because "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628 (1984). Their purpose is to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.'" *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964). Section 134-9.5 is the antithesis of that.

2. Peacefully exercising one's right to carry a firearm would not have justified denying them service. As explained above, the obligation to serve did not arise from any travel requirements, but people often did travel with arms. For example, "when George Washington traveled between Alexandria and Mount Vernon he holstered pistols to his saddle, 'as was then the custom.'" *Grace v. D.C.*, 187 F. Supp. 3d 124, 137 (D.D.C. 2016), *vacated and remanded sub nom. Wrenn v. D.C.*, 864 F.3d 650 (D.C. Cir. 2017) (citation omitted). Thomas Jefferson "once left his pistol at an inn between Monticello and Washington, D.C. and asked two friends—both members of Congress—to retrieve it and bring it to him at the White House." *Id.*

This is because highway robbery was a problem at the founding. *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 34 (1820); *Evans v. Com.*, 44 Mass. 453, 455 (1842) (An 1804 Massachusetts statute punished highway robbery by "hard labor for life."). That is why many early American jurisdictions did not regulate carrying firearms while traveling or on a journey. *See*, *e.g.*, New Jersey Act, ch. 9 (1686); *State v. Buzzard*, 4 Ark. 18, 18 (1842). On the contrary, about half of the colonies *required* arms to be carried while traveling. *Grace*, 187 F. Supp. 3d at 136–37 (collecting authorities). The lodging and dining needs that those individuals would have needed could not have been denied to them for carrying arms as required by law. On the contrary, those establishments would have been required to serve them under their common-law duty.

Carrying was not only common while traveling—it was common everywhere. As Judge St. George Tucker observed, "In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 William Blackstone Commentaries App. n.B, at 19 (St. George Tucker ed., 1803). Thus, there is no reason to think that customary practice would have created a common exception to the common law.

C. Hawaii cannot circumvent the common-law tradition by compelling speech.

The First Amendment limits the state's authority to pass public accommodation laws. Specifically, the right to associate forbids "forced inclusion" into private groups by the state. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000). Hawaii's *forced exclusion* de-

fault has a different First Amendment problem: compelled speech. It is no longer good enough for an entity to hang out a sign indicating that they are open for business. Now the entity is compelled to say more to legally serve customers who are exercising their Second Amendment rights.

Yet, "'[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.'" *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l Inc.*, 570 U.S. 205, 213 (2013) (citation omitted). "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech," and is treated "as a content-based regulation." *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781,795 (1988); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (The state could not require drivers to display state motto on their license plates.). "Content-based laws … are presumptively unconstitutional." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

Hawaii cannot use a presumptively unconstitutional devise to negate the historical tradition of carrying arms. Yet that is what § 134-9.5 does. The default rule is entirely inconsistent with the common law tradition and violates the Second Amendment.

II. PRE-REVOLUTIONARY HUNTING "QUALIFICATION" LAWS ARE NOT RELEVANTLY SIMILAR HISTORICAL ANALOGUES.

When Hawaii and the Ninth Circuit below get around to citing analogues, the default rule fares no

better. The "court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'applying faithfully the balance struck by the founding generation to modern circumstances.'" *Rahimi*, 602 U.S. at 692 (alterations and citations omitted). "Why and how the regulation burdens the right are central to this inquiry." *Id* (citing *Bruen*, 597 U.S. at 29). Put simply, the Court must determine if Hawaii's regulation "works in the same way and does so for the same reasons" as the historical regulations. *Id.* at 711 (Gorsuch, J., concurring). In so doing, the Court must "be careful not to read a principle at such a high level of generality that it waters down the right." *Id.* at 740 (Barrett, J., concurring). This brief addresses the pre-Revolutionary hunting qualification laws cited by Hawaii below. These laws flunk *Bruen's* analysis.

The obvious justification for these statutes, which is stated in their titles, is protecting wildlife. *See*, *e.g.*, 1721 Pa. Laws, c. 142; 1722 N.J. Law 141. That is not the same "why" behind § 134-9.5. *Bruen*, 597 U.S. at 42 (noting that Henry VIII's handgun restrictions were to promote "Englishmen's proficiency with the longbow"). But there is another reason for them that is even more problematic. They were classist laws designed to control the population and protect the interests of the qualified elites. They were also promptly rejected by the ordinary Americans to whom the Second Amendment applies.

Even worse for Hawaii is the fact that the poaching laws did not prohibit carrying firearms or hunting on open lands owned by another. And after the Revolution, the American people established a tradition where hunting was permitted on open and unim-

proved lands unless the landowner said otherwise. The "how" is simply not the same—it is not even close.

A. Hunting qualification laws were classist restrictions designed to control the population.

While founding-era jurists like St. Goerge Tucker believed the Second Amendment right of the people "may be considered as the true palladium of liberty," *Heller*, 554 U.S. at 606 (citation omitted), hunting is another story. Hunting was traditionally highly restricted.

1. English game laws date back to the Norman invasion of England in 1066, after which the crown "was said to own, and therefore control, all wildlife." Michael C. Blumm & Lucus Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 Envtl. L. 673, 673, 680 (2005). That is when "all forest and game laws were introduced into Europe … by the same policy … the feudal system." 2 William Blackstone Commentaries on the Laws of England *413 (1766). The feudal system required "keep[ing] the … natives … in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting." *Id.* Another 18th-century commentator noted that "one analysis of early British game laws concluded that 'they were originally made with a view of taking the arms out of the hands of the common people, or at least with a design of rendering them inexpert in the use of them.'" Thomas A. Lund*, British Wildlife Law Before the American Revolution,* 74 Mich. L. Rev. 49, 52 n.16 (1975) (citation omitted).

Accordingly, the forests and game were managed "for the benefit of the king and his favored subjects." Blumm & Ritchie, *The Pioneer Spirit and the Public Trust*, at 680.[2] The disparity of the penalties, however, demonstrate the ulterior motivation behind restricting hunting. "Impermissibly entering or damaging the forest … resulted in monetary fines for the wrongdoer." *Id.* Poaching game, however, "was punishable by castration, banishment, and even death." *Id.*

English common law, nevertheless, allowed trespassing to harvest game. The King had the authority to "roam throughout his kingdom" as he pleased and "take all the game animals he found." Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. Rev. 703, 708 (1976). Accordingly, he had the power to grant "franchise," a license to hunt, which included the power to authorize "hunting or sporting upon another man's soil." 2 William Blackstone Commentaries on the Laws of England *38, *417 (1766). This practice was common. *See*, *e.g.*, *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 370 (1842) (referencing the 1664 conveyance of hunting rights from King Charles II to the Duke of York covering most of the northeastern U.S.). The Crown could also authorize a "chase," which allowed hunting on others' lands, or a "warren," which allowed hunting on certain lands, and could be alienated from ownership of the land. Blumm & Ritchie, *The Pioneer Spirit and the Public Trust*, at 681–82. The Crown granted these exclusive

[2] Here, "'forest' was a legal classification of land rather than a physical description of that land." Dale D. Goble & Eric T. Freyfogle, *Wildlife Law: Cases and Materials* 201 (2d. Ed. 2010). The forest included villages and cultivated lands in addition to wooded areas, not all of which was owned by the King. *Id.*

hunting privileges "to wealthy individuals in order to gain influence, endear himself to nobility, and raise money." Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 1437, 1453–54 (2013).

When the Crown's power began to fade, outright bans were replaced with "qualification statutes" that gave the elites a monopoly on hunting. Lund, *British Wildlife Law Before the American Revolution,* at 55. It began with minimum wealth requirements passed in 1389 and 1670. Dean Lueck, *The Economic Nature of Wildlife Law,* 81 J. Legal Stud. 291, 294 (1989). Individuals who were not qualified were prohibited from hunting and "restricted from owning hounds and other 'engines' (such as guns, traps, and nets) used to kill game." *Id*. These wealth requirements were steep. As Blackstone pointed out, the law required owning "fifty times the property … to enable a man to kill a partridge, as to vote for a knight in the shire." Lund, *British Wildlife Law Before the American Revolution,* at 56 (citation omitted). There were also title requirements, such as "Lord of Parlement" or "esquire." *Id*. at 57.

One of the rationales for these qualifications was that the "misdirected souls" who did not qualify would be incentivized "to surmount their lethargy and apply themselves with the degree of effort needed to join the ranks of the elite." *Id*. at 59. Another justification was that if laborers could obtain their food through hunting, then they would be less incentivized to work, and the economy would slow. *Id*. at 59–60, 65. These qualification statutes were eventually abolished in the UK in 1831. Lueck, *The Economic Nature of Wildlife Law,* at 294.

2. "During the early years of the colonial period, Americans tried to adopt the English class system and the English method of controlling wildlife." David S. Favre, *Wildlife Rights: The Ever-Widening Circle*, 9 Envtl. L. 241, 247 (1979). Thus, it is no surprise that the pre-Revolutionary poaching laws that Hawaii cited below maintained these classist qualifications.

Start with the 1721 Pennsylvania statute titled "An Act to Prevent the Killing of Deer out of Season, *And Against Carrying of Guns or Hunting by Persons not qualified*." 1721 Pa. Laws, c. 142 (emphasis added). The Act spells out how much wealth one needed to be "qualified." "And if any Person whatsoever who is not Owner of Fifty Acres of Land, and otherwise qualified in the same Manner as Persons are, or ought to be by the Laws of this Province, for Electing of Members to serve in Assembly." *Id*. Those qualified elites could "carry any Gun, or hunt in the Woods or unenclosed Lands without License or Permission obtain'd from the Owner or Owners of such Lands." *Id*.

The 1722 New Jersey Statute of the same title tells the same story. 1722 N.J. Law 141. That statute specifies that one needed to own "one Hundred Acres of Land, or [be] otherwise qualified, in the same Manner as Persons are or ought to be for electing Representatives to serve in General Assembly" to carry a gun and hunt on the unenclosed lands of another without permission. *Id*. It also specifies the cause for the legislation: "whereas divers[e] abuses have been committed, and great Damages and Inconveniences arisen by Persons carrying of Guns and presuming to hunt on other Peoples Land." *Id*.

Things were similar with the 1771 New Jersey

statute titled "An Act for the Preservation of Deer, and other game, and to prevent trespassing with guns." 1771 N.J. Laws 343-347. While Section 1 of the 1771 Act may appear to be a prohibition on possessing a firearm on another's land, that is not the case. As the Petitioner's Brief, at *34, points out, the restriction in Section 1 only applied to improved and enclosed lands, which were the only lands taxed at the time. The statute must also be read as a whole. And Section 6 of the statute, like the 1722 version, allows qualified persons to hunt on unimproved lands and waters in the state. 1771 N.J. Laws at *345. Section 6 also spells out the reason for the qualification requirement: the unqualified are "idle and disorderly Persons" whose "Families are neglected, and the Public is prejudiced by the loss of their Labour." This is the same justification for the earlier English poaching laws. Lund, *British Wildlife Law Before the American Revolution,* at 59–60, 64–65.

If the text were not clear enough, the Act's purpose seals the deal. The Act's preamble asserts that the prior qualification laws have "been found insufficient to answer the salutary Purposes thereby intended." This is a common problem with early and modern poaching laws.

Poaching is a hard crime to police and prosecute: it generally takes place in remote areas without witnesses and requires proof beyond a reasonable doubt. Eric T. Freyfogle & Dale D. Goble, *Wildlife Law: A Primer* 143 (2009); Lund, *British Wildlife Law Before the American Revolution,* at 66 ("Wildlife is typically taken in areas that pose difficulties to law enforcement."). This was well known to "early British lawmakers" who supplemented their poaching laws with sales prohibitions, which are easier to enforce as sales

occur in markets, although those generally did not apply to qualified elites. Lund, *British Wildlife Law Before the American Revolution,* at 66–67. Sales prohibitions, however, have limitations. Poached game that is consumed by the poacher is never offered for sale and remains a hard crime to police.

This was especially true for early deer poaching statutes. Favre, *Wildlife Rights*, at 247-48. The "vastness of the American Continent" made the laws difficult to enforce. *Id.* at 247. The growing economy and population meant that people needed food, and "[t]he frontier attitudes of the rugged individualists ultimately created a situation [of harvesting wildlife] beyond the control of the early state governments." *Id*. The response was to draft broader poaching statutes that made prosecution easier. Some eighteenth-century techniques included increasing the "weight of the evidence and the presumed credibility of witnesses" and shifting the burden of proof to the accused. Lund, *Early American Wildlife Law*, at 725.

To this day, lawmakers are broadly drafting poaching statutes, and courts are routinely narrowing them. A Michigan court found that a statute in the natural resources code that prohibited hunting *or* discharging a firearm within 150 yards of a dwelling was strictly limited to hunting and did not apply to target shooting. *Cheboygan Sportsman Club v. Cheboygan Cnty. Prosecuting Att'y*, 858 N.W.2d 751, 757 (Mich. Ct. App. 2014). The Arkansas Supreme Court held a regulation aimed at banning hunting from roads was overbroad because the plain language of the regulation prohibited possessing a firearm on a public road, which was otherwise lawful. *Arkansas Game & Fish Comm'n v. Murders*, 938 S.W.2d 854, 855 (Ark. 1997).

Courts in Alabama and Kentucky struck spotlighting restrictions as being overly broad because they outlawed possessing a firearm while in a vehicle with headlights regardless of any intent to hunt. *Ex parte W.F.*, 214 So. 3d 1153, 1159 (Ala. 2015); *Singleton v. Com.*, 740 S.W.2d 159, 161 (Ky. Ct. App. 1986). The New Jersey statute—to the extent that it applies to carrying a firearm at all—is an early example of this. That is why the New Jersey Supreme Court characterized it as a poaching statue. *State v. One 1990 Honda Accord*, 712 A.2d 1148, 1155–56 (N.J. 1998).

3. The English elitist approach to hunting does not reflect the American tradition. Dr. Samuel Johnson quipped that "'Hunting was the labour of the savages of North America, but the amusement of the gentlemen of England.'" Lund, *Early American Wildlife Law*, at 703 (citation omitted). Indeed, "America's early settlers promptly rejected their mother country's legacy of conditioning the right to take game on wealth and birthright." Blumm & Ritchie, *The Pioneer Spirit and the Public Trust*, at 685. Nineteenth century courts consistently rejected qualification laws as "'productive of tyranny'" and "'contrary to the spirit of our institutions.'" *Id.* at 685 n.77 (collecting authorities). In fact, St. George Tucker observed that the Second Amendment itself is a rejection of these traditions. 2 Blackstone Commentaries *414 n.3 (St. George Tucker ed., 1803). Indeed, the Second Amendment guarantees the right to bear arms to "'all Americans,'" not merely to the elites. *Bruen*, 597 U.S. at 70 (quoting *Heller*, 554 U.S., at 581).

Bruen also teaches that the Court should be hesitant of sensitive place restrictions when there are "disputes regarding the lawfulness of such prohibi-

tions." 597 U.S. at 30. And "in using pre-ratification history, courts must exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind." *Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring). These rejected, classist restrictions belong in the past as "cautionary tales." *Id.* at 776 (Thomas, J., dissenting). They cannot be used to render the Second Amendment a "'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen*, 597 U.S. at 70 (citation omitted).

B. The hunting qualification laws never banned hunting on open or unimproved lands.

Once the elitest aspect of the historical poaching laws is set aside, there is another problem with them: they never applied to open or uncultivated lands. They are not analogous to Hawaii's ban on places that are held open to the public.

1. In early America, "the right of all people to fish and hunt, even on another's land, often was recognized despite the law of trespass." Favre, *Wildlife Rights*, at 247. The original Vermont and Pennsylvania Constitutions expressly protected the right to hunt on all "lands not inclosed [sic]." Pa. Const. of 1776 § 43; Vt. Const. of 1777 Ch. 2 § 67. This Court acknowledged that was the law of the land a century ago: "with regard to the large expanses of unenclosed and uncultivated land in many parts … of this country … it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country." *McKee v. Gratz*, 260 U.S. 127, 136 (1922) (citing *Marsh v. Colby*,

39 Mich. 626, 627 (1878)); Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 Duke L.J. 549, 585 n.55 (2004).

Owners rarely prohibited others from hunting on their open lands. There was so much uncultivated land that it would have been expensive to post signs prohibiting hunting or entry. Lund, *Early American Wildlife Law*, at 713. And the owner would have achieved little by doing so. *Id*. Poachers would have ignored the signs, either willfully, because that is what criminals do, or unintentionally, because they likely would have been illiterate. *Id*. at 713–714.

2. This common law tradition is confirmed by the poaching laws that Hawaii relied on below. Many of them apply only to improved or closed lands. 1721 Pa. Laws, c. 142; 1722 N.J. Law 141; 1771 N.J. Laws 343-347. Some only apply to farmlands or plantations. 1715 Md. Laws 90; 1763 N.Y. Laws 441. These lands, however, are not open to the public.

Several early cases establish what types of lands are open to hunting despite trespass laws. Common forests are open and unenclosed places where individuals could hunt, provided that they did not cause injury. *McConico v. Singleton*, 9 S.C.L. 244, 352 (S.C. Const. App. 1818). If the hunter reasonably believed that the land "if not wholly abandoned, was so exposed, and the dilapidated state of the fencing was such as to justify the belief that it was," then he was justified in hunting there, provided that he did not cause any injury. *Broughton v. Singleton*, 11 S.C.L. 338, 340 (S.C. Const. App. 1820). In contrast, "a deep, navigable stream, is declared to be equivalent to a fence" that encloses a field and forbids hunting. *Fripp v. Hasell*, 32 S.C.L. 173, 176 (S.C. App. L. 1847). And

as the Vermont Supreme Court later summarized "the land must be surrounded by visible objects, natural or artificial … and … an imaginary line only is not sufficient." *Payne v. Gould*, 52 A. 421, 421 (Vt. 1902). Thus, there needed to be something indicating that the hunter could not enter that land. Places that are open to the public, likewise, do not have any indicia of being closed.

The plantation protection statutes likewise are not relevantly similar. "Developed lands were spared these [hunting] incursions because domestic agriculture was favored over hunting and fishing." Lund, *Early American Wildlife Law*, at 712. Some early hunters used destructive methods like setting fires, which "also incinerated cattle pasture." *Id.* at 726. Some would abandon deer carcasses, which would attract wolves that prey on livestock. *Id.* Their presence would frighten other livestock. *Id.* And as the preamble to 1763 N.Y. Laws 441 declares, hunters would damage the crops by trampling over them. Leo Bernabei, *Taking Aim at New York's Concealed Carry Improvement Act*, 92 Fordham L. Rev. 103, 130 (2023). Moreover, there is no implicit invitation to enter cultivated lands. Cultivating or improving the land has always served as an implicit sign saying do not enter. Lund, *Early American Wildlife Law*, at 713 n.84

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These laws had a very specific purposes: protecting improved and enclosed lands, usually agricultural lands, from physical damage. They are the well-established boundaries to the American hunting tradition, which allowed hunters to hunt on unenclosed and uncultivated lands, despite trespass laws, provided that they caused no physical damage. *McKee*, 260 U.S. at

136. They establish that the landowner needed to assert his or her right, in some way, to exclude the hunter from entering the land. They are not relevantly similar to § 134-9.5. And they do not overcome the common law tradition that all entities that held themselves out as being open to serving the public had an obligation to provide that service. Hawaii's reliance on them is misplaced and should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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