No. 24-1046

In the Supreme Court of the United States

JASON WOLFORD, et al.,

Petitioners,

v.

ANNE E. LOPEZ, ATTORNEY GENERAL OF HAWAII,

Respondent.

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

BRIEF OF CITY OF BALTIMORE, CITY OF NEW HAVEN, AND SOUTH CAROLINA SMALL BUSINESS CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF CITY OF BALTIMORE, CITY OF NEW HAVEN, AND SOUTH CAROLINA SMALL BUSINESS CHAMBER OF COMMERCE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are local governments and a business association that recognize the value of a no-carry default property rule to protect the public (including patrons of local businesses) from gun violence, encourage commerce by assuring the public of a safe and welcoming environment in local businesses, and reduce the risk to local businesses from gun violence that might otherwise occur on their premises. Because Hawaii's default rule advances those interests without impinging on the Second Amendment, which does not guarantee an individual's right to carry firearms onto another person's private property, *Amici* urge the Court to affirm the judgment of the court of appeals.

Amicus curiae City of Baltimore is a municipality located in Maryland committed to fostering small business entrepreneurship, public safety, and community development.

Amicus curiae City of New Haven is a municipality located in Connecticut committed to fostering small business entrepreneurship, public safety, and community development.

Amicus curiae South Carolina Small Business Chamber of Commerce is a statewide advocacy

[1] Pursuant to Rule 37.6, no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund this brief, and no person other than *amici*, their members, and their counsel contributed money to fund this brief.

organization with more than 5,000 supporters. The Chamber provides leadership in making South Carolina friendlier to small businesses in areas such as taxation, regulation, worker training, Workers Compensation Insurance, utility costs, health insurance, energy/conservation, and economic development. The Chamber has also worked at the federal level on access to capital, federal regulations, health insurance, coastal environmental protection, and democracy.

SUMMARY OF ARGUMENT

Local governments and businesses have a strong interest in ensuring the right conditions exist for entrepreneurs to grow their businesses into thriving forces in local economies and for patrons and customers to feel safe and confident in patronizing local businesses. A no-carry default can foster such conditions in two ways. First, a no-carry default mitigates the risk of liability for businesses open to the public. Under well established tort principles, businesses owe a duty to protect their patrons from foreseeable dangers and risks, and a no-carry default allows businesses to be aware of firearms on their premises and take necessary steps to protect their patrons from harm. That awareness can mitigate the risk that local businesses will be subject to crushing liability, burdensome litigation, and expensive insurance costs from the risk of gun violence, and can also ensure that the public has a safe and welcoming experience when patronizing local businesses—all of which encourages local commercial activity and helps sustain local communities more broadly.

Second, default private property rules have long been the province of state and local governments, and

the default rule that Hawaii adopted here is part of a long pattern consistent with state and local police power. Hawaii's rule also reduces transaction costs for businesses and their patrons. Identifying the correct default rule is often not a simple matter, as state and local governments seek to balance important social costs and benefits while taking heed of the preferences of the public, and local businesses seek to find the best balance between providing a safe and welcome environment to their customers and mitigating their own risks and costs. But choosing a default rule is fundamentally a question for policy determination, not constitutional rule, and Hawaii has done here is well within the remit of a government's discretion to protect the public and assist local businesses.

Moreover, default rules like Hawaii's do not implicate or imperil the Second Amendment. To be sure, under this Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), the Second Amendment protects a right to carry firearms in public in many instances. But the Second Amendment does not guarantee to anyone a right to carry firearms onto the private property of another. Property owners retain the right to exclude firearms and persons carrying them, just as they retain the right to exclude other items and activity that are potentially dangerous—or even merely inconvenient—to their patrons, such as animals, loud noise, graffiti, political canvassing, or religious proselytizing. Hawaii's rule ensures that property owners may readily become aware whether potential patrons are carrying firearms and decide, with that knowledge, whether or not to allow them entry. Because a property owner always retains the right to permit or disallow firearms on their

property at their discretion, the default rule neither implicates nor offends the Second Amendment.

ARGUMENT

Under well established tort principles, all businesses and other establishments generally open to the public owe their patrons a duty of reasonable care. Private property owners may be subject to liability—or at the very least, may face years of expensive and burdensome litigation—for torts committed on their premises with a firearm, even when those torts are committed by third parties. And especially since gun manufacturers and retailers face additional layers of protection from liability by state and federal laws, a business where a shooting took place may be a victim's only hope of obtaining compensation for their harms. Businesses therefore have a strong interest not only in protecting their patrons from harm, but also in mitigating their liability risk by taking necessary steps to prevent gun violence on their premises. And state and local governments have an interest in enabling local businesses to do so, to protect the safety of the public while they patronize local businesses and to sustain the economic vitality of those businesses.

This is easier said than done, however, when a business owner may not even be aware of who is carrying firearms onto their property. A no-carry default rule increases the likelihood that property owners will know when a potential patron is carrying a firearm, thus enabling the property owner to make an informed decision and take reasonable care to prevent harm to their patrons or employees. That result both protects the public and facilitates commercial activity in local communities.

I. Both local governments and private property owners have strong liability reasons to prefer a no-carry default private property rule.

The longstanding rule of tort law is that a business open to the public owes its customers a duty of care to take reasonable precautions to ensure their safety. *See* Restatement 2d of Torts, § 344. This duty of care to a business invitee "is the highest duty owed to any entrant upon land." *Charlie v. Erie Ins. Exch.*, 100 A.3d 244, 253 (Pa. Super. 2014) (quoting *Emge v. Hagosky*, 712 A.2d 315, 317 (Pa. Super. 1998)). Commercial businesses are also the most common locations where active shooter incidents occur in the United States. Blair J. Peter and Schweit, Katherne W., Tex. State Univ. and Fed. Bureau of Investigation, U.S. Dep't of Justice, A Study of Active Shooter Incidents in the United States Between 2000 and 2013 13–15 (2014). After *Bruen*, as public carry has become more prevalent—or, in Hawaii, newly legal—business owners must now assume that some firearms are being carried in public spaces.

Furthermore, because federal and state laws often place additional barriers to liability for gun manufacturers and retailers for injuries caused by the firearms they make or sell (and because the shooters themselves are likely to be judgment-proof), victims of gun violence often have few options for seeking legal recourse after a shooting. *See, e.g.*, Protection of Lawful Commerce in Arms Act of 2005, Pub. L. No. 109-92, 119 Stat. 2095; *see also, e.g., Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1219–22 (D. Colo. 2015) (dismissing suit by victims of mass shooting against stores that sold weapons to the gunman because

federal and state law shielded the sellers from liability). Victims of gun violence hoping to recover for their injuries often have little choice but to try and obtain compensation from businesses where shootings occur, making businesses especially vulnerable to liability—or at the least, drawn out, costly, legal proceedings—whenever their patrons are injured by firearms on their premises.

At one point in time, courts viewed public shootings as so unlikely to occur, so unforeseeable, that a business could not be liable for the injuries that result. *Lopez v. McDonald's Corp.*, 193 Cal. App. 3d 495, 509-10 (Cal. Ct. App. 1987) (finding restaurant not liable for shooting because gun violence was "so unlikely to occur" that it could not have been reasonably foreseeable). As mass shootings become more prevalent,[2] however, courts are increasingly likely to find that injuries from firearms are foreseeable, and thus that businesses may face potential liability for failing to prevent such events. *See Axelrod v. Cinemark Holdings, Inc.*, 65 F. Supp. 3d 1093, 1099 (D. Colo. 2014) ("But what was 'so unlikely to occur' within the setting of modern life; as to be unforeseeable in 1984 was not necessarily so unlikely by 2012.") (quoting *Lopez*, 193 Cal. App. 3d at 509-10); *see also Mitchell v. Rite Aid of Md., Inc.*, 290 A.3d 1125, 1131 (Md. App. Ct.), cert. denied, 296 A.3d 419 (Md. 2023) ("As grim statistics and the development of the law in our sister states

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[2] Mass shootings—defined as "incident[s] of targeted violence carried out by one or more shooters at one or more public or populated locations"—have steadily increased in frequency since 1966. Rockefeller Inst. of Gov., *Mass Shooting Factsheet* (Dec. 15, 2025), available at https://perma.cc/2LVR-FMX5.

foreshadow, the standards of care surrounding a business owner's duty to protect invitees from gun violence are not static and will continue to evolve[.]"). If, as some studies have concluded, the risk of violent crime increases as public carry becomes more common, the risk that businesses will face liability for gun violence committed on their premises will increase as well. *See* Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923, 1923 (2017); John J. Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. Empirical Legal Stud. 198 (2019).

And even before the modern acceleration of public shootings, businesses have always had a duty to protect patrons from reasonably foreseeable harm—such as unruly or erratic patrons. *See, e.g., Massaro v. McDonald's Corp.*, 280 A.3d 1028 (Pa. 2022); *see also Carey v. New Yorker of Worcester, Inc.,* 245 N.E.2d 420, 422 (Mass. 1969) ("The defendant, as the operator of a restaurant and bar, was in possession of real estate open to the public for business purposes. It owed a duty to a paying patron to use reasonable care to prevent injury to him by third persons whether their acts were accidental, negligent, or intentional."). These principles are no less applicable whether a patron is injured by the discharge of a firearm or a drunken affray. *See McKown v. Simon Prop. Grp., Inc.*, No. C08-5754-BHS, 2018 WL 3971960, at *3–4 (W.D. Wash. Aug. 20, 2018) (holding that a shopping mall had a duty of ordinary care to protect patrons from mass shooting where the shooter had been

pacing for 40 minutes prior to shooting and was described as "in a bad mood").

Businesses therefore face a significant risk of liability for shootings committed on their property. And this risk of liability can also threaten the vitality of commerce in local communities. As mass shootings become more common, courts are more likely to hold that the risk is reasonably foreseeable and that businesses should exercise reasonable care to prevent it. *See, e.g., Piazza v. Kellim*, 377 P.3d 492, 494-95, 506-07 (Or. 2016) (en banc) (nightclub's history of violent assaults, including gun violence, created a triable issue of fact as to whether the club should have foreseen a shooting) *see also, e.g., McKown v. Simon Prop. Grp. Inc.*, 622 F. App'x 621, 622 (9th Cir. 2015) (vacating grant of summary judgment to shopping mall operator in suit arising from mass shooting even despite lack of "evidence of prior similar criminal acts on the mall premises"); *Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 467 P.3d 287, 293–94 (Colo. 2020) (finding that site of mass shooting knew of "risk of violence against its facilities," making foreseeability of shooting a jury question, and refusing to hold that "summary judgment is required in virtually every case involving a mass shooting because the shooter's actions [are] the predominant cause of the victims' injuries").[3]

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[3] *Wagner* prompted Colorado to amend the Colorado Premises Liability Act to limit liability for third party criminal acts. *Vance v. El Paso Cnty. of Comm'rs*, 789 F. Supp. 3d 1051, 1056, 1060 (D. Colo. 2025) (explaining history of CPLA and "reluctantly" dismissing claims resulting from shooting at LGBT nightclub). The need for legislative intervention to protect businesses from premises liability following shooting events in Colorado is just one

Moreover, the growing prevalence of shootings in commercial establishments may raise a factual issue on foreseeability that precludes the case from being decided at an early stage, potentially subjecting the business to years of drawn-out and expensive litigation and discovery. *See, e.g., Axelrod*, 65 F. Supp. at 1099 (denying summary judgment to defendant finding that "the grim history of mass shootings and killings that have occurred in more recent times" made it possible that the theater should have anticipated the risks of gun violence on its premises, but eventually resolving litigation in favor of defendant movie theater after defendant had been forced to incur substantial costs"); *Haire v. Bonelli*, 107 A.D.3d 1204, (N.Y. App. Div. 2013) (granting summary judgment to defendant shopping mall where mass shooting occurred, following significant discovery and expert testimony, and years of litigation). Thus, even if a business may have a defense to liability on the merits, the expense of litigation and the inherent unpredictability of jury trials may lead it to settle cases arising out of shooting incidents.

This duty to protect patrons from reasonably foreseeable harm, combined with the increasing prevalence and foreseeability of gun violence in commercial establishments, puts businesses at a risk of incurring significant liability and litigation costs associated with shootings that take place on their premises. Businesses face a growing risk of gun violence on their premises, whether from mass shootings or from altercations between patrons, of the kind that might have

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additional indication of the continued prevalence of mass shootings in commercial locations.

once escalated only to fisticuffs but now escalate instead to deadly gun violence. And years' long court battles, even if the business is ultimately victorious, can deplete the resources of a small business. That drain can also undermine local communities more broadly, if local businesses are forced to close or reduce operations because they cannot afford such costs.

Local governments and businesses therefore both have a strong interest in ensuring that businesses can be vigilant to the presence of guns on their premises. But in a right-to-carry default regime, a business may have no way of knowing which patrons are armed: patrons under such a regime will have no obligation to inform businesses that they are carrying weapons. And businesses may well not want to subject all of their patrons to the inconvenience of declaring upon entry whether they do, or do not, have weapons, especially since relatively few patrons are likely to carry weapons on to commercial property. By contrast, under a default rule under which persons carrying firearms must affirmatively obtain the consent of the business owner to enter, a business can much more readily make itself aware of the potential presence of firearms and can take necessary steps to both prevent violence and mitigate their liability. Requesting consent before bringing a firearm onto the private property of another does not impinge on the Second Amendment, but it does allow businesses the opportunity to ensure that they are aware of any firearms on their property and to take reasonable steps to protect their patrons and, in turn, minimize their liability. And, of course, a business always retains the discretion to consent to licensees carrying firearms on the premises, without any need for gun owners to ask for permission.

Businesses may also face higher insurance costs, or barriers to coverage, to protect themselves against liability for injuries caused by firearms. Not all insurance policies provide coverage for shootings that occur on business premises. *See, e.g., Hudson Specialty Ins. Co. v. Snappy Slappy LLC*, 2019 WL 1938801, at *2–3 (M.D. Ga. May 1, 2019) (finding that the insurance policy of the bar where a shooting took place did not provide coverage because the policy excluded coverage for injuries "arising out of the . . . use of firearms or weapons"); *Atain Specialty Ins. Co. v. Sai Darshan Corp.*, 226 F. Supp. 3d 807, 810, 819 (S.D. Tex. 2016) (holding hotel could not recover for expenses arising from shooting on its property because the hotel's insurance policy contained exclusion for "Assault or Battery . . . at or near the premises owned or occupied by the Insured"). And even where an insurance policy does include coverage for injuries arising out of shooting incidents, those policies may become more costly, as businesses must adapt to the new reality that at any given moment, some of their patrons may be armed. And if insurance becomes too costly for local businesses, they may close—to the detriment of their patrons, employees, and local communities generally.

Under the rule advanced by Petitioners here, where a business owner must take affirmative steps to publicly post notice that they disallow firearms without consent, businesses face greater obstacles to protecting themselves and their patrons. By contrast, in a no-carry default regime, business owners can more readily assure themselves that they are aware of any firearms on their premises and take steps to protect themselves and their patrons, including by denying entry to someone who is carrying a dangerous weapon or otherwise presents a risk to patrons.

II. Default rules, which express policy preferences and not constitutional rights, are useful tools that state and local governments use to protect both property owners and the public.

States and municipalities have a long tradition of adopting and reformulating default rules, which are useful tools to protect both the general public and property owners. The right to exclude is "one of the most treasured" rights of property ownership, *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021), and persists even when property has been "opened" to the public to serve a commercial function. Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract 303 (Chicago: Callaghan and Company) (1879) (explaining that "[e]very retail dealer impliedly invites the public to enter his shop for the examination of his goods" but that "the invitation is limited by the purpose"). Implied permission to enter another's property does not imply—much less guarantee—permission to enter under all circumstances, for any purpose, or without any behavioral limitations.

The right of commercial property owners to exclude is not absolute, of course, and can be modified to accomplish important public policies—most notably, the principle forbidding invidious discrimination in public accommodations.[4] And states and

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[4] The Supreme Court has repeatedly rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty. *Heart of Atlanta Motel, Inc. v.*

municipalities can also modify the right to exclude to allow socially useful and important functions to take place on private commercial property. *See, e.g., PruneYard Shopping Ctr. v. Robbins*, 447 U.S. 74 (1980) (upholding a provision of the California Constitution protecting free speech rights on private commercial property). But state and local governments can also recognize that the property owner's right to exclude is an important tool in protecting public safety and commerce, and they can set default rules against which property owners and potential licensees can negotiate. The choice of which default rule to use—whether, for example, to allow patrons to bring guns onto property, or to conduct political canvassing on private property (a) only if the owner affirmatively consents or (b) unless the owner affirmatively refuses—is a matter for policy decision, not constitutional right. Variance between these default rules reflects the fact that our constitution largely leaves regulating private property to the states and is consistent with states' retention of the power to set and adjust such rules as a matter of public policy.

Whether in the context of property ownership or otherwise, default rules maximize whatever substantive or procedural values the "choice architect"—here, a legislature or municipal body—wants to promote by working as "nudges," not mandates. S.I. Strong, *Truth in A Post-Truth Society: How Sticky Defaults, Status*

United States, 379 U.S. 241, 260–61 (1964) (collecting cases). On the contrary: there is no doubt that legislation prohibiting race-based discrimination in the use of public accommodations is within the police power of the state (and thus municipalities, except as restricted by state constitutions). *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953).

Quo Bias, and the Sovereign Prerogative Influence the Perceived Legitimacy of International Arbitration, 2018 U. Ill. L. Rev. 533, 558 (2018). Indeed, many law and economics scholars consider default rules "prime nudges" specifically because they are "interventions that maintain freedom of choice, that do not impose mandates or bans, but that nonetheless incline people's choices in a particular direction." Cass R. Sunstein, *Deciding by Default*, 162 U. Pa. L. Rev. 1, 5 (2013). Instead, default rules work by setting a reference point and altering the impact of transaction barriers and biases. *See* Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. Chi. L. Rev. 1155, 1157, 1161 (2013).

Identifying the right default rule is often not simple, and policymakers must weigh numerous factors, including balancing socially valuable benefits (the right of self-defense, the right of citizens to engage each other on political issues) against costs (the risk of violence, and detriments to commerce if the public fears patronizing commercial establishments where dangerous or annoying activity may take place). Policymakers must also consider the impact of shifting transaction barriers such as opt-out costs, confusing opt-out procedures, and invisible opt-out options. *Id.* at 1163. The impact of those factors on a party's choices is augmented by biases—including loss aversion, discounting, procrastination, and omission bias—that alter how a person might weigh the costs and benefits. The impact of these factors is not limited to individual decision-making. Policy defaults have the power to attract (or repel) business, *id.* at 1171, which makes the substance of the default rule particularly important.

In particular, default rules help commercial property owners calibrate how to assure their patrons that they will have a safe and welcoming experience—and thus remove impediments to commerce, which benefits not just the businesses themselves but also their patrons, their employees, and the communities in which they are located. The decision to adopt any default rule must take into consideration the transaction costs involved in opt-outs. Against the backdrop of a default rule, one party might fear that proposing an opt-out from the default will dissuade another party from entering into an agreement. Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 Fla. St. U. L. Rev. 651, 652 (2006). For example, under a default rule allowing patrons to carry guns onto private property unless the property owner affirmatively objects, a business owner might fear that opting out of the default rule (for example, by posting a sign saying "No Guns Allowed") would dissuade pro-carry individuals from entering. But a business owner might well fear the opposite, instead worrying that opting out of the opposite default rule (by posting a sign saying "Guns Allowed") would dissuade certain individuals, whether for fear for their own safety or due to perceived political misalignment, from coming in.

Regardless, the default rule is a policy choice well within the remit of state and local governments, and policymakers can take into account a wide range of considerations, including how best to promote commerce, how to offer local businesses protection against disruption and risk of liability, and which default rule best reflects the preference of the public. States and municipalities have adopted (and altered) hundreds of default rules across a broad swath of policy areas. For

example, some prohibit people from parking a vehicle on private property without the express permission of the property owner. Poway, Cal., Mun. Code. § 10.48.020 (2025); Va. Code § 46.2-1215 (2025). Others govern third parties' deposit of garbage on another's property. *See, e.g.*, Baltimore, Md., City Code (Health) § 7-609.

State and municipalities' default rules are not static: New York City, for example, recently adopted a rule making it unlawful to bring dogs into a dining establishment unless the owner posts a sign stating that dogs are allowed. It did so for a variety of policy reasons, including "to limit potential dog-to-dog altercations." NYC Dep't of Health and Mental Hygiene, *Notice of Public Hearing and Opportunity to Comment on Proposed Rules* (July 2025), *available at* https://perma.cc/DRS8-R5PH. Jersey City recently flipped its default rule regarding solicitation to prohibit that behavior on private property without the owner's consent. Jersey City, N.J., Code of Ordinances § 245-7 (2025). The fact that it did so raises no constitutional concerns; the First Amendment does not grant a constitutional right to solicit funds on another's private property. So too, in the context of firearms, several states have adopted a no-carry default rule for private dwellings. Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J.L. Med. & Ethics 183, 184 (2020). That also raises no constitutional concerns, as the Second Amendment does not grant a right to carry firearms on another's private property.

Such changes are common and often reflect evolutions of property owners' preferences. Ian Ayres & Fredrick E. Vars, *Tell Me What You Want: An Affirmative-Choice Answer to the Constitutional Concern*

About Concealed-Carry on Private Property, 17 J. Legal Analysis 105, 111 (2025). In the 1800s, for example, most states flipped the default rule regarding whether domesticated cattle were allowed to graze on another's property. *Id.* More recently, states have adopted default rules governing drone use in the airspace above another person's private property. *See, e.g.*, Nev. Rev. Stat. § 493.103 (2015); Fla. Stat. § 934.50(3)(b) (2022).

Safety-focused default rules are common, both as a matter of law and business. For example, products are often sold with maximally safe settings as the default, "shielding consumers from physical injury and manufacturers from injury to reputation and product-defect liability." Willis, *supra* p. 14, at 1170 (citation omitted). In the legal context, several states and the District of Columbia have default rules preventing individuals from carrying firearms at a private residence absent the owner's consent. *E.g.*, La. Stat. Ann. § 1379.3 (West 2020); D.C. Code Ann. § 7-2509.07 (West 2019); Ark. Code. Ann. § 5-73-306 (West 2019); Alaska Stat. Ann. § 11.61.220 (West 2019).

By implementing a default no-carry regime, Hawaii expressed its policy preference to minimize transaction costs for businesses and patrons whose personal and financial interests align with that default rule. By doing so, the State both granted property owners a measure of assurance against liability (*see supra* pp. 5–11*)* and granted the general public a measure of assurance of physical safety while on the premises. No such assurances can be absolute, of course, but that does not disable governments from acting. Doing so was consistent with the role states play in how property owners make exclusion decisions, enabling them to adopt terms of entry that most

closely align with their preferences. *See* Lior Jacob Strahilevitz, *Information Asymmetries and the Right to Exclude*, 104 Mich. L. Rev. 1835, 1837–1838 (2006); *Breard v. Alexandria*, 341 U.S. 622 (1951) (upholding a municipal default rule against door-to-door solicitation).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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