No. 24-1046

IN THE

Supreme Court of the United States

JASON WOLFORD, ET AL.,

Petitioners,

v.

ANNE E. LOPEZ, ATTORNEY GENERAL OF HAWAI'I,

Respondent.

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

BRIEF OF BRADY CENTER TO PREVENT GUN VIOLENCE AND GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae the Brady Center to Prevent Gun Violence ("Brady") and Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") are nonprofit organizations dedicated to reducing and eliminating gun violence.

Founded in 1974, Brady is the nation's longest-standing nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, legal advocacy, and political action. Brady works to free America from gun violence by passing and defending gun violence prevention laws, reforming the gun industry, and educating the public about responsible gun ownership.

Brady has a substantial interest in ensuring that the Constitution is properly construed with the safety of our society in mind, and in protecting the authority of democratically elected officials to address the nation's gun violence epidemic. Brady has filed numerous briefs as an *amicus curiae* in cases involving firearms regulations, including in this Court. *E.g.*, *Bondi v. VanDerStok*, 604 U.S. 458 (2025); *United States v. Rahimi*, 602 U.S. 680 (2024); *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

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[1] No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Giffords Law Center is a nonprofit policy organization serving lawmakers, advocates, legal professionals, gun-violence survivors, and others who seek to reduce gun violence and improve the safety of their communities. The organization was founded more than 30 years ago following a gun massacre at a San Francisco law firm and was renamed Giffords Law Center in 2017 after joining forces with the gun-safety organization led by former Congresswoman Gabrielle Giffords.

Today, through partnerships with gun-violence researchers, public-health experts, and community organizations, Giffords Law Center researches, drafts, and defends laws, policies, and programs proven to effectively reduce gun violence. Giffords Law Center also advocates for the interests of gun owners and law enforcement officials who understand that gun-safety legislation and community violence prevention strategies are not only consistent with the Second Amendment—they are essential to protecting the health, safety, and lives of Americans. Giffords Law Center has contributed technical expertise and informed analysis as an *amicus curiae* in numerous cases involving firearm regulations and constitutional principles affecting gun policy. *E.g.*, *Rahimi*, 602 U.S. 680; *Bruen*, 597 U.S. 1; *Heller*, 554 U.S. 570.

INTRODUCTION AND SUMMARY OF ARGUMENT

The question granted for review in this case is narrow and calls for a narrow resolution. Yet Petitioners, their supporting *amici*, and the Solicitor General seek a broader ruling from this Court. They devote

much of their briefing, for example, to where guns may be carried and how many historical analogues are needed to successfully defend a law against a Second Amendment challenge. *See* Pet. Br. 25-44; U.S. Amicus Br. 21-30. Those questions are not properly presented in this case.

Justice Barrett's observation in *Fulton v. City of Philadelphia*, 593 U.S. 522, 544 (2021) (Barrett, J., concurring), is fully applicable here: the Court "need not wrestle with these questions in this case." The Court has limited the question presented to a sole issue: whether Hawai'i's consent default rule violates the Second Amendment. Limiting questions presented in this way helps "keep the Court's case law stable" and "discourages … the Court from stretching too far." Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1730, 1733 (2013).

Bruen marked a sea change in Second Amendment doctrine, instructing lower courts for the first time to evaluate Second Amendment challenges solely on the basis of text and history. 597 U.S. at 17. *Rahimi* clarified those instructions, explaining that courts must determine "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." 602 U.S. at 692. Now, "t[o] ensure that [its] decisions reflect the 'evenhanded' and 'consistent development of legal principles,'" this Court should apply these precedents step by step "rather than widen them unnecessarily at the first opportunity." *Collins v. Yellen*, 594 U.S. 220, 273-74 (2021) (Kagan, J., concurring in part and concurring in the judgment) (quoting *Payne v. Tennessee*, 501

U.S. 808, 827 (1991)). *Amici* urge this Court to resolve only the question presented in this case—other methodological questions "can await another day." *Rahimi*, 602 U.S. at 740 (Barrett, J., concurring).

Hawai'i has enacted a default rule that, among other things, protects the choices and interests of private property owners. Hawai'i requires actual consent from owners before visitors may carry firearms onto their private property that is held open to the public. Absent such consent, visitors may not bring their firearms with them onto private property that is not theirs. Petitioners challenged the constitutionality of this statute under the Second Amendment. They broadly claimed that, unless they have been told in advance by property owners that they *cannot* do so, they have a Second Amendment right to bring their guns onto anyone's private property. Petitioners were unsuccessful on these claims in the Court of Appeals.

Petitioners now concede that they have no Second Amendment right to carry guns onto private property if that property is closed to the public. But they claim that the State cannot constitutionally require them to obtain the owner's permission when the private property is open to the public. In those circumstances, Petitioners argue that the Second Amendment requires placing an obligation on property owners to affirmatively bar guns from their property if they do not want concealed weapons brought onto their property. Petitioners contend that the Second Amendment prohibits States from setting a legal default that proactively protects private property owners' rights. Whether the Second Amendment prohibits States from honoring private property owners' rights in this way is the only

question posed here, and, framed in this way, it becomes clear that Petitioners' argument is wrong.

Amici submit that States can protect private property rights (which are themselves protected by the Constitution) as Hawai'i has done here. Nothing in Hawai'i's default rule bans firearms on private property open to the public. The law simply relieves property owners of the burden of taking affirmative steps to prevent guns from being brought onto their property (which Petitioners agree the owner has an absolute right to do).

Hawai'i's law not only protects private property rights, but also promotes the Second Amendment's core purpose of lawful self-defense. Hawai'i's default rule supports the Second Amendment rights of property owners to defend themselves and others on their private property without worrying that another person has brought a concealed firearm onto the property without the owner's knowledge and consent. *See GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012) ("[P]roperty law, tort law, and criminal law provide the canvas on which our Founding Fathers drafted the Second Amendment."). Under the challenged law, all a visitor has to do to carry a firearm on someone else's property is receive the owner's verbal or written permission, or verify that there is appropriate signage.

For all of these reasons, the Ninth Circuit's decision upholding the constitutionality of Hawai'i's default rule should be affirmed.

ARGUMENT

I. This Is A Narrow Case Concerning Only The Default Rule Governing Private Property Open To The Public.

It is essential to recognize what this case is, and is not, about. This case concerns only one discrete part of Hawai'i's law regulating firearms, § 134-E of Act 52, and only one application of this provision of the law, namely to private property open to the public.

The challenged section "establishes a default rule with respect to carrying firearms on private property of another person." Act 52 § 1; *see also id.* § 2. This default rule requires a gun carrier to have "express authorization" before the person may carry a firearm on an owner's private property. Haw. Rev. Stat. Ann. § 134-9.5(a). The statute provides that such authorization "shall be signified by" either: "(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." *Id.* § 134-9.5(b). In this way, the default rule empowers "private entities to 'opt-in' to authorize the public carry of firearms on their property." Act 52 § 1.

Further narrowing the scope of this case, this Court limited its grant of certiorari to Question 1, which challenges the default rule's application only as to private property that is *open to the public*. *See* Pet. Br. i. Private property that is closed to the public—like residences or private offices—is not at issue. Nor could it be, because Petitioners did not challenge the

district court's holding that the Second Amendment does not apply to private property closed to the public. *See* Pet. App. 56a n.8. Indeed, Petitioners concede that they have no Second Amendment right if the property in question is not open to the public. *See* Pet. Br. 17 ("To be sure, a private property owner has the unquestioned 'right to exclude others, including those bearing arms.' Petitioners have no quarrel with that principle." (quoting Pet. App. 59a)); *see also id.* at 26-27 & n.14.

This concession underscores Petitioners' failure to explain what in the Second Amendment requires different treatment of open private property and closed private property for concealed carry purposes. Petitioners cannot offer such an explanation because this distinction has no basis in the Second Amendment. In either circumstance, the property belongs to another private person who exercises complete control over it, which itself is protected by the Constitution.

In addition, nothing in this case questions the power of private property owners to decide who and what comes onto their property. Under Hawai'i's law, private property owners may display "No Guns Allowed" signs or otherwise communicate their desire to not permit guns on their property. Neither the question presented, nor the Ninth Circuit's decision below, unsettles a property owner's traditional and long-established right to decide who and what may enter the owner's property, including which guests, if any, may carry firearms. That right remains inviolate under the terms of Hawai'i's law. *Cf. PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) ("[W]hen a shopping center owner opens his private property to the

public for the purpose of shopping, the First Amendment to the United States Constitution does not thereby create individual rights in expression beyond those already existing under applicable law.").

Indeed, Petitioners and their *amici* recognize forthrightly that "property owners are free to disallow firearms if they so choose." Pet. Br. 27; U.S. Amicus Br. 26 (a property "owner may revoke" permission to carry a firearm on their private property); States of Montana et al. Amicus Br. 5 ("[P]rivate property owners are generally free to [prohibit people from carrying guns] within the boundaries of their property"); Nat'l Shooting Sports Found. Amicus Br. 10 (observing that Petitioners do not claim that there is a constitutional right to carry onto another owner's property over the owner's objection); Claremont Inst. Amicus Br. 20 ("There is no dispute that a property owner may choose to exclude armed visitors from his land.").

Under Hawai'i's rule, as Petitioners agree, Pet. Br. 27, property owners remain free to allow or prohibit firearms on their property, consistent with their own fundamental and constitutionally protected property rights. Regardless of the result in this case, Hawai'i law will still validly prohibit Petitioners and other gun owners from carrying guns onto someone else's private property without the owner's permission. The only question is whether Hawai'i law may provide that such permission may not be presumed from the property owner's silence.

II. The Hawai‘i Default Rule Is Not A Sensitive Places Law.

This case is not about sensitive places. Hawai‘i's default rule applies broadly to all private property. It is not limited to specific categories of locations, and it is not dependent upon particular characteristics of the private property.

Hawai‘i does have a sensitive places law, but it is codified separately from the default rule in the state's firearms laws. *Compare* Haw. Rev. Stat. Ann. § 134-9.5 (consent default rule) *with* Haw. Rev. Stat. Ann. § 134-9.1 (sensitive places law). Petitioners and the Solicitor General recognize that the consent default rule is not a sensitive places law.[2] Therefore, sensitive-places doctrine has no proper role to play here.

Indeed, the default rule operates unlike a sensitive places law. It treats all private property the same; it does not tie the permissibility of carrying firearms to any particular characteristics of the property. For purposes of § 134-E, it is, for example, irrelevant whether the private property in question is a school, a mall, a restaurant, a grocery store, or a gas station. In contrast, sensitive places laws restrict the carrying of firearms with respect to defined locations, such as "schools and government buildings," and "legislative assemblies, polling places, and courthouses." *Bruen*, 597 U.S. at 30.

In short, the default provision at issue in this case is not a "sensitive places" law. All that matters under

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[2] *See* Pet. Br. 39-40; U.S. Amicus Br. 22.

the default rule in § 134-E is whether the property is privately owned. If it is, then the private property owner may freely consent to the carrying of firearms on the property, either verbally or in writing, including by posting signs authorizing the carrying of firearms. Absent such actual consent, the terms of the statute provide that other persons may not bring firearms onto the owner's property.

III. Private Property Is A Foundational Right Long Protected By State Law, Including Through Default Rules.

A. The private property right is foundational.

The Constitution enshrines the private property right as a core individual right. *Soulard v. United States*, 29 U.S. 511, 512 (1830) ("the free enjoyment of … property" is a "sacred" principle); *see* 1 William Blackstone, *Commentaries on the Laws of England* 134 (1765) (Blackstone) (private property is "[t]he third absolute right, inherent in every Englishman," along with personal security and personal liberty). Express or implied private property protections exist throughout the Bill of Rights and the Constitution.

The Third Amendment, for example, bars the government from quartering troops in a private home during peacetime without the homeowner's consent. U.S. Const. amend. III; *Katz v. United States*, 389 U.S. 347, 350 & n.5 (1967) (the Third Amendment protects a home's "privacy from governmental intrusion").

The Fourth Amendment "safeguard[s] the privacy and security" of an individual's "houses, papers, and effects" "against arbitrary invasions by governmental officials." *Carpenter v. United States*, 585 U.S. 296, 303 (2018) (quoting *Camara v. Mun. Ct. of City & Cnty. of San Francisco*, 387 U.S. 523, 528 (1967)); *see also United States v. Jones*, 565 U.S. 400, 405 (2012) ("[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all.") (quoting *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817).

The Fifth Amendment's protection against deprivations of private "property, without due process of law" or "without just compensation" hearkens back "at least 800 years to Magna Carta." *Horne v. Dep't of Agric.*, 576 U.S. 351, 358 (2015); *see also Bartemeyer v. Iowa*, 85 U.S. 129, 136 (1873) ("life, liberty, and property … are sacred rights, which the Constitution … guarantees to its humblest citizen against oppressive legislation") (Bradley, J., concurring).

And the Fourteenth Amendment applies the property protections of the Fifth Amendment's Due Process Clause to State action. U.S. Const. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); *Timbs v. Indiana*, 586 U.S. 146, 150 (2019) ("[T]he Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States.").

Even constitutional provisions lacking explicit reference to property buttress the sacrosanct private

property right. For example, the Seventh Amendment's right to a jury trial "operates together with Article III and the Due Process Clause of the Fifth Amendment to limit how the government may go about depriving an individual of life, liberty, or property." *SEC v. Jarkesy*, 603 U.S. 109, 141 (2024) (Gorsuch, J., concurring). The Excessive Fines Clause of the Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Austin v. United States*, 509 U.S. 602, 609-10 (1993) (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)) (emphasis omitted).

In addition, Article I, Section 10, bars States from enacting any law "impairing the Obligation of Contracts …." U.S. Const. art. I, § 10. And Article I, Section 8, empowers Congress to legislate to protect intellectual property rights. U.S. Const. art. I, § 8.

The Second Amendment likewise supports private property rights. As this Court has observed, "whatever else it leaves to future evaluation," the Second Amendment ensures the "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635; *id.* at 628 (describing how "the need for defense of self, family, and property is most acute" at "the home"); *McDonald v. City of Chicago*, 561 U.S. 742, 885 (2010) (Stevens, J., dissenting) ("The decision to keep a loaded handgun in the house is often motivated by the desire to protect life, liberty, and property."); 1 Blackstone 136-40 (describing the right "of having arms for their defence" as an "auxiliary subordinate right[]" for "preserv[ing]"

the private property right "from violation"); *see infra* § IV.

B. The right to exclude is essential to private property rights.

"[T]he '*sine qua non*' of property" is "the right to exclude." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150 (2021) (quoting Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 752 (1998)); *see* Pet. Br. 17.

Indeed, this right of exclusion "is 'one of the most treasured' rights of property ownership." *Cedar Point*, 594 U.S. at 149 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). It is "'universally held to be a fundamental element of the property right' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* at 150 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-80 (1979)). "Perhaps the best-known exposition" of the centrality of the right to exclude—that it "is both a necessary and sufficient condition of property"—is Felix Cohen's description of private property as that "to which the following label can be attached:

> To the world: Keep off X unless you have my permission, which I may grant or withhold.
>
> Signed: Private citizen
>
> Endorsed: The state."

Merrill, *supra*, 77 Neb. L. Rev. at 734-35 (quoting Felix S. Cohen, *Dialogue on Private Property*, 9 Rutgers L. Rev. 357, 374 (1954)).

This essential exclusionary element has endured for centuries. As this Court has observed, "the very idea of property entails 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'" *Cedar Point*, 594 U.S. at 149-50 (quoting 2 Blackstone 2); *cf.* Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 Harv. L. Rev. 932, 957 (1919) ("Your right to swing your arms ends just where the other man's nose begins.").

Consistent with this long tradition, States may legislate to protect private property owners' fundamental right to exclude through a variety of regulations. And such regulation is not limited to residential property; it may govern commercial property as well. *See, e.g.*, *Dolan v. City of Tigard*, 512 U.S. 374, 394 (1994) (recognizing commercial property owner's "right to exclude"); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972) ("Nor does property lose its private character merely because the public is generally invited to use it for designated purposes.").

These rules governing exclusions from private property have historically applied even when they might impact other individual constitutional rights. For example, it is settled that the First Amendment does not grant entrants onto private property held open to the public unfettered rights of expression on

that property. "The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property." *Manhattan Cmty. Access Corp. v. Halleck*, 587 U.S. 802, 813 (2019).

A private shopping center, for example, can forbid people from distributing handbills on the property without running afoul of the First Amendment. In *Lloyd Corp.*, 407 U.S. at 570, the Court concluded that individuals did not have a First Amendment right to enter a shopping center to distribute handbills protesting the Vietnam war. "Although … the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only." *Id.* at 567-68.

Similarly, in *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976), "the pickets … did not have a First Amendment right to enter [a] shopping center for the purpose of advertising their strike against" one of the companies within the shopping center. "[W]hile statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself." *Id.* at 513.

Significantly for this case, these precedents recognize that private property owners have a right to exclude even when the property is open to the public and even when individuals seek to engage in otherwise

constitutionally protected conduct. *Manhattan Cmty. Access Corp.*, 587 U.S. at 812 (collecting cases).[3]

C. Default rules regarding a property owner's consent have existed since the Nation's earliest days and have taken a variety of forms.

Default rules have applied to the question of property owners' consent to the carrying of weapons on their private property since the colonial era. Throughout the Nation's history, and to this day, States have enacted a variety of such rules in a variety of contexts, including settings implicating otherwise constitutionally protected activity. These longstanding legislative practices confirm that default rules are consistent with the Constitution.

1. Historical consent default rules.

As early as 1722, the New Jersey Colony created a default rule akin to Hawai'i's modern-day rule, mandating that no "Person or Persons shall presume, at any Time after the Publication hereof, to carry any

[3] Of course, there are limits to the right to exclude. For example, private property owners who exercise this right in order to discriminate against protected classes may run afoul of public accommodation laws or even the Constitution's guarantee of due process and equal protection. *See generally* 42 U.S.C. § 2000a; *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948) (holding judicial enforcement of racial covenants violated Fourteenth Amendment because the covenants were "directed toward a designated class of persons and [sought] to determine who may and who may not own or make use of the properties for residential purposes … wholly in terms of race or color."). No such claims or concerns, however, are at issue in this case.

Gun, or hunt on the improved or inclosed Lands in any Plantation, other than his own, unless he have License or Permission from the Owner of such Lands or Plantation." VIII Geo. I, ch. XXXV, § 4 (N.J. 1722) ("An ACT to prevent Killing of Deer out of Season, and against Carrying of Guns and Hunting by Persons not Qualified.").[4]

The colonial New Jersey legislature subsequently broadened the statute to forbid "any Person or Persons … to carry a Gun or Guns … in any Person or Persons Land, without leave … in writing under the hand of the Owner." XXV Geo. II, ch. CXIV, § 7 (N.J. 1751). This 1751 revision eliminated the earlier reference to "improved or inclosed Lands in any Plantation" in favor of the broader "any Person or Persons Land." *Id.*

Observing that the 1722 and 1751 acts had not adequately "prevent[ed] trespassing with Guns," the New Jersey legislature revised the law again in 1771 to focus the first section exclusively on addressing that problem, relegating hunting restrictions to a

[4] Petitioners point to an 1828 dictionary defining "guns" to mean only "long guns or cannons, not pistols." Pet. Br. 36. But, as noted, New Jersey enacted the first iteration of its consent default statute in 1722. As used in New Jersey's 18th century laws, "guns" more likely meant: "The general name for firearms; the instrument from which shot is discharged by fire." *Gun*, A Dictionary of the English Language (1755); *cf. Heller*, 554 U.S. at 581-82, 584, 597 (citing the 1773 edition of A Dictionary of the English Language); *id.* at 647 (Stevens, J., dissenting) (citing the 1755 edition); *id.* at 685 (Breyer, J, dissenting) (citing the 1773 edition); *see also Gun*, Dictionarium Britannicum (1736) ("a Fire-Arm or Weapon of several Sorts and Sizes"); *Gun*, Dictionarium Anglo-Britannicum (1708) ("A Fire-arm of several sorts").

later section. XII Geo. III, ch. DXL, preamble (N.J. 1771) ("An ACT for the Preservation of Deer and other Game, and to prevent trespassing with Guns."); c*ompare id.* § 1 ("to carry any Gun") *with id.* § 2 ("to hunt or watch for Deer with a Gun"). The 1771 revision barred "any Person or Persons … to carry 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 … or legal Possessor." *Id.* § 1.

Petitioners focus on how the default rule applied to land "for which the Owner pays Taxes," which they argue reaches "only 'improved' or 'inclosed' lands." Pet. Br. 34. Their characterization is wrong. For example, New Jersey required owners of "certain large Tracts of Land, neither having Property therein" to "give a true Account of the particular Parts of all such Lands which they are respectively seated on, both cleared and Woodland" and "shall pay their several and respective Taxes for the same." X Geo. III, ch. CCCCXCV, § 25 (N.J. 1769). Thus, New Jersey taxed more than "only 'improved' or 'inclosed' lands," making private property in general subject to New Jersey's actual consent rule.[5]

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[5] Even if their tax argument were correct, Petitioners ignore the rule's application to lands that an individual has "in his lawful Possession." XII Geo. III, ch. DXL, § 1 (N.J. 1771). The possession prong considerably expanded the reach of New Jersey's 1771 default rule beyond taxed land. *See*, *e.g.*, *Possession*, A Dictionary of the English Language (1755) ("The state of owning or having in one's own hands or power; property."); *Possession*, The Law-Dictionary (1797) ("Is either actual, where a person actually

New Jersey further renewed the 1771 act in a substantively identical 1846 law. Lucius Elmer, *1868 Digest of the Laws of New Jersey* 362 (4th ed. 1868) ("An Act for the preservation of deer and other game, and to prevent trespassing with guns."). Although Petitioners attempt to characterize New Jersey's 1771 law as a one-off "outlier," Pet. Br. 37-38, New Jersey's actual consent default rule survived from the colonial era through the Founding until after Reconstruction, when New Jersey enacted a presumed consent statute. Acts of the 119th Legis., ch. CXLVIII, § 1 (N.J. 1895) (requiring for the first time the owner's public notice "posted conspicuously" to exclude those carrying guns).

States applied similar actual-consent default rules in other private property contexts as well. For example, throughout the 19th century, some States prohibited anyone from selling goods, provisions or refreshments within one mile of religious revival meetings without first obtaining the consent of the religious authorities in charge of the meeting. *See, e.g.*, Mass. Gen. Laws ch. 272, § 39 (amended in 1867 to add consent default language); Acts and Resolutions of the First Session Legis. § 871.03, ch. VIII, § 20 1868 Fla. Laws 98-99 (enacted 1868, repealed 2010);

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enters into lands or tenements descended or conveyed to him; or, in Law, when lands, etc. are descended to a man, and he hath not actually entered into them."); *Lawful Possession*, Black's Law Dictionary (12th ed. 2024) ("Possession based on a good-faith belief in and claim of ownership" or "Possession granted by the property owner to the possessor"; dating from the 16th century). Thus, land subject to taxation and land in another's lawful possession were both subject to New Jersey's actual consent rule.

Pub. Laws R.I. cap. 629, of March 30, 1877; Ill. R.S. 1845, p. 177, § 147 (codified at Ill. Rev. Stat. ch. 38, § 59). When individuals challenged these laws on constitutional grounds, States uniformly upheld them as permissible "police regulation[s]." *Meyer v. Baker*, 120 Ill. 567, 572 (1887); *see also Commonwealth v. Bearse*, 132 Mass. 542, 542 (1882) (affirming that Massachusetts's 1867 consent rule "is constitutional"); *State v. Read*, 12 R.I. 135, 137 (1878) (same for Rhode Island's consent rule).

Other States enacted actual-consent default rules regarding the grazing of cattle on other people's private property. *See, e.g.*, Acts of the Virginia Gen'l Assembly, ch. 14 (1862) (repealing state-wide "fence out" presumed-consent default rule for grazing)[6]; *cf.* 1915 Cal. Stat. ch. 397, pp. 636-37 (repealing California's "fence out" presumed-consent law in favor of a "fence in" actual-consent regime, though exempting six rural counties).

Although these actual-consent default rules varied in subject matter, they shared a common feature: individuals seeking to make use of another's private property were trespassing unless the property owner actually consented to their use.

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[6] A "fence in" regime reflects the English common law rule requiring owners to fence in their livestock to avoid liability for private property damage. A "fence out" regime allowed livestock owners to graze their animals on unenclosed private land unless the private property owner erected a fence to exclude animals. Yasuhide Kawashima, *Farmers, Ranchers, and the Railroad: The Evolution of Fence Law in the Great Plains, 1865-1900*, 30 Great Plains Quarterly 21, 21-22 (2010).

2. Modern-day consent default rules.

These historical default rules continue to have modern counterparts, both in the firearms context and in other contexts. These laws reflect that a State may choose to design its default rules with owners' concerns for protecting the value, utility, and safety of their real property, as well as their own safety and that of their employees, in mind. *See, e.g.*, *McCoy v. ATF*, 140 F.4th 568, 580 (4th Cir. 2025) ("Basic respect for traditional democratic authority [in the Second Amendment context] is a modest ask.").

For example, to this day, several States require those carrying weapons to secure a homeowner's consent before entering a residence armed. *See, e.g.*, Alaska Stat. § 11.61.220(a)(1)(B) (requiring "express permission" to carry concealed weapon "within the residence of another person"); Ark. Code Ann. § 5-73-306(18)(A)(iii)-(iv) (posted notice "not required for a private home" and "[a]ny licensee entering a private home shall notify the occupant that the licensee is carrying a concealed handgun"); La. Rev. Stat. § 40:1379.3(O)(2) (requiring anyone "carrying a handgun" to "first receiv[e] the consent" of the owner of a "private residence").

States also have a variety of consent default rules for hunting on private property. For example, Maryland prohibits hunting on someone else's private property without "written permission" from the property owner. Md. Code Ann., Nat. Res. § 10-411. Virginia likewise requires an owner's express, though not necessarily written, consent. Va. Code Ann. § 18.2-132 ("Any person who goes on the lands, waters,

ponds, boats or blinds of another to hunt, fish or trap without the consent of the landowner or his agent shall be deemed guilty of a Class 3 misdemeanor.").

Maine, by contrast, allows hunters to presume a property owner consents to the carrying of firearms on the owner's property unless the owner posts signs prohibiting access. *See* Me. Rev. Stat. Ann. tit. 17-A, § 402; *see also* Ariz. Rev. Stat. Ann. § 17-304 (requiring private landowners to post signs if they "desire to prohibit hunting, fishing, trapping or guiding on their lands without their permission"). Some States recognize "purple paint laws," allowing property owners to deny consent by painting purple blazes on their property. *See, e.g.*, 18 Pa. Cons. Stat. § 3503(b)(1)(vi) (criminal trespass statute defining "identifying purple paint marks" as "notice against trespass"); Tex. Penal Code § 30.05 (similar).

Modern consent default rules also govern the use of other people's private property in contexts not involving firearms, even where otherwise constitutionally protected activity is implicated. For example, some States require an individual to obtain the property owners' actual consent before the property is used for specified expressive purposes. Florida bars the projection of an image onto private property—even where there is no physical trespass onto the property—"without the written consent of the owner." Fla. Stat. § 806.13(7). Georgia forbids "any person to place posters, signs, or advertisements" on private property "unless the owner … has given permission." Ga. Code Ann. § 16-7-58(a)(2). And Idaho requires

owner consent before anyone may "erect, install, attach or paint … election posters or signs upon … private property." Idaho Code § 18-7029.

Still other States require obtaining an owner's consent for other persons to lawfully use drones to take photos or videos over the owner's private property in specified settings. *See, e.g.*, Ky. Rev. Stat. Ann. § 511.100(1), (2)(b) (drones cannot "conduct surveillance" over "key infrastructure assets," including commercial facilities, "without the prior consent of the owner"); Iowa Code § 715E.6(1) (prohibiting drones "over a person's homestead or farmstead" unless user "acts with the consent of the owner").

These examples are merely illustrative of the many variations of default rules. They show that default rules for property owners' consent to others entering or using their property have varied and continue to vary across time and place in their nature and content. The existence and variety of these default rules demonstrates that their content is not—and has never been—fixed by the Constitution. Accordingly, and especially against this backdrop, Hawai'i's default rule requiring simply that property owners actually consent before others may carry guns on their private property does not violate the Second Amendment.

IV. Lawful Self-Defense, Particularly For Property Owners, Is Central To The Second Amendment, And Hawai'i's Law Supports That Right.

"[P]roperty law, tort law, and criminal law provide the canvas on which our Founding Fathers drafted the Second Amendment." *GeorgiaCarry.Org*, 687 F.3d at 1264. As discussed above, *supra* § III.B, the right to exclude necessarily informs the scope of Petitioners' claimed Second Amendment interest in this case. So too does the right to lawful self-defense as provided in criminal law.

A. A property owner's right to lawful self-defense is longstanding and well-established.

This Court has made clear that lawful self-defense is the core purpose of the Second Amendment. *See Heller*, 554 U.S. at 628 ("the inherent right of self-defense has been central to the Second Amendment right," and it allows for the "defense of self, family, and property"). This right to lawful self-defense is at its apex on one's own private property. *See Semayne's Case* (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91a, 91b. ("[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose."); *see also Heller*, 554 U.S. at 628-29.

Private property owners wishing to exercise their right to lawful self-defense on their own property may prefer that visitors to their property not carry weapons. These owners may not trust that all visitors to

their property will carry firearms in a responsible and lawful way. They may conclude that allowing any and all visitors to carry concealed weapons on their property poses a threat to the owners' and others' personal safety. Some owners may simply prefer to know in advance before visitors carry weapons onto their property. The Second Amendment cannot properly be read to interfere with the rights of private property owners to make these informed decisions.

This logic holds true even when private property owners open their property to the public for commercial or other purposes. As noted above, private property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *PruneYard Shopping Ctr.*, 447 U.S. at 81 (citation omitted). Property owners can generally restrict the scope of that use, including by disallowing the carrying of firearms if such disallowance is their preference. "The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which … [it] has expressly or impliedly assumed." *N. Pac. Ry. Co. v. N. Dakota ex rel. McCue*, 236 U.S. 585, 595 (1915).

"[The] fundamental rights of personal security, personal liberty, and private property can, and must, coexist together to fully protect civil liberties." *GeorgiaCarry.Org*, 687 F.3d at 1265 (citing 1 Blackstone 129). Hawai'i's default rule helps to ensure this balance.

B. Hawai‘i's law supports public safety.

Hawai‘i's default rule promotes public safety. Hawai‘i enacted this law to protect against "the risks to public health, safety, and welfare associated with firearms and gun violence." Act 52 § 1.

Research supports this policy choice. People carrying guns in public are rarely successful in defending themselves from crime, with at least one study indicating that people in possession of a gun may be more than four times more likely to be shot in an assault. *See* Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034, 2037 (2009).

Some *amici* in support of Petitioners claim otherwise, but such assertions are unsupported by reliable data and rest on significant methodological errors. For example, the Peace Officers' amicus brief, relying on claims by John Lott, asserts that: (1) armed civilians stopped 35.4% of active shooter events; and (2) 92% of mass shootings since 1998 have occurred in "gun-free zones." Peace Officers Research Ass'n of Cal. Amicus Br. 12-19; *see also* Pet. Br. 23 n.13. Neither statistic holds up to scrutiny. The first claim about armed civilians stopping active shooter events relies on the researcher's improper and unjustifiable exclusion of thousands of shootings from the analysis,[7] while the second claim regarding "gun-free

[7] Specifically, this first claim relies on discredited research that uses a different definition of "active shooter" incidents than the FBI's, and then applies even that aberrant definition selectively to encompass only cases involving defensive gun use. The

zones" similarly relies on flawed data that misclassifies the number of mass shootings over the relevant period.[8]

FBI limits the term "active shooter" to "one or more individuals actively engaged in killing or attempting to kill people in a populated area," and excludes shootings committed in conjunction with, or related to, another crime, for example, gang violence, drug violence, and domestic disputes. *See* FBI, *Active Shooter Incidents in the United States in 2021*, at 2 (May 2022), https://perma.cc/77DW-R2VR. But Lott's research expands the definition to include all public shootings where there is not an underlying crime (not just in populated areas), and includes, for example, road rage incidents and escalating arguments involving firearms. *See* GVPedia, *Debunking John Lott's latest dishonest attacks on the FBI active shooter reports*, https://perma.cc/YH6B-HEBF (last visited Dec. 18, 2025). Compounding the error, he then applies his own definition to include only cases involving defensive gun use. *Id.* The analysis thus excludes thousands of shootings that would meet his own definition of active shooter incidents but did not involve armed civilian intervention. *Id.*; *see also* Pete Blair & M. Hunter Martaindale, *Misrepresenting the FBI Active Shooter Report: A Response to Lott*, ACJS Today (May 2015), https://perma.cc/D3R8-QFBV.

[8] The Peace Officers brief's assertion that 92% of mass public shootings since 1998 have occurred in gun-free zones is also wrong: this number distorts the underlying piece itself, which reports ostensible figures of 83% since 1998, and 92% since 1950. *See* GVPedia, *Debunking the Gun-Free Zone Myth*, https://perma.cc/MJ2W-EC4V (last visited Dec. 12, 2025). More important, the calculations are themselves derived from a substantial data error in which each mass-shooting fatality was counted as a separate mass-shooting incident. *Id.* This error inflates the proportion of mass public shootings attributed to gun-free zones. The assessment further misclassifies multiple high-profile shootings. Just as one example, the shooting at the Allen, Texas mall is incorrectly labeled as occurring in a gun-free zone. *Id.* The analysis similarly misclassifies more than a dozen other shootings.

In any event, this flawed research is also irrelevant to this case. Hawai‘i’s default rule does not bar individuals from exercising their Second Amendment right to carry firearms in public. It does not create gun-free zones. Instead, Hawai‘i’s default rule allows private property owners to choose whether to permit firearms on their property before any visitors enter with a concealed weapon. In this way, Hawai‘i’s law properly respects the fundamental rights of private property and personal security, rights that are “necessary to our system of ordered liberty.” *Rahimi*, 602 U.S. at 690 (citation omitted).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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