No. 24-1046

In the Supreme Court of the United States

JASON WOLFORD, ET AL., PETITIONERS

v.

ANNE E. LOPEZ, ATTORNEY GENERAL OF HAWAII

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Second Amendment allows a State to make it unlawful for concealed-carry license-holders to carry firearms on private property open to the public without the property owner's express authorization.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the preservation of the right to keep and bear arms and in the proper interpretation of the Second Amendment.

INTRODUCTION

The "right to carry a handgun for self-defense outside the home" ranks among the Second Amendment's most basic guarantees. *NYSRPA* v. *Bruen*, 597 U.S. 1, 10 (2022). *Bruen* thus held that the government cannot enact licensing regimes that effectively eliminate the right to public carry. *Id.* at 15. Nor, more broadly, may the government restrict firearms without showing that the restriction fits within a discernible tradition of firearm regulation. *Id.* at 17; see *United States* v. *Rahimi*, 602 U.S. 680, 692 (2024).

Bruen invalidated Hawaii's prior firearm-licensing regime, under which Hawaiians could virtually never

obtain public-carry licenses. Hawaii responded by loosening its licensing restrictions, yet it simultaneously enacted a new restriction that effectively nullifies those licenses and prevents public carry. Specifically, Hawaii made it a crime for licensees to carry firearms on private property open to the public—the very places where licensees would go in their daily lives—unless those establishments provide "[u]nambiguous written or verbal authorization" or post "clear and conspicuous signage" allowing firearms. Haw. Rev. Stat. § 134–9.5(b). Four other States whose public-carry laws *Bruen* invalidated —California, Maryland, New Jersey, and New York— enacted materially similar restrictions.

In Hawaii, public-carry licensees who stop for gas with a pistol in the glove compartment risk a year in prison if they fail to obtain the gas-station owner's unambiguous consent. The same goes for licensees who run errands at grocery stores, dine at restaurants, or stop to buy coffee. A mere nod from the property owner —or an insufficiently conspicuous sign—puts licenseholders at risk of prosecution even if the owner welcomes firearms but failed to express his approbation clearly enough. Meanwhile, Hawaii exempts nonlicensees from this restriction—so hunters, target shooters, and out-of-state police officers can publicly carry firearms on the same property without the owner's affirmative consent.

Hawaii's restriction is blatantly unconstitutional as applied to private property open to the public. States cannot evade *Bruen* by banning public carry through indirect means. History establishes that firearms regulations are per se unconstitutional if they are designed to thwart the right to publicly carry arms, or if they effectively negate the right. Hawaii's restrictions fail

both metrics. Hawaii designed its novel affirmative-consent rule to inhibit the exercise of the right to bear arms. Hawaii's restriction singles out the carrying of firearms for discriminatory treatment; requires owners who have opened their property to the public to satisfy a special clear-statement rule for firearms; and contains exemptions that make sense only if Hawaii were trying to limit arms-bearing to favored groups and to exclude everyone else. Further, Hawaii's law is so broad that it effectively nullifies licenses to carry arms in public. Because most owners do not post signs either allowing or forbidding guns—and because it is virtually impossible to go about publicly without setting foot on private property open to the public—Hawaii's law functions as a near-total ban on public carry.

Hawaii's law is independently unconstitutional because it lacks any well-established historical analogue. In the United States, individuals traditionally have been free to carry firearms on private property open to the public unless the property owner directs otherwise. Laws like Hawaii's first appeared only two years ago, in response to *Bruen*. The court of appeals invoked six supposed historical analogues, but five applied only to property closed to the public. The sixth is an 1865 Louisiana law enacted to prevent newly freed slaves from carrying arms. None shows that States could or did restrict Second Amendment rights by revolutionizing the rules governing private property open to the public.

Finally, Hawaii draws an analogy to First Amendment doctrine. But that analogy hurts Hawaii. Though property owners may restrict speech on their own premises, States generally may not override owners' preferences with blanket affirmative-consent requirements for speech on private property. Because Ha-

waii's law plainly violates the Second Amendment, this Court should reverse the decision below.

STATEMENT

1. Before *NYSRPA* v. *Bruen*, 597 U.S. 1 (2022), Hawaii had the Nation's strictest firearms licensing regime. Individuals could obtain carry licenses only in "exceptional case[s]" after showing "reason to fear injury." Haw. Rev. Stat. § 134–9 (2021). Even then, local police chiefs retained broad discretion to deny licenses. See *ibid.* By 2018, the Ninth Circuit noted that Hawaii had granted only four licenses to private citizens in the preceding 18 years and that one county had never issued a single license. See *Young* v. *Hawaii*, 896 F.3d 1044, 1071 n.21, rev'd, 992 F.3d 765 (9th Cir. 2021) (en banc), judgment vacated, 142 S. Ct. 2895 (2022).

Bruen held that the Second Amendment guarantees a "general right to publicly carry arms for self-defense." 597 U.S. at 31. And *Bruen* held that licensing regimes like Hawaii's, which require applicants to show a special need for self-defense, violate that right. See *id.* at 11.

In response, the Hawaii State Legislature enacted Act 52, which established a new licensing regime and overhauled Hawaii's public-carry laws. See Act of June 2, 2023, No. 52, 2023 Haw. Sess. Laws 113. As relevant here, the Act "establishes a default rule with respect to carrying firearms on private property of another person." § 1, 2023 Haw. Sess. Laws 114. Specifically, a licenseholder "shall not intentionally, knowingly, or recklessly enter or remain on private property of another person while carrying" a firearm unless he "has been given express authorization to carry a firearm on the property." Haw. Rev. Stat. § 134–9.5(a). That restriction applies whether the firearm is "concealed or unconcealed," "loaded or unloaded," and "operable or not." *Ibid.* To

overcome that rule, the owner, lessee, operator, or manager must provide "[u]nambiguous written or verbal authorization" or post "clear and conspicuous signage" allowing firearms. *Id.* § 134–9.5(b). Carrying a firearm without such permission is a misdemeanor, punishable by up to a year in prison. *Id.* §§ 134–9.5(e), 706–663.

The rule's stated purpose is to protect "the right of private individuals and entities to choose for themselves whether to allow or restrict the carrying of firearms on their property." § 1, 2023 Haw. Sess. Laws 114. But the rule exempts various groups. Haw. Rev. Stat §§ 134–9.5(d), 134–11(a). For example, Hawaii excludes "state and county law enforcement officers" (even off duty). *Id.* § 134–11(a)(1). Hawaii's rule is also inapplicable to federal, state, or local employees while on duty or going to or from their workplaces, if their jobs "require them to be armed." *Id.* § 134–11(a)(4). Further, the rule applies only to those who carry firearms "pursuant to a license" issued by Hawaii. *Id.* § 134–9.5(a). Hawaii thus exempts individuals who may may carry firearms without such a license, such as active or retired police officers from other States, 18 U.S.C. 926B, 926C, and hunters or target shooters "going to and from the place of hunting or target shooting," Haw. Rev. Stat. § 134–5(a).

2. Petitioners are three Hawaii concealed-carry license-holders and a gun-rights organization. Pet. App. 9a-10a. Invoking 42 U.S.C. 1983, they sued the state attorney general, claiming, as relevant here, that Hawaii's affirmative-consent rule violates the Second Amendment. Pet. App. 10a. The district court understood them to raise a "facial challenge" and an "as-applied challenge regarding private property held open to the public." *Id.* at 157a.

The district court granted a temporary restraining order to petitioners. Pet. App. 82a-167a. It rejected their facial challenge but held that Hawaii's affirmative-consent rule likely violates the Second Amendment as applied to property "held open to the public." *Id.* at 157a. It explained that individuals have traditionally been free to carry firearms on such property, unless the proprietor directs otherwise. *Id.* at 152a. It found no historical support for Hawaii's inversion of that presumption. *Id.* at 156a. The parties agreed to, and the court approved, a stipulation converting the temporary restraining order to a preliminary injunction. *Id.* at 215a-218a.

3. The Ninth Circuit affirmed in part and reversed in part. Pet. App. 1a-81a. As relevant here, it reversed the portion of the injunction prohibiting enforcement of the affirmative-consent rule to private property open to the public. *Id.* at 56a-64a. Citing four historical laws that banned carrying firearms without the owner's consent on "subsets of private land," and two historical laws that allegedly did so for "*any* private property," the court discerned a "tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property." *Id.* at 60a-62a.

The court of appeals denied petitioners' petition for rehearing. Pet. App. 168a-202a. Judge VanDyke, joined by five other judges, issued a dissent opining that the challenged statute "effectively nullifie[s] the Second Amendment rights" of Hawaiians and "has no grounding in the historical record." *Id.* at 181a, 189a; see *id.* at 170a-202a. Judge Collins, joined by one other judge, dissented for "many of the same reasons set forth by Judge VanDyke." *Id.* at 169a; see *id.* at 169a-170a.

SUMMARY OF ARGUMENT

Hawaii's ahistorical affirmative-consent rule for private property open to the public infringes the "right to keep and bear Arms" guaranteed by the Second Amendment. Hawaii cannot criminalize public carry by imposing on property owners a clear-statement requirement that applies to no other constitutional right.

A. Firearms restrictions violate the Second Amendment unless they are "consistent with the Nation's historical tradition of firearm regulation." *NYSRPA* v. *Bruen*, 597 U.S. 1, 24 (2022). That tradition encompasses two basic, cross-cutting principles that doom Hawaii's restriction. First, firearms regulations must serve legitimate objectives and may not be designed simply to inhibit the ability to possess or carry protected firearms. Second, firearms regulations may not have the effect of broadly negating protected rights. Under the Second Amendment's original meaning, those limits represent the bare minimum requirements that any firearms regulation must fulfill.

Applying those principles here, Hawaii's affirmative-consent rule violates the Second Amendment because its manifest purpose and effect is to burden the Second Amendment right to public carry, not to advance a legitimate interest. Hawaii claims that the statute protects owners' ability to decide for themselves whether to allow firearms on their property. But normal property law already does that; an owner need only post a "no guns" sign to require visitors to keep firearms out. Hawaii's statute seeks instead to make it harder for the people to exercise the public-carry right recognized in *Bruen* on property open to the public—the heartland of where the public-carry right is exercised. The statute singles out firearms for a discriminatory clear-invitation-

to-carry rule that does not apply to any other conduct, including carrying knives, protesting, or leafletting. Hawaii's exemptions—such as for off-duty police officers and for government employees going to and from work—underscore that the statute seeks not to protect property rights but to restrict public carry to favored groups.

Hawaii's affirmative-consent rule also unconstitutionally defeats the right writ large. Unlike historically grounded regulations that narrowly focus on specific people, places, weapons, or modes of carry, Hawaii's law operates as a near-complete ban on public carry. Because most owners do not post signs either allowing or prohibiting firearms, Hawaii's law effectively means that ordinary citizens licensed to publicly carry may not carry firearms in public at all. That near-total ban defies the "general right to publicly carry arms." *Bruen*, 597 U.S. at 31.

B. Even setting aside those cross-cutting principles, Hawaii's affirmative-consent rule is unconstitutional because it is a modern-day aberration, not "'relevantly similar' to laws that our tradition is understood to permit." *United States* v. *Rahimi*, 602 U.S. 680, 692 (2024).

Since before the Founding, the common law has distinguished between property closed to the public (such as homes) and property open to the public (such as inns, shops, docks, and train stations). Generally, no one may enter property closed to the public without the owner's permission. By contrast, everyone may enter property open to the public unless the owner affirmatively restricts his entry. As part of that open-permission policy, members of the public may carry firearms unless the owner directs otherwise.

Hawaii's law supplants that longstanding rule, replacing the default right to carry with a state-imposed ban on carrying firearms on property open to the public unless the owner affirmatively and unambiguously consents. That inversion has no basis in our Nation's tradition; it was pioneered in 2020 as an avowed attempt to circumvent Second Amendment rights, was first adopted by a State in 2023, and does not fit within any broader principle accepted at the Founding.

The court of appeals upheld Hawaii's law on the erroneous basis that States have historically set default rules for carrying firearms on private property. But the six scattered laws the court cited—four from the 18th century, one from the mid-19th century, and one from the late 19th century—show no such thing. Most of those laws were limited to land closed to the public, making them poor analogues for Hawaii's law, which applies even to land open to the public. The only historical law that resembles Hawaii's is an 1865 Louisiana law enacted as part of systematic efforts to disarm black people after the Civil War. That outlier defies rather than reflects our constitutional tradition.

C. Hawaii's analogy to First Amendment doctrine just confirms its law's unconstitutionality. The Court's First Amendment cases establish that the government may not require a speaker to obtain a homeowner's affirmative consent before going door to door to communicate religious ideas, before mailing political literature, or even before mailing advertisements for contraceptives. Those decisions illustrate that, while owners may exclude unwanted activities from their property, governments generally may not enact affirmative-consent requirements for owners that attempt to prevent even invitees to the property from exercising con-

stitutional rights. The Second Amendment deserves no less solicitude.

ARGUMENT

The Second Amendment guarantees an individual right to publicly possess and carry firearms for lawful purposes such as self-defense. See *NYSRPA* v. *Bruen*, 597 U.S. 1, 31 (2022); *District of Columbia* v. *Heller*, 554 U.S. 570, 592 (2008). But Hawaii has effectively prohibited people licensed to carry firearms publicly from actually doing so. Instead, Hawaii makes it a crime to carry firearms on property open to the public unless each owner conspicuously and affirmatively allows firearms on his property. That restriction is unconstitutional many times over. The Second Amendment prohibits governments from restricting firearms out of a bare desire to suppress the right, as Hawaii has done here. The Second Amendment likewise forbids restrictions that effectively nullify Second Amendment rights, as Hawaii has done as to the right to publicly carry firearms. And the Second Amendment prohibits firearms regulations unless the government shows that they are consistent with our regulatory tradition. But Hawaii's law bucks that tradition, under which governments have historically declined to disturb the common-law rule that members of the public may carry firearms on publicly accessible property unless the owner objects.[1]

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[1] This case does not concern property closed to the public. The Court thus need not address state laws that prohibit carrying a firearm into a private residence without the owner's affirmative consent. See, *e.g.*, La. Rev. Stat. § 40:1379.3.O(2).

A. Hawaii's Restriction Serves An Improper Purpose And Effectively Negates The Right To Bear Arms

States can regulate the possession or carrying of arms only if they surmount the heavy burden of showing that the law is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. Hawaii's law fails that test: It both serves an improper objective and effectively nullifies the public-carry right.

1. Firearms restrictions must advance a valid purpose and may not effectively negate the right to bear arms

A court resolving a Second Amendment case must apply "the principles that underpin our regulatory tradition." *United States* v. *Rahimi*, 602 U.S. 680, 692 (2024). This Court has already derived some of those principles from the historical record. For instance, "self-defense" is a "central component of the right," *Heller*, 554 U.S. at 599 (emphasis omitted); States may not ban arms "in common use" for lawful purposes, *id.* at 624; and government officials may not exercise open-ended "discretion" to withhold the right, *Bruen*, 597 U.S. at 14.

Two such principles are dispositive here. First, a firearms regulation is per se unconstitutional if its design, operation, or enforcement reveals that it restricts firearms simply to frustrate the exercise of Second Amendment rights. Second, a law is per se unconstitutional if it broadly prevents ordinary Americans from carrying protected firearms in public. Those principles are the minimum requirements that all firearm regulations must satisfy. A law that satisfies them does not automatically comply with the Second Amendment, but a law that violates them is necessarily unconstitutional. Courts cannot, as the Ninth Circuit did here, rely on

loose analogies to uphold laws that violate those basic requirements.

a. A firearms regulation violates the Second Amendment if its design, operation, or enforcement shows that it seeks to frustrate the exercise of the right to keep and bear arms. Though States may enact firearms laws that pursue legitimate objectives in ways permitted by history, they may not restrict firearms based on the bare desire to make it harder for people to exercise Second Amendment rights.

That principle flows from *Bruen* and *Rahimi*, which recognized that a law's constitutionality turns on "why" it regulates arms-bearing. *Rahimi*, 602 U.S. at 698; *Bruen*, 597 U.S. at 29. *Rahimi* explained that a law complies with the Second Amendment only if it "regulates arms-bearing for a permissible reason." 602 U.S. at 692. And *Bruen* explained that a regulation is constitutional only if properly "justified." 597 U.S. at 29. *Bruen* also stated that, although States may adopt licensing schemes "designed to ensure" that only qualified individuals possess arms, they may not pursue "abusive ends" by using long wait times or exorbitant fees to thwart the public-carry right. *Id.* at 38 n.9.

That principle reflects the original meaning of the Second Amendment's command that the right to bear arms "shall not be infringed." U.S. Const. Amend. II. The Founding generation distinguished between legitimate regulation and illegitimate "infringement." See Daniel D. Slate, *Infringed*, 3 J. Am. Const. Hist. 381, 415-441 (2025). A restriction could be an infringement in various ways, including by serving "a pretextual repressive purpose." *Id.* at 441; see *id.* at 387-392. Commentators accordingly cited English game laws—which disarmed most subjects on the pretext of preventing

poaching, see *Heller*, 554 U.S. at 606-607—as a paradigmatic example of infringement. For instance:

- Blackstone described "every wanton and causeless restraint," adopted "without any good end in view," as "tyranny." 1 William Blackstone, *Commentaries on the Laws of England* 126 (10th ed. 1787). He also warned that "disarming the bulk of the people" "is a reason oftner meant, than avowed, by the makers of forest or game laws." 2 *id.* 412.
- St. George Tucker, a Virginia judge and scholar, wrote that when arms-bearing is prohibited on a "pretext," "liberty, if not already annihilated, is on the brink of destruction." 1 St. George Tucker, *Blackstone's Commentaries* App. 300 (1803). He added that English game laws, enacted under the "specious pretext" or "mask" of "preserving th[e] game," were "calculated" to "confine the right within the narrowest limits." *Ibid.*
- Pennsylvania lawyer William Rawle warned that an attempt to "disarm the people" "under some general pretence" would violate the Second Amendment. William Rawle, *A View of the Constitution of the United States of America* 122 (1825). He also viewed English game laws as an infringement because they sought to prevent "resistance to government" by "disarming the people." *Id.* at 123.
- Justice Story wrote that English laws had "greatly narrowed" the right to bear arms under "various pretences," so that the right was "more nominal than real, as a defensive privilege." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1891, at 747 (1833).

Consistent with that history, American courts in the early 19th century recognized that firearms regulations designed to frustrate the right violate the Constitution. Alabama's and Georgia's Supreme Courts explained that a law that, "under the pretence of regulating," seeks "a destruction of the right," "would be clearly unconstitutional." *State* v. *Reid*, 1 Ala. 612, 616-617 (1840); see *Nunn* v. *State*, 1 Ga. 243, 249 (1846). And when courts upheld state laws requiring arms to be carried openly rather than concealed, they emphasized that the laws served legitimate purposes such as "prevent[ing] bloodshed and assassinations." *State* v. *Chandler*, 5 La. Ann. 489, 490 (1850).

The understanding that pretextual restrictions infringe the right persisted after the Civil War, when the former Confederate States made "systematic efforts" to disarm black people. *McDonald* v. *City of Chicago*, 561 U.S. 742, 771 (2010). While some States "formally prohibited" black people from possessing arms, others resorted to subtler measures. *Ibid.* For example, States banned "cheap handguns, which were the only firearms the poverty-stricken freedmen could afford," and levied exorbitant taxes "to price handguns out of the reach of blacks." Stefan B. Tahmassebi, *Gun Control and Racism*, 2 Geo Mason U. C.R. L.J. 67, 73, 75 (1991). Those who opposed such pretextual restrictions "frequently stated that they infringed blacks' constitutional right to keep and bear arms." *Heller*, 554 U.S. at 614.

That history is unsurprising. Similar inquiries into statutory design recur throughout constitutional law, and the right to bear arms is not "a second-class right, subject to an entirely different body of rules." *Bruen*, 597 U.S. at 70. For example, the Free Exercise Clause forbids laws whose "object or purpose" is the "suppres-

sion of religion." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 533 (1993). The Free Speech Clause forbids restrictions whose "purpose" is "to suppress [protected] speech." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 566 (2011). And the Takings Clause bars the government from taking property "under the mere pretext of a public purpose, when its actual purpose [i]s to bestow a private benefit." *Kelo* v. *City of New London*, 545 U.S. 469, 478 (2005).

None of this is to suggest that courts should examine legislators' subjective motives or invalidate laws based on motives alone. Courts generally do not probe lawmakers' mental states, see *Fletcher* v. *Peck*, 6 Cranch 87, 130 (1810), and Second Amendment analysis is no exception. Rather, courts routinely examine a law's design, operation, and enforcement to judge whether it actually serves "a legitimate objective." *FEC* v. *Ted Cruz for Senate*, 596 U.S. 289, 305 (2022). That familiar inquiry governs Second Amendment cases as well.

b. To justify a restriction on protected arms, a State must further show that the "burden [it] imposes" "fits within our regulatory tradition." *Rahimi*, 602 U.S. at 698. That tradition precludes laws that "broadly restrict arms use by the public generally." *Ibid.*

This Court has repeatedly applied that principle to invalidate near-total bans. *Heller*, for instance, invalidated the District of Columbia's "total ban on handguns," as well as its law requiring that firearms in the home be "kept nonfunctional." 554 U.S. at 576. *Heller* declined at that juncture to adopt a doctrinal test for resolving Second Amendment cases because a "complete prohibition" on handguns "would fail constitutional muster" under any standard. *Id.* at 629.

Bruen likewise explained that, though the "general right to publicly carry arms" is subject to regulations identifying "the exceptional circumstances in which one [may] not carry arms," the historical record "does not demonstrate a tradition of broadly prohibiting" public carry. *Bruen*, 597 U.S. at 31, 38. "American governments simply have not broadly prohibited the public carry of commonly used firearms." *Id.* at 70. Applying that principle, *Bruen* invalidated a state law that required carry-license applicants to show a special need for self-protection, explaining that the law "operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public." *Id.* at 60.

Those conclusions track the original meaning of the verb "infringe" in the Second Amendment. While even a "partial restriction" could infringe a right, early commentators regarded "total destruction" as a blatant form of infringement. Slate 412, 441. Commentators regarded English game laws as infringements of the right to possess arms not just because the restrictions served an illegitimate purpose, see pp. 12-13, *supra*, but also because of their sheer scale: They allowed "general disarmaments," *Heller*, 554 U.S. at 593. For instance:

- Blackstone wrote that the game laws improperly sought to disarm "the bulk of the people." 2 Blackstone 412.
- St. George Tucker regarded English game laws as infringements because "[w]hoever examines [them] will readily perceive that the right of keeping arms is effectually taken away from the people of England." 1 Tucker 143 n.41. He explained that those laws disarmed the English people "generally," so that "not one man in five hundred [could] keep a gun in his house." *Id.* App. 300.

- William Rawle believed that English game laws infringed the right to bear arms because they restricted the right to a "very small proportion of the people." Rawle 122.

The Second Amendment's prefatory clause—"[a] well regulated Militia, being necessary to the security of a free State," U.S. Const. Amend. II—helps explain why the Amendment so clearly forbids total or near-total prohibitions. The Framers codified the right to bear arms in part to "secur[e] the militia by ensuring a populace familiar with arms." *Heller*, 554 U.S. at 617. They considered "general knowledge of firearms" valuable "because it would be impossible, in case of war, to organize promptly an efficient force of volunteers unless the people had some familiarity with weapons." *Id.* at 619 (quoting Benjamin Vaughan Abbott, *Judge and Jury* 333 (1880)). Laws that "broadly restrict arms use by the public generally," *Rahimi*, 602 U.S. at 698, defeat the Amendment's aim of "ensuring a populace familiar with arms," *Heller*, 554 U.S. at 617.

Nineteenth-century courts therefore recognized that States could enact limited restrictions on the possession and carrying of arms but could not prohibit the exercise of the right altogether. See William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 Notre Dame L. Rev. 1467, 1490 (2024). The Alabama Supreme Court distinguished between laws that "regulat[e] the manner of bearing arms" and those seek "a destruction of the right" or that "render [arms] wholly useless for the purpose of defence." *Reid*, 1 Ala. at 616. The Georgia Supreme Court held that the legislature could regulate the manner of carrying arms, but that a statute that "entirely forbids" arms is unconstitutional. *Nunn*, 1 Ga. at 251. The Tennessee Supreme Court, too, rec-

ognized the "manifest distinction" between "a law merely regulating the manner in which arms may be worn" and "a law prohibiting the right." *Aymette* v. *State*, 21 Tenn. 154, 160 (1840). "The power to regulate," it explained, "does not fairly mean the power to prohibit." *Andrews* v. *State*, 50 Tenn. 165, 181 (1871). The Arkansas Supreme Court agreed that the right to bear arms could be "to some extent regulated" but not "prohibit[ed]" altogether. *Wilson* v. *State*, 33 Ark. 557, 559-560 (1878).

Again, it is unsurprising that the Second Amendment has historically embraced that principle, since the notion that a restriction is per se invalid if it nullifies a right recurs throughout constitutional law. The Free Speech Clause forbids speech regulations that "completely" "foreclose an entire medium of expression." *City of Ladue* v. *Gilleo*, 512 U.S. 43, 55 (1994). The Takings Clause requires compensation for property regulations that deny "all economically beneficial or productive use of the land." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). And the Confrontation Clause forbids restrictions on cross-examination that have the effect of "cutting off all questioning" about a material issue. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). The Second Amendment draws a similar distinction.

2. Hawaii's law is designed to accomplish an invalid purpose

Under those principles, Hawaii's affirmative-consent rule violates the Second Amendment because Hawaii cannot identify any "permissible reason" to adopt it. *Rahimi*, 602 U.S. at 692. Under Hawaii's post-*Bruen* regime, a Hawaiian who wants to carry a handgun must apply for a license, undergo fingerprinting and photo-

graphing, disclose his mental-health history, complete a training course, and meet rigorous qualifications, including showing that he has the "temperament necessary to be entrusted with a firearm." Haw. Rev. Stat. § 134–9(a)(3); see *id.* § 134–2. Yet, having surmounted those hurdles, licensees cannot carry firearms on private property, including property open to the public, without the owner's affirmative consent. The affirmative-consent rule transparently serves a forbidden purpose: to "eviscerate the general right to publicly carry arms for self-defense." *Bruen*, 597 U.S. at 31; see Robert Leider, *Pretextually Eliminating the Right to Bear Arms through Gerrymandered Property Rules* (Dec. 23, 2022).[2]

According to the Hawaii Legislature, the affirmative-consent rule protects "the right of private individuals and entities to choose for themselves whether to allow or restrict the carrying of firearms on their property." § 1, 2023 Haw. Sess. Laws 114. But that account is implausible. The previous rule already protected property rights: The owner could decide whether to open his property to the public or to a particular guest, and if he did so, could also decide whether to prohibit the guest from carrying firearms. An owner who wanted to invite the public but exclude guns could simply post a "no guns" sign, just as an owner who wants to exclude pets would post a "no pets" sign. And if Hawaii thinks that trespass law provides owners with too little protection, it could (like some States) make it a crime to violate an owner's directive banning firearms from his property.[3]

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[2] https://firearmslaw.duke.edu/2022/12/pretextually-eliminating-the-right-to-bear-arms-through-gerrymandered-property-rules

[3] See, *e.g.*, Ohio Rev. Code Ann. § 2923.126(C)(3)(a); S.C. Code Ann. § 23-31-220(B).

Hawaii's singling out of firearms confirms that its rule has nothing to do with protecting property rights. Individuals entering property open to the public presumptively may bring in just about anything other than firearms—including bicycles, roller skates, protest banners, muddy shoes, dripping umbrellas, melting ice-cream cones, open containers of alcohol, boomboxes, and knives. Only someone who wants to carry a firearm needs "express authorization." Haw. Rev. Stat. § 134–9.5(b). That discriminatory rule manifestly seeks to suppress gun rights, not protect property rights.

Further undercutting Hawaii's asserted rationale, the statute imposes a heightened burden on owners who want to allow firearms on their premises. Ordinarily, a person may give consent (for anything that requires consent) through "words or acts"—or even "silence or inaction, if the circumstances or other evidence indicate that the silence or inaction is intended to give consent." Restatement (Second) of Torts § 892, cmt. (b) (1979). But in Hawaii, an owner may allow firearms on his property only by giving "[u]nambiguous written or verbal authorization" or posting "clear and conspicuous signage." Haw. Rev. Stat. § 134–9.5(b). If a person asks an owner whether he may carry a gun, and the owner nods his head in approval—or if the owner posts an insufficiently conspicuous sign—the person *still* may not bring his gun on that property. That result confirms that Hawaii is simply trying to make it harder for people to carry guns.

On top of that, Hawaii's law contains exemptions that would be inexplicable if its purpose were to protect property rights. It exempts "state and county law enforcement officers," whether on or off duty, Haw. Rev. Stat. § 134–11(a)(1), as well as federal, state, or local

employees while on duty or going to or from work, if their duties "require them to be armed," *id.* § 134–11(a)(4). Because it covers only license-holders, it does not apply to hunters and target shooters, who may carry firearms without a carry license while going to and from the place of hunting or target shooting. See Haw. Rev. Stat. § 134–5(a). Nor does it apply to certain active or retired police officers visiting from other States, who likewise may carry firearms without licenses. See 18 U.S.C. 926B, 926C.

Hawaii does not explain why off-duty police officers, state employees, or out-of-state retired police officers may carry guns without the owner's affirmative consent while stopping for coffee, but ordinary Hawaiians may not. It does not explain why Hawaiians carrying guns for self-defense—but not Hawaiians en route to hunting grounds or target-shooting ranges—must obtain the owner's affirmative consent before entering a grocery store. It does not explain why its law disfavors license-holders, who have run the regulatory gauntlet to show their fitness to bear arms. Nor does it explain why owners would presumptively draw the lines differently for the exempt groups if they object to having firearms on their property at all. The exemptions raise "serious doubts" about whether Hawaii "is in fact pursuing the interest it invokes, rather than disfavoring" a constitutional right. *Brown* v. *EMA*, 564 U.S. 786, 802 (2011). In sum, Hawaii's law, through its scope and operation, unconstitutionally seeks to impede the public carrying of firearms.

3. Hawaii's law effectively negates the right to carry arms in public

Hawaii's default rule likewise violates the Second Amendment in "how" it regulates firearms. *Bruen*, 597

U.S. at 29. By requiring the owner's affirmative consent to carry firearms on property open to the public—the primary places where one would publicly carry firearms for self-defense—Hawaii imposes a far more severe burden than the Amendment permits.

Unlike some historically grounded regulations that narrowly focus on specific people, places, weapons, or modes of carry, Hawaii's rule "broadly restrict[s] arms use by the public generally." *Rahimi*, 602 U.S. at 698. Unlike laws targeting individuals who pose "a special danger of misuse," *ibid.*, Hawaii's statute applies to ordinary Hawaiians who hold carry licenses, see Haw. Rev. Stat. § 134–9.5(a). Unlike laws excluding arms from "sensitive places," *Bruen*, 597 U.S. at 30, Hawaii's law covers nearly all private property, whether "residential, commercial, industrial, agricultural, institutional, or undeveloped," even if the property is open to the public, Haw. Rev. Stat. § 134–9.5(c).[4] Unlike laws restricting "dangerous and unusual weapons," *Bruen*, 597 U.S. at 47, Hawaii's law applies to any type of "firearm," including those commonly used for self-defense, Haw. Rev. Stat. § 134–9.5(a). And unlike laws regulating "the manner of carry," *Bruen*, 597 U.S. at 38, Hawaii's rule applies whether the firearm is "operable or not," "loaded or unloaded," and "concealed or unconcealed," Haw. Rev. Stat. § 134–9.5(a). This Court has already determined that "there is no historical basis" for such "broad prohibitions." *Bruen*, 597 U.S. at 50.

As a practical matter, Hawaii's rule operates as a near-complete ban on carrying firearms in the places

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[4] Other provisions of Hawaii law altogether ban firearms in places—such as fairs, stadiums, and parks—that the State deems sensitive. See Haw. Rev. Stat. § 134–9.1(a). The breadth of Hawaii's restrictions is dubious, but those are not at issue here.

one would normally carry them for self-defense—places open to the public. Because it is virtually impossible to go about publicly without setting foot on property open to the public, and because most owners do not post signs either allowing or forbidding firearms, the rule effectively means that ordinary citizens may not carry arms publicly. Indeed, because most people do not trespass on property closed to the public, Hawaii's law does most of its work in places open to the public—again, the very places where it is most natural to carry arms for self-defense. That restriction deprives individuals who want to exercise their Second Amendment rights of their ability to "go about their daily lives." Pet. App. 181a (VanDyke, J., dissenting). A person carrying a firearm cannot pick up a cup of coffee, get lunch at a drive-through restaurant, stop for gas, enter a parking lot, go into a store, buy groceries, or perform other routine tasks that require setting foot on private property.

The scholars who pioneered the affirmative-consent rule acknowledged that "only a small minority of businesses" would "actively contract around a no-carry default and allow patrons to carry concealed weapons onto the premises." Ian Ayres & Frederick E. Vars, *Weapon of Choice* 89 (2020). They have also stated that the rule would "radically expand" the areas "where guns could not be carried" and would have "knock-on effects" by making it "inconvenient" to "travel freely" with firearms. Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns*, 48 J. L. Med. & Ethics 183, 184 (2020). When asked where people could carry firearms under a New York law that resembles Hawaii's, New York's Governor answered, "probably some streets." Luis Ferré-Sadurní & Grace Ashford, *N.Y. Democrats to Pass New*

Gun Laws in Response to Supreme Court Ruling, N.Y. Times (June 30, 2022).[5]

That near-complete ban defies *Bruen* and the history underlying it. *Bruen* recognized that an "ordinary, law-abiding citizen" has a "general right to publicly carry arms for self-defense." 597 U.S. at 9, 31. Just as States may not limit that right to those who show "a special need for self-defense," *id.* at 11, States may not limit it to "those who aimlessly wander the streets," Pet. App. 181a (VanDyke, J., dissenting).

It makes no difference that Hawaii has achieved that result through state-imposed restrictions on property owners rather than a formal ban on carrying firearms publicly. "The legal result must be the same, for what cannot be done directly cannot be done indirectly." *Cummings* v. *Missouri*, 4 Wall. 277, 325 (1867). The Constitution forbids "sophisticated as well as simple-minded" "contrivances" to thwart its guarantees. *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939).

B. Hawaii's Restriction Lacks Any Historical Analogue in Private-Property Rules

Hawaii's law is also unconstitutional because its restrictive affirmative-consent rule for carrying firearms on private property open to the public has no footing in our Nation's regulatory tradition. Historically, States did not interfere with traditional rules of property law, under which any member of the public, armed or not, may enter private property open to the public unless the owner directs otherwise. Hawaii has inverted that traditional rule, prohibiting armed individuals from entering private property open to the public without specific

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[5] https://nytimes.com/2022/06/30/nyregion/handgun-concealed-carry-ny-html

authorization from the owner. That inversion lacks any "well-established and representative historical analogue." *Bruen*, 597 U.S. at 30 (emphasis omitted).

1. Under traditional property law, armed individuals may enter property open to the public unless the owner affirmatively restricts entry

The right to exclude others is a core element of property ownership. See *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 149-150 (2021). Trespass law has traditionally enforced the right to exclude by requiring a person to obtain the owner's affirmative permission before entering his property. "Our law holds the property of every man so sacred, that no man can set foot upon his neighbour's close without his leave." *United States* v. *Jones*, 565 U.S. 400, 405 (2012) (quoting *Entick* v. *Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765)) (brackets omitted). An entry made "without the owner's leave," even if not "contrary to his express order," "is a trespass." 3 Blackstone 209.

The common law has traditionally taken a different approach when the owner opens his property to the public. Blackstone wrote that "a man may justify entering an inn or public house, without the leave of the owner first specially asked; because, when a man professes the keeping of such inn or public house, he thereby gives a general license to any person to enter his doors." 3 Blackstone 212. And American courts have long recognized that, by "opening their doors" to the public, property owners give "an implied license to any and all persons to enter" without first obtaining specific authorization. *Commonwealth* v. *Power*, 48 Mass. 596, 602 (1844). Applying that logic, American courts have determined that members of the public hold implied licenses to en-

ter places such as inns, shops, mills, docks, wharfs, and train stations.[6]

At common law, "all such licenses are in their nature revocable." *Power*, 48 Mass. at 602. Within outer limits set by common-carrier and public-accommodation laws, an owner who has generally opened his property to the public may still forbid entry by an "individual" or "class of individuals." *Id.* at 603. The owner also may make permission to enter "conditional" on compliance with specified rules, so long as he provides "due notice" of the conditions. *Id.* at 602-603.[7] As judge and scholar Thomas Cooley explained, one who "impliedly invites the public to enter" his premises may restrict the invitation "by placard or otherwise." Thomas M. Cooley, *A Treatise on the Law of Torts or the Wrongs which Arise Independent of Contract* 303 (1879). Such a "conditional or restricted consent to enter land creates a privilege to do so only in so far as the condition or restriction is complied with." Restatement (First) of Torts § 168 (1934).

Under those common-law rules, a person carrying a firearm presumptively holds an implied license to enter private property open to the public, but an owner may revoke that license, including by posting a "no guns" sign on his premises. See Pet. App. 173a (VanDyke, J., dissenting).

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[6] See *Sterling* v. *Warden*, 51 N.H. 217, 231 (1871); *Harris* v. *Stevens*, 31 Vt. 79, 92 (1858); *Lee* v. *Inhabitants of Templeton*, 72 Mass. 579, 584 (1856); *Heaney* v. *Heaney*, 2 Denio 625, 627 (N.Y. Sup. Ct. 1846); *State* v. *Newbegin*, 25 Me. 500, 504 (1846); *Gowen* v. *Philadelphia Exchange Co.*, 5 Watts & Serg. 141, 143 (Pa. 1843); *Adams* v. *Freeman*, 12 Johns. 408, 409 (N.Y. Sup. Ct. 1815).

[7] See, *e.g.*, *State* v. *Steele*, 11 S.E. 478, 484-485 (N.C. 1890); *Barney* v. *The Oyster Bay & Huntington Steamboat Co.*, 67 N.Y. 301, 302 (1876); *Jencks* v. *Coleman*, 13 F. Cas. 442, 443 (C.C.D.R.I. 1835) (No. 7258) (Story, J.).

The carrying of firearms on unenclosed (*i.e.*, unfenced), uncultivated lands illustrates that principle. Since colonial times, many States have treated unenclosed, uncultivated lands as presumptively open to members of the public, including hunters. See Mark R. Sigmon, *Hunting and Posting on Private Land in America*, 54 Duke L.J. 549, 554-558 (2004). In those jurisdictions, "it is customary to wander, shoot and fish at will" on such lands "until the owner sees fit to prohibit it." *McKee* v. *Gratz*, 260 U.S. 127, 136 (1922). Proprietors who want to exclude hunters (and their firearms) from such publicly open lands have traditionally borne the burden of posting signs saying so. See Sigmon 558-564.

More generally, the historical record reveals many examples of proprietors' affirmatively banning firearms on their property. In the 19th century, many colleges forbade students from possessing firearms on campus.[8] And firearms were often prohibited in cemeteries.[9] Those special restrictions confirm that, when the owner of publicly accessible property did *not* affirmatively ban firearms, members of the public remained free to carry them on the premises.

2. Hawaii's law lacks an adequate historical analogue

a. States traditionally respected the common-law rule for carrying firearms on property open to the public. Only recently have States such as Hawaii attempted

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[8] See, *e.g.*, *The Laws of Middlebury College* 18 (1839); *Statutes and Laws of the University in Cambridge, Massachusetts* 23 (1825); *Laws of the College of New Jersey* 26 (1819).

[9] See, *e.g.*, *By-Laws of the Trustees of Mount Hope Cemetery of the City of Boston* 14 (1874); *First Report of the Managers of the Erie Cemetery* 29 (1852); *Report of the Trustees of Green Lawn Cemetery* 52 (1849).

to override that rule by providing that a person licensed to publicly carry firearms presumptively may not do so on publicly accessible land unless the owner expressly consents.

The "movement to flip the default rule began in 2020," when scholars proposed the reform. Ian Ayres & Frederick E. Vars, *Tell me what you want*, 17 J. Legal Analysis 105, 107 (2025); see *Weapon of Choice* 84-93. Those scholars acknowledged that, until 2020, "all states" had applied a "right-to-carry default." *Guests with Guns* 184. Their proposal for States to displace that rule was "new" and "innovative." Frederick Vars & Ian Ayres, *A new no-carry default for the U.S.*, N.Y. Daily News (July 20, 2022).

States began enacting affirmative-consent restrictions after *Bruen* held that the Second Amendment protects the right to carry firearms in public. In 2023, four weeks after *Bruen*, New York enacted "the first modern provision flipping the default for all private property." *Tell me what you want* 106; see N.Y. Penal Law § 265.01–d(1). In 2023 and 2024, four more States (California, Hawaii, Maryland, and New Jersey)—which all previously had the type of licensing regime invalidated in *Bruen*—followed suit. See Cal. Penal Code § 26230(a)(26); Md. Code Ann. §6–411(d); N.J. Stat. Ann. § 2C:58–4.6(a)(24).

That history decides this case. Firearms laws must be "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. If that test means anything, it means that the Second Amendment prohibits a novel firearms law that jettisons the rule that prevailed in all 50 States until two years ago.

b. The court of appeals upheld Hawaii's law on the ground that States have historically "regulate[d] the de-

fault rules concerning private property." Pet. App. 61a. It cited six laws punishing those who carried firearms on private property without the owner's permission:

- Two laws from Pennsylvania and New Jersey covering "improved or inclosed lands of any plantation." Act of Aug. 26, 1721, ch. 246, § 3, 3 *The Statutes at Large of Pennsylvania from 1682 to 1801*, at 255 (James T. Mitchell & Henry Flanders eds., 1896); see Act of May 5, 1722, ch. 35, § 4, *The Acts of the General Assembly of the Province of New-Jersey* 101 (Samuel Nevill ed., 1752).
- A New York law covering "any Orchard, Garden, Corn-Field, or other inclosed Land." Act of Dec. 20, 1763, ch. 1233, § 1, 1 *Laws of New-York, from the Year 1691, to 1773 inclusive* 442 (1774).
- A New Jersey law addressing lands "for which the owner pays Taxes." Act of Dec. 21, 1771, § 1, *Laws of the State of New-Jersey* 26 (1821).
- Louisiana's 1865 statute covering the "premises or plantations of any citizen." Act of Dec. 20, 1865, No. 10, § 1, 1865 La. Acts 14.
- Oregon's law as to "enclosed premises or lands." Act of Feb. 20, 1893, § 1, 1893 Or. Laws 79.

The court's reliance on those laws was misplaced.

First, the government bears the burden of showing that a firearms regulation rests on a "well-established" tradition. *Bruen*, 597 U.S. at 30. It cannot meet that burden by pulling "scattered cases or regulations," *Rahimi*, 602 U.S. at 738 (Barrett, J., concurring), from "seemingly random time period[s]," *Samia* v. *United States*, 599 U.S. 635, 655 (2023) (Barrett, J., concurring in part and concurring in the judgment). In *Bruen*, the

State could not satisfy its burden by citing "three colonial regulations," "a single state statute and a pair of state-court decisions" from the 19th century, and a "handful of temporary territorial laws" "enacted nearly a century after the Second Amendment's adoption." 597 U.S. at 46, 65, 67-68 (emphasis omitted). The evidence cited by the court of appeals—four colonial laws, one mid-19th-century law, and one law enacted in 1893—is similarly inadequate here.

Moreover, most of the cited laws do not resemble Hawaii's law because they were limited to lands that were not open to the public. The court of appeals acknowledged that four of the six laws—the 1721 Pennsylvania law, the 1722 New Jersey law, the 1763 New York law, and the 1893 Oregon law—applied only to "enclosed lands" (*i.e.*, lands surrounded by a fence or other visible boundary). Pet. App. 60a. In contrast to unenclosed lands, which are often publicly accessible, see p. 27, *supra*, enclosed lands have never been open to the public, see Pet. App. 61a. The cited laws thus applied primarily, if not exclusively, to trespassers; in effect, they punished the offense of armed trespass. See *Koons* v. *Attorney General*, 156 F.4th 210, 233-234 (3d Cir. 2025).

Even if those laws applied to invitees, lands "generally open to the public" are "readily distinguishable" from "property closed to the public." *Cedar Point*, 594 U.S. at 157. Requiring affirmative consent to carry firearms in places open to the public, such as supermarkets and gas stations, imposes a significantly greater burden than requiring affirmative consent to carry firearms within fenced plantations.

The court of appeals wrongly believed that New Jersey's 1771 law provided a closer analogue. See Pet. App.

61a-62a. Among other distinctions, see Pet. Br. 33-36, that statute applied to taxed land, and "[a]t the time, New Jersey taxed only improved land." Brian Sawers, *Keeping Up with the Joneses*, 111 Mich. L. Rev. First Impressions 21, 25-26 (2013); see *Antonyuk* v. *James*, 120 F.4th 941, 1046 (2d Cir. 2024), cert. denied, 145 S. Ct. 1900 (2025). Like unenclosed land, improved or cultivated land is closed to the public. See Pet. App. 61a. The 1771 New Jersey law is thus inapposite for the reasons discussed above.

To be sure, Hawaii's law is analogous to the 1865 Louisiana law that forbade anyone to carry firearms on another person's "premises" without the owner's consent. § 1, 1865 La. Acts 14. But that lone outlier hardly suffices. Louisiana enacted that law immediately after the Civil War, as part of its systematic efforts to disarm black people. See Pet. App. 188a (VanDyke, J., dissenting). Its Reconstruction Governor later explained that "[t]his [law], of course, was aimed at the freedmen." Henry Clay Warmoth, *War, Politics and Reconstruction* App. 1, at 278 (1930). Far from supporting Hawaii, Louisiana's deliberate effort to suppress constitutional rights is "probative of what the Constitution does *not* mean." *Rahimi*, 602 U.S. at 720 (Kavanaugh, J., concurring).

C. Hawaii's Reliance On First Amendment Doctrine Is Misplaced

Hawaii invokes (Br. in Opp. 23-25) cases interpreting the First Amendment, where the Court has employed an interest-balancing approach that the Court has rejected in the Second Amendment context. See *Bruen*, 597 U.S. at 22. Regardless, First Amendment doctrine undermines Hawaii's position. First and foremost, Hawaii already requires anyone seeking to carry a gun in

Hawaii to undergo rigorous licensing processes, then piles on its restrictions on carrying publicly—a regime with no counterpart in the First Amendment context. See pp. 18-19, *supra*.

Further, in the First Amendment context, the Court has recognized that "persons not specifically invited" may "go from home to home" and "ring doorbells to communicate ideas to the occupants." *Martin* v. *City of Struthers*, 319 U.S. 141, 141 (1943). Though the "master of each household" may decide "[w]hether such visiting shall be permitted," a city may not "make this decision for all its inhabitants" by banning religious or political door-to-door solicitation. *Ibid.*; see *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150, 164-169 (2002). Separately, the Court has held that Congress may not require a sender of mail to obtain the recipient's affirmative consent before mailing communist propaganda, see *Lamont* v. *Postmaster General*, 381 U.S. 301, 306-307 (1965), or contraceptive advertisements, see *Bolger* v. *Youngs Drugs Products Corp.*, 463 U.S. 60, 68-75 (1983). Those cases confirm that rules restricting activity on private property can violate the Constitution when, as here, the government rather than the owner "is the actor." *Lamont*, 381 U.S. at 306.

Breard v. *Alexandria*, 341 U.S. 622 (1951) (cited at Br. in Opp. 23-24) further undercuts Hawaii's case. There, this Court rejected a First Amendment challenge to a city ordinance barring door-to-door magazine salesmen from making uninvited visits to homes. See *id.* at 629-633. The Court recognized that, under *Martin*, a similar ordinance targeting fully protected speech would violate the First Amendment by "substitut[ing] the judgment of the community for the judgment of the

individual householder." *Id.* at 642. But it held that the city could bar solicitation by magazine salesmen, which constituted then-unprotected commercial speech. *Ibid.*; see *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 758-773 (1976). In the Court's view, the "privacy" interests of the "hospitable housewife" outweighed the interests of magazine publishers (the only actors whose First Amendment rights the Court credited), given that magazine subscriptions could be freely procured "without the annoyances of house-to-house canvassing." *Breard*, 341 U.S. at 644. Unlike *Breard*, this case involves fully protected conduct on premises open to the public.

Hawaii also cites (Br. in Opp. 25) cases about speech regulations at private malls—*Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), and *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980)—but those cases do not help Hawaii either. *Lloyd* held that, because the First Amendment restricts only state action, a privately owned shopping mall does not violate the Amendment by prohibiting the distribution of handbills. See 407 U.S. at 567-570. And *PruneYard* held that, because a State may recognize "liberties more expansive than those conferred by the Federal Constitution," a State may require a shopping mall to allow the distribution of handbills. 447 U.S. at 81. Translated to the Second Amendment context, *Lloyd* supports the notion that private property owners ordinarily can decide for themselves whether to allow firearms on their premises. And *PruneYard* suggests that a State may recognize more expansive firearms rights than the Second Amendment demands—for instance, by enacting laws requiring private employers to allow employees to store their fire-

arms in cars parked in the employers' parking lots.[10] Here, by contrast, petitioners are challenging a Hawaii statute (state action) that limits (rather than expands) basic Second Amendment rights. Had Hawaii required the owner's affirmative consent for First Amendment rather than Second Amendment activity, such a law would plainly be unconstitutional. See p. 32, *supra*. The Second Amendment dictates the same result.

CONCLUSION

This Court should reverse the judgment of the court of appeals and remand the case for further proceedings.

Respectfully submitted.

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[10] See, *e.g.*, Fla. Stat. § 790.251(4)(a); Tex. Labor Code § 52.061; Wis. Stat. Ann. § 175.60(15m)(b).