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 PROFESSORS OF PROPERTY LAW AS AMICI CURIAE SUPPORTING RESPONDENT

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INTEREST OF AMICI CURIAE[1]

Amici curiae are professors specializing in property law. Their expertise is relevant to the relationship between property law and the Second Amendment. Amici, listed below, submit this brief in their individual capacities and include their affiliations for identification purposes only:

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners and Respondent agree: the right to carry firearms onto another's property, even property open to the public, begins and ends with the consent of the property owner. *See* Pet. Br. 17 (explaining that "Petitioners have no quarrel" with the principle that "a private property owner has the unquestioned right to exclude others, including those bearing arms" (quotation omitted)). This foundational principle is the starting point for any Second Amendment analysis of Hawai'i's Act 52 private property default rule, codified at Haw. Rev. Stat. § 134-9.5 (2024) (the "private property default rule").

As this Court explained in *New York State Rifle & Pistol Association, Inc.* v. *Bruen*, Second Amendment protection turns on the question of whether the conduct at issue is covered by "the Second Amendment's plain text." 597 U.S. 1, 24 (2022). Here, the answer to that question is no. Since Petitioners concede that there is no right to bring guns onto private property over a property owner's objection, they can only satisfy *Bruen*'s first-step inquiry if the Second Amendment creates a right to the *presumption* that private property owners welcome firearms unless they explicitly state otherwise. Absent such a presumption, Hawai'i's statute—which does not ban firearms but merely sets a default rule for how an owner's silence on the allowance of firearms on

their property will be interpreted—does not implicate the Second Amendment.

Finding entitlement to such a presumption would be at odds with centuries of property law. The Framers ratified the Second Amendment against the backdrop of the common law of trespass, which afforded property owners a virtually unfettered right to exclude unwanted entrants from their property. At common law, as this Court has recognized, all entries onto another's property constituted trespasses absent an express or implied license to enter. And property owners could look to the state to vindicate their property rights, including the right to exclude.

No guaranteed license can be found in the text of the Second Amendment or this Court's jurisprudence. Far from it; a ruling that Petitioners are entitled to a default presumption that they may bring guns onto private property would undermine states' ability to protect the right to exclude.

The Framers also ratified the Second Amendment with the understanding that states set default rules with regard to private property in different ways and to different ends. Then, as now, states were free to alter default property rules, even when those rules implicated the ability of gun owners to carry firearms at will onto private property. That is what Hawai‘i did here. Any conclusion that the Second Amendment deprives states of this capacity would grant the Second Amendment favored status among the guarantees of the Bill of Rights, handicapping states' ability to protect property owners' right to exclude in the Second Amendment context only.

And a ruling that Petitioners are entitled to any sort of presumption as to the silence of property owners would also vitiate the longstanding principle that

constitutional rights end at another's property line. *See, e.g.*, *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 81 (1980); *Hudgens* v. *NLRB*, 424 U.S. 507, 516-521 (1976); *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 568-569 (1972). It would entitle those visiting private property to constitutional protection for their Second Amendment rights in places where their First Amendment rights are not similarly protected or vindicated, for example.

Petitioners can point to no source in the Constitution or this Court's jurisprudence entitling them to the presumption they seek. Without such a showing, Petitioners cannot succeed in demonstrating that the private property default rule infringes upon conduct that the Second Amendment protects.

ARGUMENT

Under *Bruen*, a court asks first whether "the Second Amendment's plain text covers an individual's conduct." 597 U.S. 1, 24 (2022). If the answer is yes, "[t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* Here the answer is no. Private property owners hold a longstanding and unchallenged right to exclude individuals, including individuals carrying firearms, from their private property, and the Second Amendment does not extend the right to carry firearms at the expense of the right to exclude others from private property.

Petitioners have failed to carry their initial burden to show the "conduct" in which they seek to engage is protected by the Second Amendment's plain text. Petitioners hold no right to carry firearms onto private property, including private property open to the public, without permission—an understanding Petitioners appear to

acknowledge. *See* Pet. Br. 17. Petitioners likewise have no freestanding right to have a property owner's silence on armed entry construed as consent. Put simply, the Second Amendment conserved property owners' fundamental right to exclude, including states' traditional power to fashion default rules designed to reinforce and protect that right.

I. THE SECOND AMENDMENT DOES NOT CREATE AN ABSOLUTE RIGHT TO CARRY WEAPONS ONTO PRIVATE PROPERTY

A. The Second Amendment Presumes a Right to Exclude.

The Second Amendment "'codified a right inherited from our English ancestors.'" *Bruen*, 597 U.S. at 20 (quoting *District of Columbia* v. *Heller*, 554 U.S. 570, 599 (2008)); *see also Heller*, 554 U.S. at 592 (recognizing that the Second Amendment "codified a pre-existing right" and providing that "[t]he very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed'"). While recognizing that the Second Amendment right is not set in stone, *see Heller*, 554 U.S. at 582, this Court has also been careful to honor inherited limits on the right. This Court, for example, has bounded the scope of the rights protected by the Second Amendment through an analysis of criminal and civil legal regimes that addressed not only the misuse of firearms but also regulated other conduct. *See United States* v. *Rahimi*, 602 U.S. 680, 694-697 (2024) (analyzing the "distinct legal regimes" of surety laws and the common law prohibition on affrays in defining the scope of Second Amendment rights). In other words, the Second Amendment "did not expand, extend, or enlarge the individual right to bear arms at the expense of other fundamental rights,"

including an "owner's exclusive right to be king of his own castle." *GeorgiaCarry.Org, Inc.* v. *Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012), *abrogated on other grounds by Bruen*, 597 U.S. 1; *accord Rahimi*, 602 U.S. at 737 (Barrett, J., concurring) (the Second Amendment "codified a pre-existing right, and pre-existing limits on that right are part and parcel of it"). As this Court has recognized, the right to keep and bear arms serves, in part, as a protector of private property rights. *See Heller*, 554 U.S. at 635. It should not now be construed to displace those rights.

At common law, private property rights were among the most "sacred and inviolable" rights granted to the individual. 1 William Blackstone, *Commentaries* *140. Blackstone wrote that "nothing … so generally strikes the imagination, and engages the affections of mankind, as the right of property; or 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." 2 William Blackstone, *Commentaries* 2 (Jones trans., Lonang Institute 2005) (1766). Blackstone further stated:

> [T]hese [fundamental rights] may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property: because as there is no other known method of compulsion, or abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

1 William Blackstone, *Commentaries* *129. The centrality of these property rights to a system of ordered liberty was well understood by the Founders. *See GeorgiaCarry.Org*, 687 F.3d at 1265 (collecting evidence).

Incident to the right to private property was the necessity of protecting it. *See Cedar Point Nursery* v. *Hassid*, 594 U.S. 139, 147 (2021) ("The Founders recognized that the protection of private property is indispensable to the promotion of individual freedom. As John Adams tersely put it, '[p]roperty must be secured, or liberty cannot exist.'" (citation omitted)); *see also Chicago, B. & Q.R. Co.* v. *City of Chicago*, 166 U.S. 226, 235-236 (1897) ("Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty' … 'is that of enjoying private property without undue interference or molestation.'" (citation omitted)).

Because one's ability to protect private property is only as strong as the right to exclude others from that property, this Court has faithfully guarded the "right to exclude others" as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979); *see also Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (quoting *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)) (quotation and citation omitted)). The right to exclude is "one of the most treasured" rights of property ownership. *Cedar Point*, 594 U.S. at 149. The Second Amendment was never meant to diminish that right.

B. The Right to Exclude Is Enforced Through the Law of Trespass, Which Imposes Strict Liability for Unauthorized Entries.

The right to exclude is not self-actualizing. It is defined by and enforced through the laws of the state and, principally, the law of trespass. At common law, the default rule was that all entry onto another's private property constituted a trespass unless the entrant received permission or license. Blackstone emphasized English common law's absolutist position on trespass, contrasting it with Roman law's requirement of "a direct prohibition." 3 William Blackstone, *Commentaries* *209. English law, Blackstone observed, "carried the point much farther, and has treated every entry upon another's lands, (unless by the owner's leave, or in some very particular cases) as an injury or wrong, for satisfaction of which an action of trespass will lie." *Id.* As the King's Bench ruled in 1765, the law holds the property of every man so "sacred" that no one "'can set his foot upon his neighbour's close without his leave.'" *Entick* v. *Carrington*, 95 Eng. Rep. 807, 817 (KB 1765); *see also Florida* v. *Jardines*, 569 U.S. 1, 8 (2013) (same). Consistent with this history in English common law, trespass has long been a strict liability offense unless a right to access had been explicitly or implicitly granted. *See, e.g.*, John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 Fordham L. Rev. 743, 748 (2016); *see also Restatement (Second) of Torts* § 158 (1965)*; Burns Philp Food, Inc.* v. *Cavalea Cont'l Freight, Inc.*, 135 F.3d 526, 529 (7th Cir. 1998) ("Trespass is a strict liability tort ...."). This default rule against trespass protects owners' authority to decide who enters their property and under what conditions. *See Alabama Ass'n of Realtors* v. *Department of Health & Hum. Servs.*, 594 U.S. 758, 765 (2021) (per

curiam) ("[P]reventing [landlords] from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude."); 3 William Blackstone, *Commentaries* *209 (the strict rule against trespass recognized "that much inconvenience may happen to the owner[] before he has an opportunity to forbid the entry").

Notwithstanding "[t]he strict rule of the English common law as to entry upon a close," a license to enter "may be implied from the habits of the country." *McKee* v. *Gratz*, 260 U.S. 127, 136 (1922). Petitioners and the United States argue that firearms are welcome on a subset of private property, private property "open to the public," "because the public has an 'implied license' to come and go at such locations." Pet. Br. 26 (quoting *Koons* v. *Platkin*, 673 F. Supp. 3d 515, 610 (D.N.J. 2023), *aff'd in part*, *vacated in part*, 156 F.4th 210 (3d Cir. 2025), *reh'g en banc granted*, *opinion vacated*, No. 23-1900, 2025 WL 3552513 (3d Cir. Dec. 11, 2025)); *see also* U.S. Amicus Br. 25-26 (Nov. 24, 2025).

But a license to enter private property, whether express or implied, is not unlimited, and Petitioners' attempt to sidestep this crucial limitation is both revealing and unavailing. *Jardines*, 569 U.S. at 9 (recognizing limitations to the scope of express and implied licenses). Consent as to one purpose is not consent as to any purpose. This Court has explained, for example, that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds," and that this license "typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.* at 8. But this license does not allow a trained police dog to explore the area around the

home. *Id.* And this Court has given numerous other examples of conduct that would not be covered by an implied license to enter another's private property for the purpose of knocking and seeking further entry. *See id.* at 9 ("[T]o spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police."); *see also id.* at 12 (Kagan, J., concurring) (explaining that a "stranger" on another's porch peering through windows with "super-high-powered binoculars" would be an example of trespass). This Court has thus made clear that the scope of a license—either express or implied—"is limited not only to a particular area but also to a specific purpose." *Id.* at 9. And violating the scope of that license, by exceeding either the geographic scope or the license's purpose, becomes a trespass.

II. THERE IS NO CONSTITUTIONAL RIGHT TO CARRY FIREARMS ONTO PRIVATE PROPERTY OVER AN OWNER'S OBJECTION

Property owners, including owners of properties open to the public, can ban firearms on their property for any reason or no reason at all. The parties do not dispute this point. *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." (citation omitted)). Put simply, the right to exclude inheres in *all* private property—including private property open to the public. *See PruneYard*, 447 U.S. at 81 (reaffirming that property does not "'lose its private character merely because the public is generally invited to use it for designated purposes'" (quoting *Hudgens*, 424 U.S. at 569)); *see also Lloyd*, 407 U.S. at 569 ("The essentially private character of a store … does not change by virtue of being large or clustered

with other stores in a modern shopping center."). This point is uncontroversial, and courts that have considered this question in the Second Amendment context have adhered to this bedrock principle.[2] To conclude otherwise—to grant a constitutional right to carry onto another's property over the owner's objection—would abrogate the owner's right to exclude, the "hallmark of a protected property interest." *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999).

This Court has reliably concluded that the reach of an entrant's constitutional rights end at the private property line. This principle is particularly evident in First Amendment jurisprudence, which this Court has looked to in defining the scope of the Second Amendment right to keep and bear arms. *See, e.g.*, *Heller*, 554 U.S. at 579, 582, 595 (analyzing Second Amendment language and scope in reference to First Amendment protections); *Bruen*, 597 U.S. at 24 ("Take, for instance, the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms.").

Amici are aware of only two potential instances where an owner's use of their private property has been constrained by nonowners' constitutional rights: the enforcement of racially restrictive covenants and

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[2] *See, e.g.*, *Siegel* v. *Platkin*, 653 F. Supp. 3d 136, 158 (D.N.J. 2023) ("'[T]he Second Amendment does not include protection for a right to carry a firearm in a place … against the owner's wishes.'" (citation omitted)); *Christian* v. *Nigrelli*, 642 F. Supp. 3d 393, 407 (W.D.N.Y. 2022), *aff'd sub nom. Antonyuk* v. *Chiumento*, 89 F.4th 271 (2d Cir. 2023), *cert. granted, judgment vacated sub nom.*, *Antonyuk* v. *James*, 144 S. Ct. 2709 (2024), *reinstated in part by*, *Antonyuk* v. *James*, 120 F.4th 941 (2d Cir. 2024); *Kipke* v. *Moore*, 695 F. Supp. 3d 638, 657-658 (D. Md. 2023).

restrictions on street expression in company towns. Neither case offers a rationale relevant to the question presented here.

In *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), the Court did not face a case implicating the owner's right to exclude. Rather, the case pitted property sellers' common-law right to alienate property and the would-be buyers' constitutional right to equal treatment against the rights of other neighborhood residents to enforce a racially restrictive covenant. In other words, property rights were on either side of the ledger, complicating any simple opposition between the rights of property owners and the constitutional rights of nonowners.

And *Marsh* v. *Alabama*, 326 U.S. 501 (1946)—which held that the First Amendment barred a company maintaining complete ownership over an Alabama town from forbidding street distribution of religious materials—is similarly inapposite. The Court later limited *Marsh*'s reach to the company towns of the past, recognizing that "this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned." *Lloyd*, 407 U.S. at 568; *see also PruneYard*, 447 U.S. at 81 ("[W]hen a shopping center owner opens his private property to the public for the purpose of shopping, the First Amendment … does not thereby create individual rights in expression[.]").

Under the First Amendment, private property owners can set their own rules regarding the speech and expression allowed on their premises. *See, e.g.*, *Lloyd*, 407 U.S. at 568-570 (rejecting a First Amendment claim challenging a private shopping mall's restriction on the distribution of handbills). Private property owners may go so far as to ban unwanted speech on their property—which means that private owners have a substantially

stronger right than the government to restrict conduct that would otherwise be constitutionally protected. *Cf. Snyder* v. *Phelps*, 562 U.S. 443, 456-457 (2011) (recognizing public streets as public forums where the First Amendment limits the government's ability to restrict speech). This aspect of First Amendment jurisprudence reflects the unextraordinary point that constitutional rights do not trump a property owner's right to exclude. *See, e.g.*, *Rowan* v. *U.S. Post Off. Dep't*, 397 U.S. 728, 737-738 (1970) (holding that "[t]he asserted [First Amendment] right of a mailer [to send unwanted material to an unreceptive addressee] … stops at the outer boundary of every person's domain" because "[t]o hold less would tend to license a form of trespass"); *Breard* v. *City of Alexandria*, 341 U.S. 622, 645 (1951) (upholding a municipality's no-solicitation default rule because "[i]t would be … a misuse of the great guarantees of free speech and free press to … force a community to admit the solicitors of publications to the home premises of its residents"); *Dietemann* v. *Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment [right to newsgathering] is not a license to trespass.").

Moreover, holding that individuals have a constitutional right to carry firearms onto private property over the property owner's objection would implicate longstanding Fifth Amendment jurisprudence, as the government is constitutionally prohibited from appropriating the right to exclude. *See Tahoe–Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002) (emphasizing that where the government appropriates a property interest, the Takings Clause imposes a "*categorical duty* to compensate the former owner" (emphasis added)). Indeed, Petitioners correctly reiterate that the right to exclude "belongs to the property owner, not the State." Pet. Br. 17. Consistent with

that principle, the Court has made clear that a government-authorized appropriation of an owner's right to exclude is a *per se* taking. *Cedar Point*, 594 U.S. at 149-150 (determining that a regulation granting organizers temporary access to an employer's property was a *per se* physical taking and declining to weigh the *Penn Central* regulatory-taking factors).

Preventing landowners from removing unwanted armed entrants thus appropriates the owners' right to exclude and implicates the Takings Clause. Whether the government takes the right of armed entry for itself or for a third-party is irrelevant to the takings analysis. *Loretto*, 458 U.S. at 432 n.9 (determining that a taking occurs "without regard to whether the State, or instead a party authorized by the State, is the occupant"). Nor does it matter how long unwanted gun carriers may remain on the property before they are discovered and removed. Any "government-authorized physical invasion[]," even if temporary, is a taking. *Cedar Point*, 594 U.S. at 150. Granting armed individuals the unconditional right to enter private property is the functional equivalent of a forced easement, which this Court has long found to be a taking. *See, e.g.*, *Kaiser Aetna*, 444 U.S. at 180.

The Takings Clause implications of any blanket right to carry firearms onto private property over owner objection are possibly thorniest with regard to private property "closed" to the public. *Cf. Cedar Point*, 594 U.S. at 156-157 (distinguishing between how Takings Clause claims are assessed when someone's property is "a business generally open to the public" rather than "property closed to the public"). But constitutional protections from government infringements on the right to exclude are not limited to "closed" private property. *Dolan* v. *City of Tigard*, 512 U.S. 374, 394 (1994) (permit

condition requiring a commercial supply store owner to dedicate land for a public greenway "eviscerated" the owner's right to exclude and was a taking). Although some forms of entry onto property open to the public may still be better analyzed under the more "flexible" *Penn Central* regulatory taking framework, *see Cedar Point*, 594 U.S. at 155-157, this Court has never found that owners of property open to the public must completely surrender their right to exclude. Rejecting any notion of a freestanding constitutional right to bring a gun onto private property is therefore consistent with how this Court has understood constitutional protections. Doing so affirms the Court's longstanding vindication of the right of private property owners to exclude unwanted conduct on their property and protects the constitutional balance between civil liberties and property rights.

III. There Is No Constitutional Right to the Presumption that a Private Landowner Welcomes or Will Allow Firearms on Their Premises

Just as there is no Second Amendment right to carry a firearm onto private property without the property owner's consent, there is no Second Amendment right to presume that a private property owner consents to entry with a firearm. Under well-established principles of property law, an entry is a trespass absent express or implied license to enter. Holding that the Second Amendment creates a license for those carrying firearms to enter private property would fatally undermine the right to exclude, barring private property owners from leveraging the law of trespass to keep firearms off their property by effectively substituting the government's (presumptive) consent for the property holder's. The plain text of the Second Amendment creates neither an express license nor a blanket implied license for gun

owners to carry onto private property until it is revoked. Rather, the Second Amendment preserves the ordinary ability of states to set default rules that govern expectations regarding a property owner's right to exclude, as Hawai'i did.

A. Hawai'i's Law Is an Ordinary Property Default Rule That Falls Within the Power of States.

The "bundle of sticks" constituting property rights is defined by state law. *United States* v. *Craft*, 535 U.S. 274, 278 (2002) (noting that "State law determines … which sticks are in a person's bundle"); *see, e.g.*, *Board of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972) (explaining that property interests "are not created by the Constitution," but by "an independent source such as state law"). A key means by which states regulate property owners' rights generally, and reinforce the right to exclude specifically, is through default rules. Default rules codify presumptions about an owner's terms of entry and the boundaries of one's property that govern unless the owner decides otherwise.

This is not new. As Jeremy Bentham wrote two centuries ago, "[p]roperty is nothing but a basis of expectation" that "can only be the work of law." Bentham, *The Theory of Legislation* 111-112 (Hildreth trans., Trübner & Co. 1864). In other words, the entire notion of a system of private property relies on the law enforcing the public's expectations of what it means to own private property. *See also* 1 Blackstone, *Commentaries* *144 ("And, lastly, to vindicate [property] rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law."). In setting default rules, states establish necessary bright-line

expectations for what it means to own, visit, or otherwise engage with property within their jurisdictions.

Default rules are ordinary tools for delineating the bounds of private property rights. States have established default rules on topics as varied as whether a landowner is entitled to natural resources like oil, gas, and groundwater that lie partly beneath their land, *see, e.g.*, *Coastal Oil & Gas Corp.* v. *Garza Energy Tr.*, 268 S.W.3d 1, 13 (Tex. 2008) (describing the "rule of capture," which "gives a mineral rights owner title to the oil and gas produced from a lawful well bottomed on the property, even if the oil and gas flowed to the well from beneath another owner's tract"); how to partition property among tenants-in-common, *e.g.*, Idaho Code § 55-508; whether the owner of part of the bed of a nonnavigable lake may enjoy the entire lake rather than only that portion of the lake described in the deed, *see Orr* v. *Mortvedt*, 735 N.W.2d 610, 616 (Iowa 2007) (collecting cases); and myriad other legal presumptions. These examples demonstrate the utility of default rules in shaping and reflecting the expectations of the public as to the use and enjoyment of private property.

Default rules are especially effective at defining the boundaries of the right to exclude and the wrong of trespass. For instance, each state has a rule specifying whether the absence of a common signifier of exclusion (*e.g.*, a physical fence) communicates consent to enter. By setting such rules, states clarify presumptions about whether entry onto another's property is lawful—presumptions that landowners retain the right to modify as they see fit.

States often change these presumptions to better align with the evolving needs of their citizens. For example, a historical default rule allowed domesticated

cattle to graze on another's land without the rancher needing to obtain advance consent. During the Nineteenth Century, most states reversed the default rule, instead requiring a visiting rancher to obtain the landowner's consent to graze cattle on the property. *See* Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 Stan. L. Rev. 623, 660-661 & n.95 (1986). In doing so, states made the choice to reinforce the property owner's exclusion right by altering the default presumption for entrants on private property.

Petitioners argue that Hawai'i's law was intended to "thwart the 'general right' to carry" in the wake of *Bruen*. Pet. Br. 11. Not so. In enacting the private property default rule, Hawai'i has sought to ensure that guns are brought onto private property only with the informed consent of property owners. Hawai'i's law therefore vindicates the right of private property owners to exclude unwanted conduct on their property by making sure that they know in advance whether an entrant intends to bring a gun onto the property. The private property default rule is focused on relations between property owners and gun owners, not on gun owners' ability to lawfully carry their firearms.

Consistent with default rule legislation, Hawai'i's private property default rule clarifies and responds to the expectations and preferences of private property owners. For one, there has been widespread public misunderstanding about whether it is lawful to bring a gun onto private property. One nationwide study showed that nearly 80 percent of respondents from across the country indicated they "don't know" whether a plumber is allowed to bring a gun without explicit permission into one's home, as did over 70 percent in response to the question of whether a friend is allowed to bring a gun

without permission into one's home, and 65 percent in response to the question of whether customers are allowed to bring guns without permission into private businesses. Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J.L. Med & Ethics 183, tbl. A5 (2020). And the small number of respondents who thought they knew the law were often mistaken; for instance, these respondents were nearly evenly split on whether customers are presumptively allowed to bring guns into private businesses. *Id.* Given this, owners who prefer not to have concealed guns on their property are often unwittingly permitting them.

Hawai'i's default rule vindicates the interests of property owners in other ways as well. The rule promotes information disclosure by prospective entrants, which helps owners execute terms of entry that align more closely with their own preferences. *See* Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 Mich. L. Rev. 1835, 1837-1838 (2006). The rule allows owners to more easily bring trespass actions as it provides invitees with increased notice about whether their license to enter private property extends to armed entry; without such a default rule, an invitee could potentially defeat a trespass action by arguing they did not see signage restricting firearms on the property. The rule protects property owners who may reasonably worry that publicly announcing a prohibition on firearms on their property could result in their property becoming a target for protests or criminals. And Hawai'i's rule gives effect to the regional custom of its citizenry. *See* Resp. Br. 20-22.

The private property default rule is not a departure from the tradition of states using default rules to define the scope of private property rights but instead falls

squarely within it. There is nothing exceptional about Hawai'i's statute that warrants treating it differently than the lion's share of default rules about the property ownership "bundle of sticks" that states unquestionably have the power to craft.

B. The Second Amendment Does Not Alter States' Power to Set Default Rules About the Right to Exclude.

Hawai'i does not ban the carrying of firearms onto another's private property; its default rule merely recasts the meaning of a landowner's silence on the issue. Because Petitioners bear the burden of demonstrating that "the Second Amendment's plain text covers [their] conduct," they must demonstrate that the act of carrying a gun onto another's property without first obtaining that owner's permission—the "conduct" encumbered by the rule—is "cover[ed]" by the plain text. *Bruen*, 597 U.S. at 17. This they cannot do.

First, the text of the Second Amendment does not limit states' power to set default rules for private property, even about carrying guns. As an initial matter, the text protects "the right of the people to keep and bear Arms," but does not refer to private property whatsoever. U.S. Const. amend. II. The plain text of the Second Amendment does not establish a right to a presumption of being allowed to carry a gun onto private property.[3]

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[3] Notably, although the Second Amendment does not reference private property, two other amendments do. The Third Amendment restricts the government's ability to quarter soldiers in private homes without the owner's consent. U.S. Const. amend. III. And the Fifth Amendment's Takings Clause requires just compensation when the government puts formerly private property to public use. *Id.* amend. V; *see supra* Part II. These amendments

Indeed, *Bruen* only recognized a "right to bear arms in public." 597 U.S. at 70. Construing that recognition to include private property would be at odds with this Court's own Second Amendment jurisprudence. Because the Second Amendment merely codified a pre-existing right, *see Heller*, 554 U.S. at 592, it incorporated a common law of trespass that did not have any carve-out for firearms. *See, e.g.*, *Baker* v. *Howard Cnty. Hunt*, 188 A. 223, 227-228 (Md. 1936) (surveying the history of "the relative rights of fox hunters" and finding "no doubt that … if the hunter himself goes on the lands of another against the owner's will, he is a trespasser"). If "public" includes private property, then the Second Amendment would be supplanting the common law of trespass, not operating alongside it.

Second, default rules expanding a property owner's right to exclude do not become unconstitutional simply by burdening constitutionally protected conduct. This Court recognized that very point in the First Amendment context in *Breard*, which upheld a municipal default rule that disallowed door-to-door solicitation (a constitutionally protected activity) unless a private owner expressly consented.[4] The Court explained that "[f]reedom of speech or press does not mean that one can

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expressly limit states' power to alter private property rights. The Second Amendment does no such thing.

[4] *Breard* was abrogated in part by *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980). *Schaumburg* rejected the notion that commercial speech falls beyond the First Amendment's protection, and it held that "[t]o the extent that [*Breard*] h[e]ld or indicate[d] that commercial speech is excluded from First Amendment protections, [that] decision[], to that extent, [is] no longer good law." *Id.* at 632 n.7. But the proposition that a law is not unconstitutional merely because it necessitates advance consent to engage in constitutionally protected conduct survives.

talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved." 341 U.S. at 642. "[I]t would be," the Court concluded, "a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit [solicitors] to the home premises of its residents." *Id.* at 645.

As with the First Amendment and *Breard*, so too with the Second Amendment and this case. As a default rule, Hawai'i's statute does not regulate gun ownership, possession, or carriage as such. Instead, it preserves the law's traditional delegation to property owners of the decision to allow firearms onto private property. The Second Amendment is not "a second-class right," but it also does not command favored treatment among the guarantees of the Bill of Rights. *McDonald* v. *City of Chicago*, 561 U.S. 742, 780 (2010) (plurality opinion).

In its amicus brief, the United States argues that because homeowners may decide whether to allow solicitors or others access to their property to "ring doorbells to communicate ideas to the occupants," a city may not make this decision for its inhabitants by banning door-to-door solicitation. U.S. Amicus Br. 32. But the cases relied on by the United States do not help its argument. The United States cites (Amicus Br. 32) *Martin* v. *City of Struthers*, but the law overturned by the Court in *Martin* forbade speech regardless of the homeowner's wishes. This law thus did not work to vindicate a property owner's rights, as the property owner could not make a decision whether to admit or exclude a potential entrant at all. *See* 319 U.S. 141, 142 (1943). The United States also relies on *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*, a case in which the Court invalidated a village ordinance that prohibited canvassers from going "in and upon" private residential

property to promote any cause without previously obtaining a permit from the municipality. 536 U.S. 150, 154-155 (2002). While the Court invalidated the ordinance, its decision rested partly on the fact that an unchallenged portion of the ordinance allowed property owners to opt out of solicitation via signage or other means, which adequately protected their privacy interests. The Court explained that these opt-out options, "coupled with [a] resident's unquestioned right to refuse to engage in conversation with unwelcome visitors," provided "ample protection for the unwilling listener." *Id.* at 168. In *Martin* and *Watchtower*, the Court confronted ordinances banning or limiting door-to-door solicitation, an activity that fully comports with the implied license to approach a private property as later articulated in *Jardines*. *See Jardines*, 569 U.S. at 9; *see also Martin*, 319 U.S. at 141. Moreover, the ordinance in *Watchtower* confronted conduct that was inherently and completely in the control of the property owner—no solicitor could engage in conversation with a homeowner over the homeowner's objection. *Watchtower* is thus inapposite.

Third, the challenged provision is hardly the first rule setting the default terms of bringing firearms onto another's property. Every state has established a default rule for carrying firearms onto another's unimproved rural property to hunt. Twenty-five states presume that such entry is lawful. In these states, landowners bear the burden of posting signs on their property to prevent unwanted gun entry. But 25 states have flipped that presumption, instead requiring landowners to signal affirmatively that guns are permitted on their property. *See* Ayres & Jonnalagadda, 48 J.L. Med & Ethics at tbl. A1.

The dispute between Petitioners and Respondent about the second step of *Bruen's* analytical framework is

further illustration that Petitioners are not entitled to a presumption that private property owners, including owners of property open to the public, welcome firearms onto their property. As the Ninth Circuit discussed below and as the parties summarize in their respective briefs before this Court, there is a robust historical tradition of various states setting default rules about the carrying of firearms on private land.[5] While the scope and import of these rules were varied, it is unquestioned that state and colonial legislatures have, for hundreds of years, determined how a property owner's silence as to a license to carry firearms onto their property is to be construed.[6]

While Petitioners and Respondent discuss the implications of these laws on *Bruen*'s historical analog inquiry, all these laws also reflect that states have long exercised the power to set default rules regarding the right to carry firearms onto private property. Petitioners fail to explain why it is permissible for a state legislature to set these rules in the first instance but impermissible for a legislature to shift the default as Hawai'i has done.[7]

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[5] Though this brief focuses on the first step of the *Bruen* analysis and the historical tradition of states articulating default rules about firearms on private land, these statutes similarly support Respondent's *Bruen* Step Two historical analysis. *See* Resp. Br. 27-39. As Hawai'i avers, the private property default rule is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24.

[6] *See, e.g.*, Act of Dec. 21, 1771, 1776 N.J. Laws 343-344 (Collins ed., 1776); 1721 Pa. Acts 22; 1728 Md. Laws 13; Act of Dec. 20, 1763, § 1, 1773 N.Y. Laws 442 (Gaine ed., 1773); Act of Jan. 30, 1790, § 2, 1789 Mass. Acts & Laws 438.

[7] This Court has made clear that an implied license to access private property is limited to a specific area and specific purpose. *Jardines*, 569 U.S. at 9. Crucially, in a trespass case from over a

Even more fundamentally, Petitioners' efforts to explain away certain analogs considered by the Ninth Circuit miss the mark. Petitioners argue, for example, that the 1771 New Jersey law considered by the Ninth Circuit applied to only "improved" or "inclosed" lands "closed to the public." *See* Pet. Br. 33-34. But Petitioners ignore the fact that in Eighteenth Century New Jersey, private business property could be improved or "inclosed" while still being open to do business with the public. *See* Hendrik Hartog Decl. ¶ 32, *Koons* v. *Platkin*, No. 1:22-cv-07464 (D.N.J. Feb. 13, 2023), ECF No. 84. It thus does not follow that the New Jersey statute did not reach property open to the public.

Landowners have the simplest possible tool for rejecting a conduct-based default rule like the challenged provision of Hawai'i's law: consent. *See*, *e.g.*, Haw. Rev. Stat. Ann. § 183D-26 (2019) (prohibiting hunting on private property without the owner's consent); Borough of Westville, N.J. General Legislation §§ 187-1, -2 (2007) (prohibiting graffiti on private property without owner's consent); Haw. Rev. Stat. Ann. § 521-70(c) (2019) (prohibiting tenant from using unit for a commercial purpose without owner's consent); City of Jersey City, N.J. Code

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century ago, this Court recognized that the customs of a state, and the state's property default rules, inform the scope of any implied license. *See McKee*, 260 U.S. at 136. In other words, in considering a potential trespass and an implied license to enter onto another's property, this Court used property default rules to inform the scope of an implied license, rather than vitiate the right to exclude by imposing its own concept of how these default rules should be drawn. *See id.* (considering the scope of an implied license to "wander, shoot and fish at will" on "expanses of unenclosed and uncultivated land" in the State of Missouri, and linking this implied license to custom, "habit[]," and the State of Missouri's default property rules with respect to enclosed and cultivated lands, which banned hunting and fishing on these properties).

of Ordinances § 245-7 (1978) (prohibiting solicitation on private property without owner's consent); Fla. Stat. § 934.50(3)(b) (2022) (prohibiting the use of certain drones to conduct surveillance over private property without owner's consent). That the decision to allow or disallow conduct on property rests with the landowner reflects that default rules do not *ban* private behavior. They simply establish baseline terms from which landowners can easily depart.

* * *

Regardless of how this Court rules, Petitioners may, of course, bring firearms onto private property with the express or implied license of the property owner. But there is no right to bring guns onto private property *over* a property owner's objection. Therefore, Petitioners can only succeed in their challenge to Hawai'i's default rule if the Second Amendment creates an entitlement to the *presumption* that private property owners welcome firearms unless they explicitly state otherwise. Such an entitlement finds no source in the Second Amendment or this Court's jurisprudence.

To find otherwise would undermine states' ability to protect property owners' right to exclude and accord the Second Amendment favored status among the guarantees of the Bill of Rights. It would vitiate the longstanding principle that constitutional rights end at another's property line: entrants to private property would have constitutional protection for their Second Amendment rights in places where their First Amendment and other civil rights are not similarly protected.

At bottom, Petitioners can point to no source in the Constitution or this Court's precedent entitling them to the right to the presumption they seek. Without that right, Petitioners cannot succeed in showing that the

challenged provision of Hawai'i's law infringes upon conduct that the Second Amendment protects.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted.

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DECEMBER 2025