No. 24-1046

IN THE

Supreme Court of the United States

JASON WOLFORD, ET AL.,
Petitioners,

v.

ANNE E. LOPEZ, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF HAWAIʻI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF

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INTRODUCTION

In the wake of *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, 597 U.S. 1 (2022), Hawai‘i revised its firearms laws to accord with this Court's guidance on the scope of the Second Amendment. In those revisions, Hawai‘i also sought to protect its citizens' right to exclude. That fundamental right, which was inherited from our English ancestors, means that "no man can set his foot upon his neighbour's close without his leave." *Florida* v. *Jardines*, 569 U.S. 1, 8 (2013) (quoting *Entick* v. *Carrington* (1765) 95 Eng. Rep. 807, 817; 2 Wils. K. B. 275, 291). The revisions were designed to vindicate both the right to bear arms and property owners' undisputed right to choose whether to permit armed entry onto their property.

The resulting law requires a person to obtain consent to bring a gun onto private property. That consent can come from the property owner or one of his agents, and it can be oral or written. The law therefore permits a person to bring a gun into any shop, convenience store, or other retail establishment so long as he gets an employee's on-the-spot okay. And if a property owner wants to dispense with the need for a conversation, he can post a sign or website notice reflecting his consent.

This law fully comports with the Second Amendment for two independent reasons. First, it does not govern conduct protected by the Second Amendment because that Amendment codified the right to bear arms as it existed at the Founding, when there was no right to armed entry onto private property without consent. Rather, the right to exclude required consent for *any* entry onto private property. In fact, petitioners agree that the Second Amendment does not override property owners' right to exclude armed entry, and they do not challenge the district court's determination that Hawai‘i's law falls outside the

scope of the Second Amendment as applied to private property that is not open to the public.

Petitioners nonetheless assert that Hawai'i's law violates the Second Amendment as applied to property that is open to the public because there is an implied license to enter such property. But while consent can be established through an implied license, state law and local custom have always defined the scope of that license. Accordingly, Hawai'i is free to enact a law clarifying that the public's implied license to enter private property does not include an invitation to bring a gun, particularly because that accords with the well-established custom in Hawai'i.

Second, even if Hawai'i's law regulates conduct covered by the Second Amendment, it fits comfortably within our Nation's history of firearm regulation. In the colonial era, numerous states had laws requiring express consent to bring a gun onto private property, at least where that property was "inclosed" (that is, fenced) or "improved" (that is, developed). Similar laws abounded in the Reconstruction era, when the Second Amendment was first applied to the states. Those laws are "relevantly similar" to Hawai'i's because they were enacted for the same basic purpose—to protect owners' right to exclude. *Bruen*, 597 U.S. at 29. And they did so in the same basic way—by requiring express consent to bring a firearm onto private property. In fact, at least two of the laws, which were expressly designed to "prevent trespassing with guns," are "dead ringers" for Hawai'i's statute. Pet. App. 62a.

Hawai'i's law therefore respects the Second Amendment right of its citizens to bear arms, while vindicating their fundamental right to exclude unwanted entry onto private property. The constitutional challenge to this common-sense legislation should be denied.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Second Amendment to the U.S. Constitution provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend. II.

Hawai'i's Act 52 provides, in relevant part:

> (a) A person carrying a firearm pursuant to a license issued under section 134-9 shall not intentionally, knowingly, or recklessly enter or remain on private property of another person while carrying a loaded or unloaded firearm, whether the firearm is operable or not, and whether the firearm is concealed or unconcealed, unless the person has been given express authorization to carry a firearm on the property by the owner, lessee, operator, or manager of the property.
>
> (b) For purposes of this section, express authorization to carry or possess a firearm on private property shall be signified by:
>
> (1) Unambiguous written or verbal authorization; or
>
> (2) The posting of clear and conspicuous signage at the entrance of the building or on the premises,
>
> by the owner, lessee, operator, or manager of the property, or agent thereof, indicating that carrying or possessing a firearm is authorized.

Haw. Rev. Stat. § 134-9.5 (2024).

STATEMENT OF THE CASE

A. Constitutional Background

The Constitution protects property owners' fundamental right to exclude. That is " 'one of the most treasured' rights of property ownership." *Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 149 (2021) (citation omitted). And " 'every American statesman' at the time of the Founding" was well aware of the "general rule * * * 'that no man can set his foot upon his neighbour's close without his leave.' " *Jardines*, 569 U.S. at 7-8 (citations omitted).

The Constitution also protects an individual's right to keep and bear arms. The Second Amendment codifies the "pre-existing right" inherited from our English ancestors. *Bruen*, 597 U.S. at 34. But the right is "not unlimited." *District of Columbia* v. *Heller*, 554 U.S. 570, 626 (2008). "From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Ibid.*

In *Bruen*, this Court clarified several aspects of the Second Amendment right. First, it explained that questions about the scope of the right to bear arms and the permissibility of regulations that burden that right must be assessed through historical analysis, not interest balancing. 597 U.S. at 26-27. Second, it applied this historical approach to invalidate New York's scheme for licensing public carry. *Bruen* held that petitioners' "proposed course of conduct—carrying handguns publicly for self-defense"—was protected by the Second Amendment. *Id.* at 32. And it determined that New York had not established a sufficient body of "relevantly similar," *id.* at 29, historical analogues to support the

state's assertion that its strict licensing laws were consistent with the Nation's regulatory history, *id.* at 70.

B. Statutory Background

After *Bruen*, Hawai'i engaged in a comprehensive effort to update its firearms laws to ensure compliance with this Court's guidance, while simultaneously protecting property owners' fundamental right to exclude.

Before *Bruen*, Hawai'i had strict rules limiting public carry that reflected its traditions from before Hawai'i became a state. Pre-statehood, Hawai'i was a kingdom, and in 1833, King Kamehameha III promulgated a law prohibiting "any person or persons" from possessing deadly weapons, including any "knife, sword-cane, or any other dangerous weapon." *Translation of the Constitution and Laws of the Hawaiian Islands, Established in the Reign of Kamehameha III* 163 (Lahainaluna ed. 1842) ("*1842 Hawai'i Constitution*"). Subsequent laws maintained similarly tight restrictions on firearms. See, *e.g.*, Act of May 25, 1852, § 1, 1852 Haw. Sess. Laws 19 (limiting right to carry any deadly weapon in public); Haw. Rev. Laws, ch. 209, § 3089 (1905), *as amended by* Act of Mar. 19, 1913, § 1, 1913 Haw. Sess. Laws 25.

In accordance with this tradition, Hawai'i's licensing scheme before *Bruen* permitted public carry only in "exceptional" cases, "when an applicant show[ed] reason to fear injury to the applicant's person or property." Haw. Rev. Stat. § 134-9(a) (2022). Under that regime, public carry was rare, so property owners in Hawai'i could reasonably assume that—unless they made express arrangements to the contrary—firearms would not be carried onto their property.

In the wake of *Bruen*, Hawai'i adopted Act 52, which relaxed its licensing requirements to make it easier to get a license to carry a gun in public. See Haw. Rev. Stat. § 134-9 (2024). At the same time, Hawai'i imposed historically

grounded limitations on where and how license holders may carry those weapons, striking a careful balance designed to protect public safety and vindicate the rights of private-property owners. See *id.* §§ 134-9.1-9.5.

As relevant here, the Act created a default rule requiring a person to obtain consent to armed entry onto someone else's private property. *Id.* § 134-9.5. Specifically, the default rule provides that a person shall not "intentionally, knowingly, or recklessly enter or remain on private property" while carrying a firearm "unless the person has been given express authorization" to do so "by the owner, lessee, operator, or manager of the property." *Ibid.* That authorization can be "written or verbal," and may be provided through signage or by an "agent" of the property owner, so long as the consent is "unambiguous." *Ibid*. Accordingly, a person wishing to carry a gun onto private property need only get a verbal "okay" from the owner or his agent.

The Legislature enacted this default rule in light of ample evidence that property owners in Hawai'i do not want people to carry guns onto their property without express consent, including testimony from residents and the business community. See, *e.g.*, Hawai'i H. Reps., *FIN Public Hearing – Wed Apr 5 2023 @ 1:55PM HST*, at 3:32:26, https://perma.cc/4C8A-V889 (testimony of Gail Abrena-Agas, Gov't Affs. Comm. Chair, Bldgs. Owners & Managers Ass'n Haw.) ("We support allowing owners of private property to choose whether they want to opt in to authorizing concealed carry on their properties and also choose to opt in to providing signage on their properties for that."). The Legislature also considered research showing that "a substantial and statistically significant majority of Americans reject the default right to carry weapons onto other people's residences, unoccupied rural land, retail establishments and businesses." J.A. 162a (discussing Ian Ayres & Spurthi Jonnalagadda, *Guests with*

Guns: Public Support for "No Carry" Defaults on Private Land, 48 J. L., Med. & Ethics 183, 189-190 (2020)). Indeed, a contemporary survey established that 78% of Hawai'i residents and 64% of Hawai'i gun owners agree that loaded, concealed firearms should not be allowed into businesses *at all*. Ward Research Inc., *Public Opinion of Gun Safety Laws (Online Survey of Hawai'i Residents)* 14 (Feb. 2023), https://perma.cc/V24Q-BEFM.

The Legislature therefore adopted the private property default rule to "respect[ ] the right of private individuals and entities to choose for themselves whether to allow or restrict the carrying of firearms on their property" and to promote "public health, safety, and welfare." 2023 Haw. Sess. Laws 114.

Separate provisions of the Act, which are not before this Court, prohibit carrying firearms in specific sensitive spaces, including government buildings, Haw. Rev. Stat. § 134-9.1(a)(1) (2024), bars and restaurants serving alcohol, *id.* § 134-9.1(a)(4), public libraries, *id.* § 134-9.1(a)(6), and parks and beaches, *id.* § 134-9.1(a)(9).

C. District Court Proceedings

Petitioners brought a pre-enforcement challenge to Act 52, seeking to invalidate the property default rule and several of the Act's sensitive-places restrictions "both facially and as applied to" petitioners. J.A. 60a. Following expedited briefing on petitioners' request for a temporary restraining order, the district court granted in part and denied in part. Pet. App. 84a-85a.

As relevant here, the district court enjoined Hawai'i from enforcing the private property default rule as applied to private property held open to the public. Pet. App. 150a-157a. The court determined that petitioners were unlikely to succeed on their facial challenge because the "portion of [Hawai'i's law] that regulates private property *not held open to the public—e.g.*, residential properties—is not

covered by the Second Amendment's plain text." Pet. App. 151a (emphasis added). But the court concluded that petitioners were likely to succeed in challenging the law as applied to private property held open to the public because the Second Amendment's text likely protects the right to armed entry onto private property open to the public, even without the owner's consent. Pet. App. 152a. And the court determined that there was no regulatory tradition supporting Hawai'i's rule because, in the court's view, most of the historical analogues identified by Hawai'i were not relevantly similar in that they applied principally to residential lands not open to the public. Pet. App. 156a.

The district court emphasized, however, that its conclusions were preliminary—especially because the temporary restraining order ("TRO") record had been compiled in just 21 days—and explained that its rulings could well "be changed" if Hawai'i provided additional historical evidence. Pet. App. 165a-166a.

The district court subsequently converted the TRO into a preliminary injunction, Pet. App. 216a, and Hawai'i appealed, Pet. App. 10a.

D. Court of Appeals Proceedings

The court of appeals reversed. Pet. App. 64a. The court determined that "carrying onto properties held open to the public is conduct that likely falls within the plain text of the Second Amendment." Pet. App. 58a. It concluded, however, that Hawai'i had shown that "the Nation has an established tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property." Pet. App. 62a. In doing so, the court relied on numerous historical analogues, including a 1771 New Jersey law and an 1865 Louisiana law, both of which "applied to *all* private property"—including private property generally held open to the public—and were designed "to prevent trespassing with Guns." Pet. App.

61a-62a. The court concluded that these two laws were "historical 'dead ringers,' " and observed that four other laws required those who wished to carry firearms onto "subsets of private land, such as plantations or enclosed lands," to secure the owner's permission. Pet. App. 60a-62a. The court accordingly held that Hawai'i's law falls "well within the historical tradition" of "colonies and States freely arrang[ing] the relevant default rules" of "carrying of firearms onto private property." Pet. App. 62a-63a.

The court denied petitioners' request for rehearing en banc, over dissent. Pet. App. 169a-202a.

SUMMARY OF ARGUMENT

A state law that regulates firearms comports with the Second Amendment if historical analysis establishes either that "the plain text of the Second Amendment" does not "protect[ ]" the "conduct" the law regulates or that the law is consistent with our Nation's tradition of firearm regulation. *Bruen*, 597 U.S. at 32. Both are true with respect to Hawai'i's law.

First, Hawai'i's law does not regulate conduct protected by the Second Amendment. That Amendment codified the right to bear arms as it existed at the Founding. And at that time, the right to bear arms did not encompass the right to armed entry onto private property without the owner's consent. Rather, the Founders recognized a property owner's right to exclude, adopting our English ancestors' fundamental rule that "no man can set his foot upon his neighbour's close without his leave." *Jardines*, 569 U.S. at 8 (quoting *Entick*, 95 Eng. Rep. at 817). That "leave" could be expressly given or implied by local law or custom, but the scope of any such implied consent was necessarily constrained by the scope of the law or custom on which it was based. *Ibid.* (quoting *Entick*, 95 Eng. Rep. at 817). Accordingly, at the Founding, a person had no right to

enter private property with a gun unless he had the owner's express consent or an implied license based on local law or custom.

Because the Founding-era right to bear arms did not encompass the right to bring a gun onto private property without consent, Hawai'i's law does not regulate conduct within the scope of the Second Amendment. The law does not prohibit carrying a gun onto private property; it merely requires consent from the owner or one of his agents. Further, while the law does not permit reliance on an *implied* license, the existence and scope of any such license has always been defined by local law and custom. And Hawai'i has never had a custom of armed entry onto private property, reflecting Hawai'i's long pre-statehood history as a kingdom that tightly regulated firearms.

Petitioners recognize that a property owner has the right to exclude armed entry, and they do not challenge the district court's holding that the Hawai'i law does not implicate the Second Amendment to the extent it applies to private property "not held open to the public." Pet. App. 151a. They insist, however, that the law infringes their Second Amendment right as applied to private property open to the public because they believe there is an implied license to enter such property without the owner's express consent. But whether that implied license includes an invitation to bring a gun depends on local law and custom. And in Hawai'i, it does not. Further, petitioners' suggestion that the right to public carry extends to private property held open to the public runs contrary to this Court's First Amendment precedents, which recognize that property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 569 (1972).

Second, even if the Hawai‘i law regulates conduct within the scope of the Second Amendment, it is constitutional because the law fits comfortably within our Nation's tradition of firearm regulation. Both at the time of the Founding and in the Reconstruction era, numerous state laws prohibited armed entry onto private property without the owner's express consent. Those laws are "relevantly similar" to Hawai‘i's statute because they share the same "why" and "how." *Bruen*, 597 U.S. at 29. The evident purpose of the laws was to protect property owners' right to exclude armed entry, and they accomplished that purpose by requiring a person to obtain consent.

In 1771, for example, New Jersey enacted a law expressly aimed at "prevent[ing] trespassing with guns" that broadly prohibited "carry[ing] *any* gun on *any* lands not his own" without "license or permission in writing from the owner." Act of Dec. 21, 1771, 1821 N.J. Laws 25-26 (emphasis added) ("1771 N.J. Law"). At the time, Pennsylvania, Maryland, New York, and Massachusetts all had similar laws requiring consent to bring a firearm onto "inclosed" or "improved" lands. And during the Reconstruction era, Louisiana, Florida, Texas, and Oregon all had laws requiring consent to armed entry onto private property.

Petitioners have no answer to this robust evidence that laws like Hawai‘i's fit well within our Nation's tradition of firearm regulation. They suggest that at least some of the historical analogues applied exclusively to property closed to the public, but that argument is based on a misinterpretation of the historical terminology. While several laws applied specifically to "inclosed" or "improved" land, or to "plantations" or "premises," all of those terms encompass property open to the public. "Inclosed" or "improved" lands are merely fenced or developed, words that describe virtually any retail establishment. And historically, "plantations" contained

shops and facilities open to the public, and "premises" often referred to businesses. Nor are petitioners correct that the laws should be disregarded because some were enacted at least in part to prevent poaching. The overall purpose of *all* the laws was plainly to protect a property owner's right to exclude firearms. Variation in the specific reasons why owners might wish to preclude guns—from preventing unwanted hunting to promoting safety, comfort, or self-defense—does not undermine the basic fact that laws that vindicate the fundamental right to exclude are well within the American tradition of firearm regulation.

Petitioners and the federal government also err in insisting that Hawai'i's law infringes the Second Amendment right because it makes it impossible to carry a gun outside the home or because Hawai'i purportedly enacted the law to limit the Second Amendment right. The law permits carrying a gun onto any property so long as the owner or one of his agents gives oral or written authorization. That means that, to bring a gun into a shop or convenience store, one need only ask an employee for an "okay." To be sure, the employee might say no, but that possibility cannot render the law unconstitutional because all agree that property owners have the right to exclude guns if they wish. Moreover, petitioners err in suggesting that the law prevents pulling into a gas station or private parking lot with a gun stored appropriately in the vehicle; the law applies to carrying a gun on one's person, not storing a gun in a car. And there is no merit to the suggestion that Hawai'i enacted the law in a covert effort to ban guns; the evident and express purpose of the law is to vindicate property owners' right to exclude.

ARGUMENT

I. THE SECOND AMENDMENT DOES NOT PROTECT ARMED ENTRY ONTO PRIVATE PROPERTY WITHOUT THE OWNER'S CONSENT.

Petitioners' constitutional challenge fails at the threshold because they cannot show that the Second Amendment protects the conduct that Hawai'i's law regulates. See *Bruen*, 597 U.S. at 32 (analyzing whether the "plain text of the Second Amendment protects [the] proposed course of conduct"). The state law does not prohibit carrying arms onto any property; it requires a person to obtain the consent of a property owner or his agent before bringing a gun onto private property. Petitioners' challenge can therefore succeed only if the Second Amendment encompasses either the right to carry a gun onto private property without the owner's consent *or* the right to presume consent. It does neither.

The Second Amendment "codifie[s] a *pre-existing* right" to bear arms that was "inherited from our English ancestors." *Id.* at 20 (quoting *Heller*, 554 U.S. at 592, 599). Our English ancestors did not recognize a right to bring guns onto private property without the owner's consent because they viewed the right to exclude as paramount. That right, which was well known to the Framers, means that "*every* entry" onto private property "*without the owner's leave*" is forbidden. 3 William Blackstone, *Commentaries* 209 (emphasis added). Moreover, while the requisite "leave" may be implied by custom, the existence and scope of any customary license varies by region and in accordance with the purpose for which the license is implied. And states have always been able to revoke or alter the scope of an implied license through legislation.

Under these principles, petitioners cannot show that their "proposed course of conduct"—bringing a gun onto private property held open to the public without express

consent—is protected by the "plain text of the Second Amendment." *Bruen*, 597 U.S. at 32. Requiring consent to armed entry is consistent with the basic rule that any entry onto private property requires the owner's leave. In Hawai'i, at least, that leave cannot be supplied by a customary license because there is no custom of armed entry onto private property. And even if there were, the legislature would be free to alter the scope of the implied license. Petitioners' and the federal government's arguments to the contrary lack merit.

A. Since Well Before The Founding, The Right To Exclude Has Precluded Armed Entry Onto Private Property Without Consent.

1. At the time of the Framing, as now, the fundamental right to exclude prevented *any* entry onto private property without the owner's consent. That rule has deep roots in English law, which has long recognized the right to exercise "sole and despotic dominion" over one's property "in total exclusion of the right of any other individual in the universe." 2 Blackstone, *Commentaries* 1. To fully vindicate this principle, the English rejected "the Roman laws" that "seem[ed] to have made a direct prohibition necessary" to prevent entry onto private property. 3 Blackstone, *supra*, at 209. Instead, to ensure "that the owner may retain to himself the sole use and occupation of his soil: every entry * * * thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression." *Ibid.* This rule requiring consent "justly" reflects "that much inconvenience may happen to the owner[ ] before he has an opportunity to forbid the entry." *Ibid.*

" '[E]very American statesman' at the time of the Founding" was aware of this "general rule * * * 'that no man can set his foot upon his neighbour's close without his leave.' " *Jardines*, 569 U.S. at 7-8 (quoting *Entick*, 95 Eng.

Rep. at 817). Accordingly, at the Founding, every entry onto private property was forbidden unless the owner "had given his leave (even implicitly) for" the entry. *Id.* at 8. And while consent could be "implied" by custom, the scope of any such implied license was constrained by the scope of the "customary invitation." *Id*. at 9*.*

That "customary invitation" might vary by both location and the purpose for which it was extended. In *McKee* v. *Gratz*, for example, Justice Holmes recognized that whether certain button makers had trespassed onto land in Missouri when they took mussel shells from a private stream depended on the "practice" that had "prevailed in th[e] region." 260 U.S. 127, 136 (1922). The Court observed that "[t]he strict rule of the English common law as to entry upon a close" had been "mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country," where it was then "customary to wander, shoot and fish at will until the owner s[aw] fit to prohibit it." *Ibid.* Whether the custom in Missouri in fact supplied such an implied license and whether the scope of that license could cover the defendants' conduct were "questions for the jury." *Ibid.* Similarly, in *Jardines*, the Court recognized that because the scope of an implied license varies according to its purpose, the license that permits the public to enter the curtilage of one's property to knock on the door does not necessarily permit the public to bring a metal detector or bloodhound. 569 U.S. at 8-9.

State and local law may also clarify or revoke a license implied by custom. That is well illustrated by the range of colonial laws regulating entry onto "unenclosed and uncultivated" property. *McKee*, 260 U.S. at 136. The basic English rule was that people could not hunt, fish, or allow animals to graze on such unfenced lands without permission, but a different custom developed in many

areas of the United States. *Ibid.* Some of the original colonies adopted provisions in their constitutions expressly permitting entry on such land without the owner's consent. Pa. Const. § 43 (1776) ("inhabitants of this state shall have liberty to fowl and hunt * * * on all * * * lands * * * not inclosed"); Vt. Const. ch. 2, § 39 (1777) (similar). But others, like the colonial legislature of South Carolina, doubled down on the English rule, prohibiting hunting "on any lands whatsoever" more than seven miles from home "without the consent of the proprietor." Act of Aug. 23, 1769, 1790 S.C. Pub. Laws 276. Over the next century, states repeatedly enacted legislation to reaffirm or revoke the implied license to roam, hunt, and graze cattle on the open range. See, *e.g.*, Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 Temp. L. Rev. 665, 679-684 (2011); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 Stan. L. Rev. 623, 660-661 & n.95 (1986).

2. Because the basic rule at the Founding was that no one could enter private property without the owner's consent, the right to bear arms codified by the Second Amendment plainly did not encompass a right to *armed* entry onto such property without consent. Nor is there any plausible argument that the Founders intended the right to bear arms to override the right to exclude. To the contrary, multiple provisions of the Constitution protect a property owner's "sole and despotic dominion" over his land. 2 Blackstone, *supra*, at 1.

Most obviously, the Takings Clause prevents the government from requiring businesses to permit individuals on their property without just compensation. U.S. Const. amend. V. The Court has explained, for example, that because "the 'right to exclude' " is "so universally held to be a fundamental element of the property right," a state may not compel a private marina to permit public access without "paying just compensation," *Kaiser Aetna* v. *United*

States, 444 U.S. 164, 179-180 (1979), or compel businesses to permit labor organizers on their property without just compensation, *Cedar Point*, 594 U.S. at 156-157.

The same solicitude for the owner's right to exclude is embodied in the Third and Fourth Amendments, which provide that the government may not quarter its soldiers or perform an unwarranted search on private property without the owner's consent. U.S. Const. amends. III, IV. Meanwhile, the Fifth and Fourteenth Amendments bar the deprivation of *any* property right without due process. *Id.* amends. V, XIV. And the writings of the Founders are replete with references to the sanctity of property rights in general. *E.g.*, John Adams, A Defence of the Constitutions of Government of the United States of America (1787), *reprinted in* 6 The Works of John Adams 3, 9 (Charles Francis Adams ed., 1851) ("The moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."); James Madison, Property (1792), *reprinted in* 6 The Writings of James Madison 101, 102 (Hunt ed., 1906) ("Government is instituted to protect property of every sort * * * .").

3. This Court's First Amendment precedents further confirm that the Second Amendment does not encompass a right to carry guns onto private property without the owner's consent. The Court has repeatedly held that, although the Constitution protects free speech, the right to engage in expressive activity generally "stops at the outer boundary of every person's domain." *Rowan* v. *U.S. Post Off. Dep't*, 397 U.S. 728, 738 (1970). In *Rowan*, for example, the Court upheld a federal law that allowed property owners to remove their names from mailing lists, thereby requiring mailers to stop all future mail to a particular address. *Id.* at 729. The Court recognized the "mailer's

right to communicate." *Id.* at 737. Nonetheless, the Court "categorically reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another." *Id.* at 738. Any other conclusion would "license a form of trespass." *Id.* at 737; see also *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988) ("[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom."). Similarly, in considering speech rights on private property held open to the public, this Court has rejected the argument that an individual is entitled to "the same right of free speech" on private property open to the public "as they would have on the similar public facilities in the streets of a city or town." *Lloyd Corp.*, 407 U.S. at 569.

The Court has also recognized that states may protect property owners' right to exclude by enacting default rules that require the owner's consent to entry, even where the would-be entrant wishes to engage in speech that would otherwise be protected by the First Amendment. Thus, in *Breard* v. *City of Alexandria*, 341 U.S. 622 (1951), the Court upheld a municipal ordinance prohibiting door-to-door solicitation without a property owner's express consent. The Court recognized that solicitation generally constitutes speech protected by the First Amendment, but held that the First Amendment did not protect the right to solicitation on another person's private property without consent. It would be "a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents." *Id.* at 645. A municipality may therefore enact a default rule that frees its property owners from the need to "churlishly guard[ ] [their] entrances with orders forbidding the entrance of solicitors." *Id.* at 640.

Indeed, for over a century, state and municipal regulations have required a person to get an owner's consent to engage in expressive activities like posting handbills and placards on private property—including property open to the public. See, *e.g.*, Ordinance of Dec. 17, 1855, Charter of the City of Louisville of 1851 and Ordinances of the City 567 (1851); Laws & General Ordinances of the City of New–Orleans 322 (1866); Charter & Ordinances of the City of New Haven 91 (1870); Ordinance of Mar. 4, 1872, Charter & Ordinances of the City of Rockford 228 (1874); Act of Mar. 26, 1874, 1 Gen. Stat. N.J. (1895); 1877 Ohio Laws 255-256; Crim. Code of Ohio 94 § 45 (1878); Ordinances of the City of Wilkes-Barre, Pa. 3-4 (1880); Ordinances and By-Laws of the Town of Davis 29 (1890); Ill. Rev. Stat. ch. 38, § 221 (1895); Rev. Ordinances of the City of Galesburg 101 (1896); Compiled Ordinances & Charter, The City of Denver 477 (1898); Wyo. Rev. Stat. 1248 (1899); Ordinance of June 5, 1899, General Ordinances of the City of Paris, Ill. 37 (1912); Rev. Ordinances and Charter of the City of Malden 104 (1900). Each of these laws comports with the Constitution because there is no First Amendment right to speak on private property without the owner's consent.

The Second Amendment does not warrant a different rule. This Court has "repeatedly compared the right to keep and bear arms" to free-speech rights. *Bruen*, 597 U.S. at 24. And there is no legal or historical evidence indicating that the Framers sought "to destroy one cornerstone of liberty—the right to enjoy one's private property—in order to expand another—the right to bear arms." *GeorgiaCarry.Org, Inc.* v. *Georgia*, 687 F.3d 1244, 1265 (11th Cir. 2012) (Tjoflat, J.), *abrogated on other grounds by*, *Bruen*, 597 U.S. 1.

B. Because Hawai‘i’s Law Vindicates The Right To Exclude, It Does Not Prohibit Conduct Protected By The Second Amendment.

1. Under these principles, Hawai‘i’s law is constitutional because it does not regulate conduct covered by the Second Amendment. Rather, it vindicates the right to exclude by providing that a person may not bring a gun onto private property without the owner’s express consent. That consent requirement does not infringe the Second Amendment right because it accords with the “general rule * * * ‘that no man can set his foot upon his neighbour’s close without his leave.’ ” *Jardines*, 569 U.S. at 7-8 (citation omitted).

That is so even though the “general rule” permits reliance on an *implied* license because state law and local custom have always defined whether and to what extent an implied license can supply the requisite consent. As *McKee* recognized, button makers might be able to rely on an implied license to enter unfenced property in Missouri if that is the custom in the “region,” 260 U.S. at 136, but the same license might not apply in Maine or Massachusetts if those states’ laws or customs are different. “[U]nder our Constitution,” property rights are generally “left to the individual States to develop and administer.” *Hughes* v. *Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring).

States are therefore free to enact laws governing the availability of an implied license to armed entry onto private property. Texas, for example, can enact a law permitting its residents to assume consent to armed entry onto private property in the absence of a prominent sign forbidding it, see Tex. Penal Code Ann. §§ 30.06(c), 30.07(c) (2025), and Hawai‘i can pass a law requiring express consent. The Hawai‘i statute does not intrude on the right to bear arms any more than the Texas law

intrudes on the right to exclude. Both merely clarify what counts as consent.

That does not mean that the scope of the Second Amendment varies by state. In both Texas and Hawai‘i, a gun owner has the right to bring a gun onto private property *with* consent, but not without. It is only what suffices to establish consent that varies. And that variation comports with how the Court has analyzed consent with respect to other constitutional protections. In the Fourth Amendment context, for example, the Court has "referred approvingly" to state laws establishing that driving a car constitutes "implied consent" to some searches, even though variation in such state laws may produce variation in what qualifies as consent. *Birchfield* v. *North Dakota*, 579 U.S. 438, 476 (2016).

2. Moreover, even before Hawai‘i enacted its law, there was no custom of armed entry onto private property that could have supplied an implied license. Hawai‘i's unique history—including its long pre-statehood existence as an independent kingdom—means that its residents never developed a practice of bringing guns into shops, convenience stores, and the like.

Before it became a state, the Kingdom of Hawai‘i flatly prohibited possessing any weapons. In 1833, King Kamehameha III enacted a law prohibiting "any person or persons" from possessing a weapon, including any "knife, sword-cane, or any other dangerous weapon." *1842 Hawai‘i Constitution*, *supra*, at 163. That law was in effect until 1870, when Kamehameha V created a narrow exception for hunting licenses in the southern part of O‘ahu. Laws of His Majesty Kamehameha V., King of the Hawaiian Islands, Passed by the Legislative Assembly, at Its Session, 1870, at 26. The 1870 law made clear that the "use or carry" of weapons without a license was prohibited and punished by fines and hard labor. *Ibid.*

In 1893, the Kingdom of Hawai‘i was overthrown with the assistance of the United States Armed Forces and replaced with a provisional government. *Rice* v. *Cayetano*, 528 U.S. 495, 504-505 (2000). One of the first things the provisional government did was prohibit the importation of guns and ammunition. Act 9, Laws of the Provisional Government of the Hawaiian Islands Passed by the Executive and Advisory Councils Acts 1 to 42, at 13 (1893). And in 1896, the government passed a law prohibiting carrying or using a gun without a license and tightly restricting the availability of licenses. Laws of the Republic of Hawai‘i Passed by the Legislature at Its Session, 1896, at 224. Similarly tight gun restrictions remained in place until Hawai‘i became a state in 1959. See, *e.g.*, Haw. Rev. Laws, ch. 209, § 3089 (1905), *as amended by* Act of Mar. 19, 1913, § 1, 1913 Haw. Sess. Laws 25; Act 206, § 5, 1927 Haw. Sess. Laws 209, 209-211.

There is no indication that, after statehood, Hawai‘i’s residents developed a custom of armed carry at odds with the pre-statehood norms. In fact, the Legislature’s decision to enact the default rule and its popularity, see *supra*, at pp. 6-7, reflect the opposite. Thus, whatever the case in states with a custom and practice of armed entry into private property, there is no basis for claiming an implied license to enter private property with a gun in Hawai‘i. And in the absence of such an implied license, the “general rule” is that a person may not enter private property without the owner’s express consent. *Jardines*, 569 U.S. at 7-8.

C. A Property Owner Who Opens His Property To The Public Does Not Forfeit His Right To Exclude Firearms.

Petitioners agree with many of the above principles. They acknowledge that “ [t]he right to exclude is ‘one of the most treasured’ rights of property ownership.” Br. 17

(quoting *Cedar Point*, 594 U.S. at 149). They recognize that "a private property owner has the unquestioned 'right to exclude others, including those bearing arms.' " Br. 17 (citation omitted). And they do not contest (and did not appeal) the district court's holding that Hawai'i's law "is not covered by the Second Amendment's plain text" to the extent it "regulates private property not held open to the public." Pet. App. 151a.

Petitioners therefore challenge the Hawai'i law only as it applies to private property held "open to the public." That is not a distinct category in the Hawai'i law, and petitioners never offer a precise definition. Instead, they vaguely suggest the category includes all property where the public may "come and go." Br. 26. The court should not adopt a holding based on such an ill-defined category, as businesses and gun owners will inevitably struggle to determine where Hawai'i's law does and does not apply. But even setting aside those administrability problems, petitioners' argument fails on the merits. They have not and cannot show that the Second Amendment bars a state from enacting a rule that vindicates the right to exclude held by all property owners, even those that open their property to the public. Each of the contrary arguments fails.

1. Petitioners primarily rely on the proposition that when "private property * * * is open to the public * * * [,] the public has an 'implied license' " to come and go, but petitioners err in suggesting that this "implied license" necessarily includes an invitation to bring a gun. Br. 26 (citation omitted). The scope of any implied license is constrained by custom and the reasonable expectations of the property owner. See *supra*, at pp. 20-21. While a person may, for example, rely on an implied license to enter a grocery store during normal business hours, he typically cannot rely on that license to enter at midnight, or undressed, or carrying an open container of alcohol

because—at least in most places—there is "no customary invitation to do *that*." *Jardines*, 569 U.S. at 9. Indeed, Blackstone observed that when a man opens his property for use as an inn or tavern, he "gives a general licence to any person to enter his doors," but that license does not imply that invitees may "tarr[y] there all night contrary to the inclinations of the owner." 3 Blackstone, *supra*, at 212-213.

Because there has been no custom of public carry in Hawai'i, see *supra*, at pp. 21-22, there is no basis for finding that every implied license for the public to enter private property includes an invitation to carry a gun. And even if petitioners could somehow establish that the scope of the customary invitation is so broad, Hawai'i would be free to alter that license through state law. See *Breard*, 341 U.S. at 640-641.

2. Even looking beyond Hawai'i's particular customs and laws, petitioners' assertion that an implied license for the public to enter private property must include a license to carry a gun is implausible given the broad range of private property that may be held open to the public—including places designed for purposes at odds with the carry of firearms, such as toy stores, places of worship, and meditation studios. *Jardines* observed that the scope of an implied license is strictly limited by the "specific purpose" for which a person is invited onto private property. 569 U.S. at 9. It simply blinks reality to assert that when a Quaker Meeting House or church opens its doors to the public for services, or Toys "R" Us invites the public in to purchase stuffed animals, they implicitly invite the public to bring their guns.

Yet petitioners cannot prevail unless the Court accepts as much because they challenge the application of Hawai'i's law to *all* private property open to the public. And while they carefully cherry-pick the examples they

use when they discuss private property open to the public—focusing on gas stations and convenience stores and disregarding churches and toy shops—they do not offer the Court a reasoned principle to avoid the unpalatable consequences of their argument. Petitioners have therefore made an all-or-nothing argument akin to a facial challenge and, having done so, they cannot succeed unless "no set of circumstances exists under which the [law] would be valid" as applied to private property open to the public. *United States* v. *Rahimi*, 602 U.S. 680, 693 (2024) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)).

3. Petitioners alternatively suggest, Br. 16, that Hawai'i's law is unconstitutional as applied to private property held open to the public because such property is essentially public property for Second Amendment purposes under *Bruen*, which recognized a right to "public" carry. *E.g.*, 597 U.S. at 33. But as this Court has explained many times across many contexts, property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd Corp.*, 407 U.S. at 569; see also, *e.g.*, *Cent. Hardware Co.* v. *NLRB*, 407 U.S. 539, 547 (1972) (rejecting the argument that private "parking lots have acquired the characteristics of a public municipal facility" merely because they were "open to the public"). Any property that is "not public" is private, regardless of whether such property is "used by the public." *W. River Bridge Co.* v. *Dix*, 47 U.S. (6 How.) 507, 538 (1848).

4. The federal government likewise errs in suggesting, U.S. Br. 32, that this Court's First Amendment precedents recognize a right to intrude on private property to engage in expressive activity, at least where that property is open to the public. For example, the government cites *Martin* v. *City of Struthers*, 319 U.S. 141 (1943), for the proposition that, although "the master of

each household may decide whether" to allow solicitation, "a city may not make [the] decision for all its inhabitants" to "ban[ ] religious or political door-to-door solicitation." U.S. Br. 32 (quotation marks, citation, and brackets omitted). But the law in *Martin* absolutely *forbade* speech *regardless* of the householder's wishes. *Id.* at 142. That was a deprivation of the property owner's rights, not a vindication of them.

Indeed, *Martin* cites *People* v. *Bohnke*, 38 N.E.2d 478 (N.Y. 1941), a case which *upheld* as constitutional a presumptive ban on solicitation without the consent of the occupant. 319 U.S. at 148 n.12. The *Bohnke* ordinance "l[eft] to the pleasure of the individual householder the determination of whether or not pamphlets may be circulated on that householder's premises," which "infringes no right" since "the Constitution does not guarantee" individuals "any right to go freely onto private property for such" purposes. 38 N.E.2d at 479.

The government does no better with its invocation of *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*, 536 U.S. 150 (2002), a case that invalidated an ordinance requiring solicitors to obtain a permit. The plaintiff there was *not* challenging the section of the ordinance that allowed for residents to opt out of solicitation—even by permit holders—through signage and other means. *Id.* at 168. And the Court invalidated the ordinance's permitting requirement in part because the opt-out law, "coupled with [a] resident's *unquestioned right to refuse to engage in conversation with unwelcome visitors*," already provided "ample protection for the unwilling listener." *Ibid.* (emphasis added).

The government also fails in its effort to undermine *Breard*. The government suggests, U.S. Br. 33, that when *Breard* was decided, commercial speech was "unprotected," such that the Court was not blessing a

default rule governing "fully protected conduct on premises open to the public." But *Breard* expressly rejected the contention that the "commercial" aspect of selling magazines deprived solicitors of First Amendment protections. 341 U.S. at 642. Instead, the Court's holding hinged on the fact that there is no First Amendment right to solicit on someone else's property without consent: It would be "a misuse of the great guarantees of free speech * * * to force a community to admit the solicitors of publications to the home premises of its residents." *Id.* at 645.

The federal government's reliance on *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), and *Bolger* v. *Youngs Drugs Products Corp.*, 463 U.S. 60 (1983), is also misplaced. Both cases invalidated laws that barred the Postal Service from delivering certain types of mail unless it was specifically requested. Those laws therefore directed a governmental entity to engage in unconstitutional content discrimination and burdened property owners' rights by requiring them to actively request certain mail. Hawai'i's law does neither.

II. HAWAI'I'S DEFAULT RULE IS CONSISTENT WITH OUR NATION'S TRADITION OF REGULATING FIREARMS ON PRIVATE PROPERTY.

Even if Hawai'i's law regulates conduct within the scope of the Second Amendment, it does not violate the Constitution because it is consistent with this Nation's "historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. An analysis of colonial and state laws from the time of the Founding through the 19th century establishes that firearms were among the subjects that states traditionally regulated when they enacted laws to clarify or alter the scope of an implied license to enter private property. Numerous laws from the colonial and Reconstruction eras

provide that a person may not carry a gun onto private property without the owner's consent.

These laws qualify as historical analogues under the rubric set out in *Bruen* and *Rahimi*. They share the same "why" as Hawai'i's law, *Rahimi*, 602 U.S. at 698, because they were enacted to vindicate a property owner's right to control whether and under what conditions the public enters his property. And they share the same "how," *ibid.*, because they do not prohibit armed entry; they merely condition that entry on obtaining the property owner's consent. Petitioners' efforts to distinguish or diminish the significance of this rich historical pedigree fail.

A. Numerous Historical Analogues Establish The Constitutionality Of Hawai'i's Law.

Hawai'i's law is consistent with the Nation's regulatory history because it is analogous to a variety of laws from the Founding era through the 19th century. Under the framework set out in *Bruen* and *Rahimi*, courts are required to "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.' " *Id.* at 692 (quoting *Bruen*, 597 U.S. at 29 & n.7 (brackets omitted)).

Where history reveals a "dead ringer" for a challenged regulation, that is an obvious indication that the law is constitutional. *Ibid.* (quoting *Bruen*, 597 U.S. at 30). But a new law need not "precisely match its historical precursors" to be "analogous enough to pass constitutional muster." *Ibid.* (quotation marks and citation omitted). Historical precursors that serve the same fundamental purpose in fundamentally the same way will provide "strong" support for the constitutionality of a contemporary regulation. *Ibid.*

Here, respondents have identified multiple historical analogues that serve the same basic purpose as the

Hawai‘i law (vindicating a property owner's right to exclude) through the same basic mechanism (a rule requiring express consent for armed entry), and the court of appeals identified at least two "dead ringer[s]" to boot. *Ibid.* (quoting *Bruen*, 597 U.S. at 30). The Hawai‘i law is therefore constitutional.

1. A raft of colonial-era laws mandated that no one could carry a firearm onto private property without the owner's express consent—at least where the land was developed or fenced, a category that readily includes the sort of retail facilities on which petitioners have focused their current challenge.

As the court of appeals explained, a 1771 New Jersey law that required express written consent before a person could bring a gun onto any premises on which someone else paid taxes is a "dead ringer[ ]" for Hawai‘i's law. Pet. App. 62a. Entitled "An Act for the preservation of deer and other game, *and to prevent trespassing with guns*," the law broadly barred colonists from "carry[ing] *any* gun on *any* Lands not his own, and for which the owner pays taxes, or is in his lawful possession, unless he hath license or permission in writing from the owner." Act of Dec. 21, 1771, 1821 N.J. Laws 25-26 (emphasis added). Expert testimony from a leading historian confirms that this law applied to "all varieties of real property, including the typical 'businesses' of the times." Decl. of Hendrik Hartog ¶ 32, *Koons* v. *Platkin*, No. 1:22-cv-07464 (D.N.J. Feb. 13, 2023), ECF No. 84. That includes "taverns, leathersmiths and blacksmiths, pharmacies, seed stores, and merchants who bought and sold livestock." *Id.* ¶ 34.

The 1771 law was no historical aberration. New Jersey had adopted a similar law in 1722 and multiple times thereafter. See 1722 Acts, Acts of the Gen. Assembly of the Province of New-Jersey (Nevill ed., 1761) 101 ("1722 N.J. Law"); see also, *e.g.*, Acts of the Gen. Assembly of the

Province of New Jersey 451 (Nevill ed., 1752); Act of Nov. 30, 1769, N.J. Acts. And the state reenacted the 1771 law verbatim in 1846. See Act of April 16, 1846, Digest of the Laws of New Jersey 362 (Elmer ed., 1868) ("1846 N.J. Law").

There is no evidence that anyone challenged any of these laws or even suggested that, by requiring consent to armed entry, New Jersey was intruding on the right to bear arms. Indeed, three courts of appeals have now considered challenges to various states' default property rules, yet *none* of the plaintiffs has been able to come up with any support for the proposition that the New Jersey law was suspect at the time of the Framing or for the more than a century the law remained in force thereafter.

Several other colonies also conditioned armed entry on the owner's consent. In 1721, Pennsylvania adopted a law under which a person could not "carry any gun, or hunt on the improv'd or inclosed Lands of any Plantation, other than his own," unless the person secured "Lisence or Permission from the Owner of any such Lands or Plantation." 1721 Pa. Acts 22. Pennsylvania re-adopted this law verbatim in 1760. See Act of April 9, 1760, § 6, 6 A Digest of the Laws of Pennsylvania 541-544 (Stroud ed., 1841).

Similarly, in 1728, Maryland made it unlawful to "come to hunt with Guns or Dogs, within any Inclosed Grounds, Islands, Peninsula's, or Necks fenced across from Water to Water, without Leave or Licence from the Proprietors thereof, first had and obtained." An Act to Encourage the Destroying of Wolves, Crows, and Squirrels, 1728 Md. Laws 13 (Parks ed.) ("1728 Maryland Law").

Meanwhile, in 1763, New York made it unlawful to "carry, shoot, or discharge any Musket, Fowling-Piece, or other Fire-Arm whatsoever, into, upon, or through any Orchard, Garden, Corn-Field, or other inclosed Land

whatsoever * * * without License in Writing first had and obtained for that Purpose from such Owner, Proprietor, or Possessor." Act of Dec. 20, 1763, 1 1773 N.Y. Laws 442 (Gaine ed., 1773) ("1763 N.Y. Law"). And in 1790, Massachusetts required that a person could only be "seen with any gun or guns" on the islands of Naushon and Nennemessett if the person first secured a "special licence of the proprietors of the said Islands," or by showing "sufficient reason therefor." Act of Jan. 30, 1790, § 2, 1789 Mass. Acts and Laws 438 ("1790 Massachusetts Law").

While, unlike New Jersey's law, these statutes were generally limited to "improv'd or inclosed Lands," 1721 Pa. Acts 22, that limitation merely exempted undeveloped and unfenced land, not the sort of retail property on which petitioners focus their challenge. During the relevant times, land was "improv'd" if it was "[u]sed" or "occupied" in any way. *Improved*, Webster's Am. Dictionary of the Eng. Language (1828) ("Webster's Dictionary"), https://perma.cc/75LL-YZCJ.[1] And land was "enclosed" if it had been separated "from common ground into distinct possessions by a fence." *Inclosure*, Webster's Dictionary, https://perma.cc/X5KF-LLQK. Those descriptions obviously apply to inns, taverns, and other privately owned businesses that might have been open to the public at the Founding.

The existence of this body of colonial laws that vindicated property owners' right to exclude by requiring express consent to armed entry provides strong support

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[1] See also John Locke, Two Treatises of Government 213 (1821) ("As much land as a man tills, plants, improves, cultivates, and can use the product of, so much is his *property*. He by his labour does, as it were, inclose it for the Common."); S.J. Clarke, History of McDonough County Illinois, Its Cities, Towns, and Villages 290 (1878) (defining improved land as "such lands as may be enclosed and value enhanced by cultivation; by erection of buildings or in the manufacture of articles of profit").

for the constitutionality of Hawai‘i’s law, which accomplishes the same purpose in the same way. As *Rahimi* explained, the existence of “laws at the founding [that] regulated firearm use to address particular problems” is “a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations.” 602 U.S. at 692.

2. Further confirmation comes from the variety of laws requiring consent to armed entry that the states enacted during the Reconstruction era, when the Second Amendment was applied to the states through the Fourteenth Amendment. See *Heller*, 554 U.S. at 614-616 (examining “post-Civil War legislation” (capitalization altered)).

In 1865, Louisiana enacted a statute barring “any person” from “carrying * * * fire-arms” on “premises or plantations * * * without the consent of the owner.” Act of Dec. 20, 1865, 1865 La. Acts 14-16. The court of appeals explained that, like the 1771 New Jersey Law, this Louisiana statute is a “dead ringer[ ]” for Hawai‘i’s law. Pet. App. 62a. The Louisiana law, however, was just one of several Reconstruction-era enactments that required a person to get a property owner’s consent to bring guns onto private land. For example, in 1866, Florida enacted a law making it unlawful “to hunt or range with a gun within the enclosed land or premises of another without the permission of the owner, tenant, or person having control thereof.” Act of Jan. 15, 1866, 1865 Fla. Acts and Resolutions 27. A year later, Texas adopted a law requiring those who wished to “carry firearms on the inclosed premises or plantation of any citizen” to secure “the consent of the owner or proprietor, other than in the lawful discharge of a civil or military duty.” Act of Nov. 6, 1866, 4 Tex. Laws 1321 (Paschal ed., 1874). And in 1893, Oregon adopted a law requiring “any person, other than an

officer on lawful business, being armed with a gun, pistol, or other firearm" to get the "consent of the owner or possessor." Act of Feb. 20, 1893, 1893 Or. Laws 79.

These Reconstruction-era laws establish that "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to" carrying guns onto private property. *Bruen*, 597 U.S. at 38. States were free to enact laws that protected a property owner's right to exclude by requiring express consent to enter private property with a firearm. Hawai'i's law fits comfortably in that regulatory tradition.

B. Petitioners' Efforts To Undermine The Historical Evidence Are Unavailing.

Petitioners do not and cannot dispute the existence of this body of colonial- and Reconstruction-era laws requiring consent to bring a gun onto private property. They therefore assert that the laws are somehow distinguishable from Hawai'i's or that the relevant historical support is too scant. Both arguments fail.

1. Petitioners offer a variety of unpersuasive reasons for rejecting the relevant colonial- and Reconstruction-era analogues for the Hawai'i law, beginning with the mistaken assertion that those laws exempted all private property held open to the public. Petitioners base that assertion on the fact that *some* (but not all) of the colonial consent laws applied to "inclosed" or "improved" lands. But as explained, those terms referred to any land that was occupied, used, or fenced. See *supra*, at p. 31. That plainly describes the sort of retail establishments that are the focus of petitioners' challenge.

Indeed, the only kinds of private property *excluded* from the consent laws were the sort of open fields, streams, and forests where Americans customarily felt free to hunt, fish, graze their cattle, and otherwise treat the land as communal. See *supra*, at pp. 15-16. Those exemptions

reflect Americans' fondness for open fields and the open range; they do not reflect a general view that *any* implied license for the public to enter private property necessarily includes a license to bring a gun.

Petitioners similarly err in suggesting that the colonial- and Reconstruction-era laws requiring consent for armed entry onto "premises" or "plantations" applied only to private property closed to the public. This distinction is entirely of petitioners' own making. Contemporary dictionaries defined "premises" as "land or other things mentioned in the preceding part of a deed" and "plantation" as "a cultivated estate; a farm." *Antonyuk* v. *James*, 120 F.4th 941, 1047 n.123 (2d Cir. 2024) (first quoting *Plantation*, Webster's Dictionary, https://perma.cc/N9BV-C4TW; and then quoting *Premises*, Webster's Dictionary, https://perma.cc/Q6PD-939X). Neither of these definitions distinguishes between land that is closed or open to the public.

Moreover, other contemporary sources confirm that the terms "premises" and "plantations" included businesses and retail establishments. The court of appeals, for example, cited a variety of 19th-century precedents that referred to businesses as "premises." Pet. App. 62a. And 18th-century plantations were often open to the public because they "served as markets for such services as weaving and carpentry." Richard Lyman Bushman, The American Farmer in the Eighteenth Century: A Social and Cultural History 226 (2018).

For example, many plantations—including Mount Vernon and Monticello—housed shops for artisans like blacksmiths, who handled "not merely the work of the plantation, but whatever business was brought to them from outside." United States George Washington Bicentennial Commission, 1 Special News Releases Relating to the Life and Time of George Washington 344

(1932); see also Monticello, *Blacksmith's Shop on Mulberry Row*, https://perma.cc/29RH-KAZT. Plantations also operated processing facilities like mills that served the surrounding communities. Mount Vernon, *Gristmill* 2, https://perma.cc/H7WP-WS23; Monticello, *Gristmill and Canal Operations*, https://perma.cc/4EZT-2PL9. And travelers would sometimes visit plantations—invited or not—to obtain provisions and even spend the night. See Library of Congress, *The Journal of Nicholas Cresswell, 1774-1777*, at 95 (1924), https://perma.cc/EG78-NDSE.

Rather than engage with these historical materials, petitioners primarily rely on the Second and Third Circuits' construction of the colonial- and Reconstruction-era laws. See Br. 35-36. But neither Circuit supported its conclusion with historical sources. For example, the Second Circuit concluded that the 1771 New Jersey law's reference to " 'land,' * * * would have been understood to refer to private land not open to the public," *Antonyuk*, 120 F.4th at 1047, and the Third Circuit followed suit, see *Koons* v. *Att'y Gen. N.J.*, 156 F.4th 210, 252 (2025). The only historical source cited by either court, however, was Noah Webster's 1828 dictionary, which defined the word "land" to mean "[a]ny small portion of the superficial part of the earth or ground." *Antonyuk*, 120 F.4th at 1047 n.123 (quoting *Land*, Webster's Dictionary, https://perma.cc/B4JY-ERA9). That definition does not draw any line between property closed or open to the public. Nor does any other part of the Second or Third Circuit's opinion point to more compelling evidence, which is presumably why petitioners and the government cite the opinions and not the historical sources themselves.

2. Petitioners also miss the mark when they attempt to distinguish the 1771 New Jersey law, contending that it "did not apply to pistols" but only to "long guns or cannons." Br. 36. In fact, laws during this period used the

words "firearm" and "gun" interchangeably. Compare 1763 N.Y. Law with 1771 N.J. Law. And the Oxford English Dictionary makes clear that, since at least 1411, the term "gun" has referred to both "a large firearm" and "[a] small portable firearm, *esp.* one which may be easily carried and used without requiring a support." See *Gun*, defs. I.1.a and I.1.b, Oxford Eng. Dictionary, https://perma.cc/T7SX-X8LQ. The 1771 New Jersey law plainly referred to both when it made it unlawful "to carry *any* gun on any lands" belonging to another. 1771 N.J. Law (emphasis added).

3. Petitioners fare no better with their assertion that the analogues are irrelevant because some were enacted to prevent poaching and therefore served a different purpose than Hawai'i's law. That is obviously not true of all of the laws; several bar guns on "premises"—a term that at the time included businesses, where hunting would hardly be an issue. See *supra*, at pp. 29-33. And others, like New Jersey's and Louisiana's, apply to all private lands, not just those where hunting might occur. More to the point, the evident purpose of *all* the relevant historical analogues was to vindicate a property owner's right to exclude unwanted entries onto his property, because all of the laws prohibit carrying a gun onto private property without the owner's consent.

Indeed, several laws expressly state that their goal was to broadly prevent unwanted armed entries. For example, the 1771 New Jersey law was enacted "to prevent trespassing with guns." See 1846 N.J. Law (same); An Ordinance to Prevent the Use of Fire Arms, Etc., Ordinances of the City of Hudson 109 (McGregor ed., 1868). And the 1865 Louisiana law was adopted to "prohibit the carrying of fire-arms * * * without the consent of the owner." Act of Dec. 20, 1865, 1865 La. Acts 14; see also Act of Nov. 6, 1866, 4 Tex. Laws 1321 (Paschal ed., 1874) (similar); Act of Jan. 15, 1866, 1865 Fla. Acts and Resolutions 27 (similar); Act of Feb. 20, 1893, 1893 Or.

Laws 79 (similar); 1728 Maryland Law (similar). The Hawai‘i law shares that purpose; it was adopted to ensure that "private individuals and entities" can "choose * * * whether to allow or restrict the carrying of firearms on their property." 2023 Haw. Sess. Laws 114.

Several of the historical analogues were also enacted to promote public safety. For example, the 1763 New York law was adopted because the carrying of firearms on someone else's property posed a "great Danger [to] the Lives of his Majesty's subjects" and "grievous[ly] Injur[ed]" private property. 1763 N.Y. Law 441. And the 1721 Pennsylvania and 1722 New Jersey laws were adopted because carrying firearms on someone else's property without their consent caused "divers Abuses, Damages, and Inconveniencies." 1721 Pa. Acts 22; 1722 N.J. Law 101 (similar); see also 1790 Massachusetts Law (adopted in part to limit "other damages sustained" by carrying firearms on other's property without their consent). Similarly, the Hawai‘i law was adopted in part to serve the state's interest in "public health, safety, and welfare." 2023 Haw. Sess. Laws 114.

4. Petitioners further argue that the 1865 Louisiana law should be disregarded because it was adopted as part of the Black Codes. Br. 31-33. The Black Codes are undoubtedly a relic of a shameful portion of American history. But that does not mean that the laws contained within them are irrelevant to the Second Amendment's historical analysis. And contemporary *opponents* of the Black Codes agreed that the Second Amendment did not authorize armed entry without the consent of a property owner. See D.E. Sickles, General Order No. 1, *reprinted in* A Handbook of Politics for 1868, at 37 (McPherson ed., 1868), *cited with approval in Bruen*, 597 U.S. at 62. General D.E. Sickles, Commander of the Department of South Carolina, issued a decree pre-empting South Carolina's Black Codes and providing that, while the "constitutional

rights of all loyal and well-disposed inhabitants to keep and bear arms will not be infringed, nevertheless this shall not * * * authorize any person to enter with arms on the premises of another against his consent." *Ibid*.

Petitioners also argue that the Reconstruction-era precedents "came too late." Br. 37. But this Court declined review of petitioners' second question presented, which asked the Court to decide the "relevant time period" courts should look to when analyzing Second Amendment claims, and for good reason. Pet. 24. There is no need for this Court to decide that question here because, as in *Bruen* and *Rahimi*, the public understanding that legislatures could require a person to obtain consent before carrying a firearm onto private property was the same in 1791 and 1868. See 597 U.S. at 37-38; 602 U.S. at 692 n.1.

5. Petitioners similarly err in asserting that the 1771 New Jersey law and the 1865 Louisiana law are "too few" to establish a relevant historical tradition. Br. 37. Respondents have pointed to numerous other examples of laws that barred armed entry onto private property without the owner's consent. That body of firearm regulations is more than sufficient, particularly because the "general rule" known to " 'every American statesman' at the time of the Founding" was "that no man can set his foot upon his neighbour's close without his leave." *Jardines*, 569 U.S. at 7-8 (citation omitted). And one would hardly expect uniformity among the states in the laws establishing default rules for firearms, given the natural variation across states with respect to their laws and customs regarding entry onto private property.

Requiring evidence of a more extensive and widespread historical tradition would turn the Second Amendment into a "regulatory straightjacket." *Bruen*, 597 U.S. at 30. It would also would overread legislative silence. As Justice Barrett has explained, "originalism does not require" this

Court to "assume[] that founding-era legislatures maximally exercised their power to regulate." *Rahimi*, 602 U.S. at 739-740 (Barrett, J., concurring). Critically, neither petitioners nor their amici have identified a single authority suggesting that anyone thought that any of the numerous historical analogues discussed above exceeded the government's power. Just as court decisions invalidating historical analogues "provide some probative evidence of unconstitutionality" of a modern-day law, *Bruen*, 597 U.S. at 27, the complete absence of constitutional objections counsels in favor of sustaining Hawai'i's law, cf. *Heller*, 554 U.S. at 629.

Bruen does not demand a contrary result. Petitioners observe that *Bruen* stated that "three colonial regulations" were likely insufficient "to show a tradition of public-carry regulation," and refused to give "meaningful weight" to a law "in effect in a single state." Br. 37 (quoting 597 U.S. at 46, 49, 67). But respondents have identified far more than three colonial regulations here. And in any event, most of the alleged historical analogues in *Bruen* were not "relevantly similar" to the law in that case, 597 U.S. at 29, as they swept much more broadly and addressed different concerns than New York's proper-cause requirement, see *id.* at 46-49. The same is not true here, and petitioners have identified no other persuasive reason to ignore the wealth of historical evidence supporting the constitutionality of Hawai'i's law.

III. THE HAWAI'I LAW FULLY RESPECTS THE SECOND AMENDMENT RIGHT TO BEAR ARMS.

Unable to demonstrate that the Hawai'i law is unconstitutional under the historical analysis prescribed by *Bruen*, petitioners and the government make the audacious claim that the law should be invalidated because it was designed to abolish the Second Amendment right altogether. That is wrong many times over.

1. To begin, petitioners' and the government's assertion that the Hawai'i law will "eliminate the right to carry," Br. 20, is based on a gross mischaracterization of the Hawai'i statute. Br. 17-25; see also U.S. Br. 11-24. They suggest that the law effectively precludes them from entering any store or restaurant because even owners that consent to guns may not post signs advertising as much. But the law permits *oral* consent from an owner *or his agent*. Petitioners are therefore free to bring a gun into any business so long as an employee gives them the okay. A simple "yes" is all it takes. Petitioners' real fear therefore seems to be that most property owners in Hawai'i do not want guns on their property and will instruct their employees to refuse consent when asked. But as petitioners themselves acknowledge, if property owners do not want guns on their property, the Second Amendment does not grant any right to override their objections.

Petitioners also err in asserting that Hawai'i's law will preclude even pulling into a gas station or private parking lot with a gun stored in the car. Br. 21. The default rule applies to "a person carrying a firearm pursuant to a license issued under section 134-9," a provision that licenses "carry[ing]" a gun "on the licensee's person." Haw. Rev. Stat. § 134-9.5 (2024). The default rule's reference to carrying a gun onto private property therefore refers to carrying a gun "on the licensee's person," not stored in his car. *Id.* § 134-9. A separate provision, § 134-9.3, governs "stor[ing]" a firearm "inside a vehicle." And while petitioners raise speculative fears about how the law might prohibit walking into a store with a gun to obtain an employee's consent, they have presented *no* evidence in this pre-enforcement challenge to suggest that Hawai'i will apply its law in that way. At this stage, unfounded speculation about how a law will be enforced is not close to enough. See *Vill. of Hoffman Ests.* v. *Flipside, Hoffman*

Ests., Inc., 455 U.S. 489, 503 (1982) (rejecting "a pre-enforcement challenge" where "no evidence has been, or could be, introduced to indicate whether the ordinance" would be "enforced in a discriminatory manner or with the aim of inhibiting unpopular speech").

2. Petitioners attempt to bolster their claim by asserting that Hawai'i's law either presumptively or outright prohibits carry on 96.4% of publicly accessible land in Maui County. Br. 22. But that contention has *no* factual basis. These figures come from maps petitioners drafted themselves and submitted to the district court; they have not been tested for accuracy, and they reflect petitioners' challenge not just to the default property rule but also to certain sensitive-place restrictions that are not before this Court. Accordingly, the 96.4% figure appears to be made up largely of public parks and beaches, which are not subject to the default rule *at all*. It also appears to include areas subject to several sensitive-place restrictions petitioners have never challenged, such as those applicable to schools, Haw. Rev. Stat. § 134-9.1(a)(7), and libraries, *id.* § 134-9.1(a)(6). Petitioners' description of an untested, unlabeled map of Maui County provides no basis for concluding that the default rule alone—the only provision before this Court—effectively abolishes the right to carry in Hawai'i.

3. Petitioners and the government also badly err in asserting that Hawai'i adopted its law to "thwart" *Bruen*. Br. 24. To the contrary, Hawai'i adopted its default rule as part of an effort to amend its firearms laws to comport with *Bruen* and to protect the lawful exercise of individual rights. See *supra*, at pp. 5-7. And the default rule is expressly aimed at vindicating the right to exclude by protecting the "right of private individuals and entities to choose * * * whether to allow or restrict the carrying of firearms on their property." 2023 Haw. Sess. Laws 114. That express purpose is plainly legitimate, and—as the

government concedes—this Court generally does "not probe lawmakers' mental states," U.S. Br. 15, or look behind "facially legitimate" laws. See *Trump* v. *Hawaii*, 585 U.S. 667, 704 (2018). To the contrary, the Court applies a "starting presumption that the legislature acted in good faith." *Alexander* v. *S.C. State Conf. of the NAACP*, 602 U.S. 1, 10 (2024).

Petitioners' and the government's evidence does not begin to support a finding of legislative animus toward the Second Amendment; still less is it sufficient to overcome this basic presumption of legislative good faith. The government asserts, U.S. Br. 20, for example, that the default rule cannot plausibly be understood to protect property rights because it applies to firearms but not certain other items, including "knives," "muddy shoes," "protest banners," and "melting ice-cream cones." But this Court has never required legislatures to explain why they chose not to regulate other weapons in a law directed to firearms—let alone entirely unrelated nuisances like muddy shoes or ice-cream cones. A state "need not address all aspects of a problem in one fell swoop," *Williams-Yulee* v. *Fla. Bar*, 575 U.S. 433, 449 (2015), especially where the record establishes that property owners view carrying a dripping ice-cream cone differently than carrying a rifle.

Nor do the exemptions for law-enforcement officers and other officials whose duties "require them to be armed," Haw. Rev. Stat. § 134-11(a) (2024), render the legislation pretextual. These exemptions merely implement federal law that *requires* states to permit those officials to carry firearms unless property owners themselves restrict "possession of concealed firearms on their property." 18 U.S.C. 926B(a)-(b), 926C(a)-(b); see also *DuBerry* v. *District of Columbia*, 824 F.3d 1046, 1053 (D.C. Cir. 2016) (noting the statute's "categorical preemption" of contrary state laws). The exemptions, moreover, likely reflect property

owners' differing expectations for officers: Officers have unique, "specialized" training, *Kolbe* v. *Hogan*, 849 F.3d 114, 147 (4th Cir. 2017) (en banc), *abrogated in part by, Bruen*, 597 U.S. 1, and society places with them a "special degree of trust" to use firearms to safeguard lives and property, *O'Donnell* v. *Barry*, 148 F.3d 1126, 1135 (D.C. Cir. 1998).

As for the exemptions for hunters and target shooters, they are permitted to carry their firearms only "while actually engaged in hunting or target shooting or while going to and from the place of hunting or target shooting." Haw. Rev. Stat. § 134-5(a) (2024). Again, that reflects property owners' reasonable expectations because Hawai'i law has long permitted hunters and target shooters to carry openly and to transport their arms. See, *e.g.*, Act 275 § 2, 1988 Haw. Sess. Laws 510, 513. In any event, nothing in this Court's Second Amendment precedents suggests that it is improper for carry restrictions to have exceptions—the result of which, of course, is to allow *more* carrying of firearms.

4. In the end, petitioners' and the government's arguments boil down to the assertion that Hawai'i's law violates the Second Amendment because it favors the interests of its property owners over those of its gun owners. But *Bruen* made clear that interest balancing has no place in the Second Amendment analysis. The question is whether a historical analysis demonstrates that the law falls outside the scope of the Second Amendment or within our Nation's tradition of firearm regulation. Because Hawai'i's law does both, it is constitutional.

* * * *

Finally, regardless of this Court's resolution of the question presented, which is limited to private property open to the public, the Court should take care to appropriately limit the scope of its holding. Petitioners

have not challenged the constitutionality of Hawai'i's law as applied to private property *not* open to the public, like residences and office buildings. Moreover, petitioners do not appear to challenge the law as applied to private property that allows only limited public access, such as daycares, country clubs, and facilities that offer only ticketed entry. Nor does petitioners' challenge concern the validity of "sensitive places" laws that rest on different rationales and flatly prohibit armed entry into certain locations such as schools, bars, and churches that might be either public or private. The Court did not grant certiorari to review sensitive-places restrictions, and it should not wade into that or any of these other unpressed and unbriefed issues.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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