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 PROPERTY LAW PROFESSORS CLAIRE PRIEST, CAROL M. ROSE & JOSEPH WILLIAM SINGER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Timothy C. Hester
Counsel of Record
Hassan Ahmad
Rachel Bercovitz
William Meyer
Cameron Bakkar
Andrew White
COVINGTON & BURLING LLP
850 10th Street, NW
Washington, DC 20001
(202) 662-6000
thester@cov.com
Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*[1]

Amici are law professors whose research, writing, and teaching focus on property law. They have no personal stake in the outcome of this case. Their sole interest is in assisting the Court in understanding fundamental principles of property law and default rules of property relevant to the resolution of this case. Joining in this brief as *amici* are the following professors:

Claire Priest, Simeon E. Baldwin Professor of Law and Professor of History, Yale Law School

Carol M. Rose, Gordon Bradford Tweedy Professor Emeritus of Law and Organization, Yale Law School

Joseph William Singer, Bussey Professor of Law, Harvard Law School

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[1] The views of *amici* expressed here do not necessarily reflect the views of the institutions with which they are or have been affiliated, whose names are included solely for purposes of identification. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

From the earliest days of the Republic, courts and legislatures have recognized that property rights, including the right to exclude, are of great importance in the legal order but are not necessarily fixed; rather, aspects of property rights have continuously been subject to social, customary, and democratic control. States have repeatedly adjusted the right to exclude through default rules that reflect evolving conceptions of ownership and access, and that differ across time, by region, and by property type. As illustrated in the historical examples discussed in this brief, these adjustments sometimes expanded property access and at other times contracted it—by permitting hunting and grazing on unenclosed and uncultivated land and by imposing duties on businesses open to the public—and later revising those defaults as circumstances changed.

In analyzing the legitimacy of regulations of property rights, this Court is guided by "history and precedent." *Tyler v. Hennepin Cnty.*, 598 U.S. 631, 639 (2023). As *amici* describe, historically, the right to exclude has been defined by local law and custom, and has been recalibrated legislatively over time, both in small increments and full pendulum swings. *See, e.g.*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 753 (1998) ("[The world] is a complex tapestry of property rights of different sorts (private, public, common) with different types and degrees of exclusion rights being exercised by different sorts of entities in different contexts.").

The Hawaii legislature's revision of its default rule to prohibit armed entry onto private property without the owner's express consent fits soundly within this historical tradition.

ARGUMENT

I. Legislatures Historically Set and Modified Default Rules Regarding Hunting and Roaming on Unenclosed and Uncultivated Land.

Although "[t]he common law of England gave the landowner an unqualified right to exclude people and required fencing livestock in," colonists departed from this rule, recognizing an implied license on unfenced and uncultivated property. Brian Sawers, *The Right to Exclude from Unimproved Land*, 83 Temp. L. Rev. 665, 675 (2011) [hereinafter Sawers, *The Right to Exclude*]; *see also* Thomas W. Merrill, Henry E. Smith, & Maureen E. Brady, *Property: Principles and Policies* 375 (4th ed. 2022) (discussing the "widespread[] property custom in the United States limiting a landowner's right to exclude" of "affording hunters a license to hunt over unenclosed unimproved land"). Indeed, until the nineteenth century, "most unenclosed and undeveloped land was open to the public" for hunting and other purposes, and property owners who sought to keep livestock from grazing on their property had to "fence them out." Joseph William Singer et al., *Property Law: Rules, Policies, and Practices* 20 (9th ed. 2026) [hereinafter Singer et al., *Property Law*]. There nevertheless remained heterogeneity in the right to exclude, with variations by region and over time. "[C]olonies and states were constantly tinkering with their fence law and the boundaries of the open range," and by the mid-

nineteenth century, around the time of the Fourteenth Amendment's ratification, "more and more counties voted to close the range." Sawers, *The Right to Exclude* at 679.

As reflected in the discussions regarding hunting and livestock grazing, in Parts I.A and I.B, *infra*, legislatures exercised their authority to adopt and modify the prevailing defaults to accord with changing norms regarding private property.

A. Hunting

Colonial and early state hunting laws rejected the default rule inherited from English common law and instead accounted for local customs and preferences, resulting in a wide variety of "default" exclusion rules for hunters on private property.

Some colonies (and later states) took a more permissive approach than the default rule under English common law, subject to certain qualifiers. Take, for example, the law governing fishing and fowling in the Massachusetts Bay Colony. An ordinance passed in 1641 provided that "[e]very inhabitant who is an householder shall have free fishing and fowling in any great ponds, bays, coves and rivers, so far as the sea ebbs and flows within the precincts of the town where they dwell." *Acts Respecting Liberties in Common, As To Flats, &c. To Pass Over Lands, and To Remove Out of the Colony*, ch. 63, § 2, reprinted in *The Charters and General Laws of the Colony and Province of Massachusetts Bay* 148 (Boston, T.B. Wait & Co. 1814). As amended in 1647, the act also ensured that private property owners could not restrict access to the "great ponds." *Id.* § 4 ("[I]t shall be free for any man to fish and fowl

there[] and may pass and repass on foot through any man's propriety for that end, so they trespass not upon any man's corn or meadow.").

An early decision by a South Carolina court outlined a similar default rule regarding unfenced and uncultivated land for hunters in that state. In 1818, a panel of the state's Constitutional Court of Appeals determined that "the right to hunt on unenclosed and uncultivated lands has never been disputed, and it is well known that it has been universally exercised from the first settlement." *McConico v. Singleton*, 9 S.C.L. 244, 244 (S.C. Const. App. 1818).

Even in states such as South Carolina that authorized hunters to trespass on unenclosed and uncultivated land, however, the permission by its nature was qualified—limited to persons armed if at all only with weapons designed for hunting, and implicitly then only in areas normally remote from other human activity and of presumably less value to landowners.

Accordingly, Vermont's first constitution, from 1777, guaranteed all citizens the "liberty to hunt and fowl, in seasonable times, on the lands they hold, and on other lands (not enclosed)." Vt. Const. of 1777, ch. II, § 39. As a result, in Vermont, "the liberty to hunt extended to unfenced land, regardless of ownership or permission." Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in* Jones, 31 Ga. State. Univ. L. Rev. 471, 495 (2015) [hereinafter Sawers, *Original Misunderstandings*]. Unlike the Massachusetts Bay Colony and South Carolina, however, Vermont placed a time limitation on the rights of hunters: they could

hunt on unenclosed private property only "in seasonable times." Vt. Const. of 1777, ch. II, § 39. New Jersey passed a temporal limitation on hunting as well, restricting such activities "in the night time." 1765 N.J. Laws 326–27.

Other states imposed greater limitations on the rights of hunters to access private property. Maryland required hunters making use of dogs or guns to seek landowner permission before hunting in fenced areas. 1728 Md. Laws 11–13 (requiring "every person that shall . . . come to hunt with Guns or Dogs, within any Inclosed Grounds . . . without Leave or License from the [landowners]" to pay a fine to the landowners). New Jersey had a similar requirement. Act of Dec. 21, 1771, 1821 N.J. Laws 25–26 (requiring hunters to seek a license or written permission from the property owner "to hunt or watch for Deer with a gun, or set in any Dog or Dogs to drive Deer, or any other Game, on any lands not his own."). North Carolina allowed landowners to prohibit hunters from accessing unfenced land, but required the landowner to undertake expensive notice procedures to exercise that right. *See* Sawers, *Original Misunderstandings* at 505.

In 1763, New York banned hunting on enclosed lands, including orchards and gardens. Act of Dec. 20, 1763, 1763 N.Y. Laws, ch. 1233, at 442. For prospective hunters to gain access to such lands, the landowner had to provide them with written permission. *Id.* This more onerous rule was a response to New York's "nuisance" hunter problem—individuals who damaged crops and improvements while traversing private lands. Sawers, *Original Misunderstandings* at 506. Virginia took a similar

approach, banning hunting and fishing within "the bounds of any other person" without the consent of the landowner. Act of Dec. 4, 1792, 1 Statutes at Large of Va., ch. 26, at 78–79; *see* Sawers, *Original Misunderstandings* at 508–09 (concluding that subsequent revisions to this statute reveal that the drafters "probably used the term ['bounds'] to mean fence"). New Jersey took a more novel approach. Instead of differentiating between enclosed and unenclosed lands, a 1771 statute prohibited hunters from entering any land with a firearm, if the landowner paid taxes on or lawfully possessed that land. Act of Dec. 21, 1771, 1771 N.J. Laws, ch. 539, at 344.

During the second half of the nineteenth century, states with stronger rights of access for hunters began to change their laws to favor the rights of landowners over hunters. Between 1865 and 1875, around the time of the Fourteenth Amendment's ratification, six southern states made trespass a criminal offense, four placed new restrictions on hunting on enclosed or posted land, and two states even gave local governments the authority to proscribe hunting on private land. *See* Brian Sawers, *Property Law as Labor Control in the Postbellum South*, 33 Law & Hist. Rev. 351, 360–65 (2015). Also during this time, courts in South Carolina began to expand their conception of enclosed land. Eric T. Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* 30, 39 (2007) [hereinafter Freyfogle, *Common Ground*] (discussing South Carolina case law holding that a private island with no man-made barriers was "enclosed" on account of it being surrounded by water).

This transition to a more landowner-friendly regime can be traced to several factors, mostly economic. As the Industrial Revolution began to take hold in the United States, state legislatures and state courts approached property questions with a newfound goal: economic development. Improvements to transportation, especially the development of a robust railroad network, opened access to national markets for farmers from all parts of the country. Sawers, *The Right to Exclude* at 681; *see also* Shawn E. Kantor & J. Morgan Kousser, *Common Sense or Commonwealth? The Fence Law and Institutional Change in the Postbellum South*, 59 J. S. Hist. 201, 208 (1993) [hereinafter Kantor & Kousser, *Common Sense or Commonwealth?*]. And as prosperity increased, the need for foraging and hunting for subsistence purposes quickly declined. Sawers, *The Right to Exclude* at 681. In addition, the increasing demand for timber made fencing an increasingly expensive activity. 2 Lewis Cecil Gray, *History of Agriculture in the Southern United States to 1860*, at 843 (1933) (noting that in the 1830s and 1840s, fencing costs "required from one third to one half the income from landed property").

B. Grazing

As in the hunting context, state and local legislatures in early America enacted statutes permitting livestock grazing on unfenced land, departing from the English common law rule and placing the burden on landowners to fence livestock

out.[2] Yet by the mid-nineteenth century, around the time of the Fourteenth Amendment's ratification, legislatures increasingly moved away from this default. *See, e.g.*, Singer et al., *Property Law* at 20.

In the eighteenth and first half of the nineteenth centuries, states and localities generally rejected the English law of trespass with respect to unfenced or inadequately fenced land, providing no cause of action for simple trespass to land and placing liability on landowners who harmed another's livestock grazing on such unfenced or insufficiently fenced land. *See, e.g.*, Amendment to 1777 Fence Law, ch. 2, § 3, 1831 N.C. Sess. Laws 5, 6 (placing damages liability on any person "whose fence be adjudged insufficient" and who "unreasonably chase[s], worr[ies], maim[s] or kill[s] any horses, mules, or other stock"); R.H. Clark, T.R.R. Cobb & D. Irwin. *The Code of the State of Georgia*, pt. 1, tit. 15, ch. 8, § 1458, at 284 (1867), Ga. Code Ann. § 1458 (1867) (providing that "[i]f any trespass or damage shall be committed in any enclosure, not being protected . . . by the breaking in of any animal, the owner of such animal shall not be liable to answer for the trespass, and if the owner of the enclosure shall kill or injure such, in any manner, he is liable in three times the damage"). As scholars have recognized, "some courts analogized open . . . land to a common."

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[2] Of course, the trespass of livestock, unlike hunters, does not involve arms. So although trespassing livestock, like "the horses hunters rode and their accompanying dogs," could damage property, Freyfogle, *Common Ground* at 38 (noting "[h]unters on horseback could damage crops and disturb farm operations," and discussing livestock damage suit brought by railroad industry), they were exceedingly unlikely to cause serious human injury or death.

Brian Sawers, *Keeping Up with the* Joneses*: Making Sure Your History is Just as Wrong as Everyone Else's*, 111 Mich. L. Rev. First Impressions 21, 24 (2013); *see, e.g.*, *Law v. Nettles*, 18 S.C.L. 447, 447 (S.C. App. L. & Eq. 1831) ("Uninclosed land, for many purposes, such as hunting and pasture, is regarded as common . . . .").

By the nineteenth century, states and localities began to migrate from this default, enacting statutes to close the range. *See, e.g.*, Freyfogle, *Common Ground* at 54 (noting that "the closing or enclosure of America's countryside . . . began, in many places, early in the nineteenth century"). In 1860, for example, a portion of one county in Virginia closed the range. *See* Act of Jan. 19, 1858, ch. 438, § 1, 4, 1857-58 Va. Acts 263–64 (providing that "owners and occupiers of" specified lands "need not keep up any fence on the boundary lines running through or across said lands" but "[w]henever a public road may cross any part of the land . . . good and substantial gates may be erected across such public road or roads, as parts of the general enclosure"). Other localities and states followed suit during the post-Reconstruction period.

Some, like South Carolina, closed the range statewide. *See, e.g.*, 1882 S.C. Acts, tit. 10, ch. 27, § 1184, at 350–51 (making it illegal for domestic animals "to run at large beyond the limits of [the owner's] own land"). Others, like Georgia, took a piecemeal approach. As early as 1872 and continuing through at least the subsequent two decades, the Georgia legislature enacted legislation allowing individual counties to hold referenda on the closure of the local range. *See* Kantor & Kousser, *Common Sense or Commonwealth?*, at 201; *see also Acts and*

Resolutions of the General Assembly of the State of Georgia 1884–85, pt. 1, tit. 7, at 581–95 (1885). Under that authority, some Georgia counties mandated the closure of the range as a matter of law. *See*, *e.g.*, *Acts and Resolutions of the General Assembly of the State of Georgia* 1884–85, pt. 1, tit. 7, at 593 (1885) ("An act to adopt the provisions of the stock law in and for the 542d district, G.M., in the county of Pulaski").

Although this evolution unfolded across time, there remained, as in the hunting context, variation by region. *See, e.g.*, Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 Stan. L. Rev. 623, 660 n.94 (1986) (noting that during the nineteenth century, "'fencing out' was the dominant rule in the United States, particularly in the *Northern* states," but citing authority reflecting that thirteen states "follow[ed] the English rule" requiring fencing in, while twenty-one states had "fencing-out regimes" (citations omitted)).

In 1788, for example, New York authorized towns to establish rules closing the range. *See* Act of Mar. 7, 1788, 1788 N.Y. Laws, ch. 64, at 766 (authorizing "the freeholders and inhabitants of each and every of the said towns" to "make, establish constitute and ordain such prudential rules, orders and regulations" regarding "the times, places and manner of permitting or preventing, cattle, horses, sheep and swine, or any of them, to go at large" and "for ascertaining the sufficiency of [a] partition and other fences," among other elements). In Connecticut, after having adopted the open range in 1643, the state amended its fence laws multiple times during the subsequent two

centuries. *See Hine v. Wooding*, 37 Conn. 123, 127–29 (Conn. 1870) (discussing amendments in 1650, 1666, 1702, 1732, 1821, and 1866). And as various states closed the range by the mid- to late-nineteenth century, others such as Ohio authorized localities to keep the range open. *See, e.g.*, Act of Apr. 13, 1865, §§ 1–2, 1865 Ohio Laws 185, 185 (declaring it "unlawful for any person or persons, being the owner, or having the charge of any horses, mules, cattle, sheep, goats, swine, or geese . . . to run . . . upon any uninclosed land in the state of Ohio" but providing that "general permission may be granted by the commissioners of any county, for any [horses, mules, cattle, sheep, goats, swine, or geese] . . . to run at large in their respective counties").

* * *

As illustrated by this evolution in property rights in the contexts of hunting and grazing, between the Founding and Reconstruction Eras (and beyond), states retained and exercised authority to adapt local property law to changing norms, customs, and economics within their borders.

II. Legislatures Historically Exercised Authority to Modify Default Rules Governing the Right to Exclude Through Public Accommodations Laws.

These shifts in default rules were not limited to the context of unfenced property. Rather, state legislatures also routinely exercised their authority to change default rules for businesses held open to the public.

Until the mid-nineteenth century, American courts "affirmed the obligation on public accommodations to serve the public." Singer et al., *Property Law* at 29; *see, e.g.*, *Adams v. Freeman,* 12 Johns. 408, 409 (N.Y. Sup. Ct. 1815) ("Any person professing to keep an inn, thereby gives general license to all persons to enter his house."). This rule "appears to have applied broadly" to "barber shops, victuallers, bakers, tailors, [] traders," and other private properties held open to the public, based on the principle that "[t]hose who hold themselves as ready to serve the public thereby make themselves public servants and have a duty to serve." Elizabeth Sepper, *Free Speech and the "Unique Evils" of Public Accommodations Discrimination*, 2020 U. Chi. Legal F. 273, 277 (2020) (quoting Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1321, 1327–31 (1996) [hereinafter Singer, *No Right to Exclude*]). Soon after this right of access was extended to African Americans following the Civil War, however, this public right was replaced in many jurisdictions with a statutory absolute right to exclude. *See* Singer, *No Right to Exclude* at 1300.

While these postbellum restrictions on property access were borne out of an odious effort to entrench white supremacy, *id.*, their passage nevertheless makes clear that states have long exercised the authority to alter the default rules governing entry onto private property. In the same year that Congress enacted the Civil Rights Act of 1875, Tennessee, for example, replaced its existing public accommodations law, which granted all persons the right of access to places open to the public, with an anti-public

accommodations act that released businesses from their duty to serve and affirmed the power of places of public accommodation to "control the access and admission or exclusion of persons to or from" their premises. 1875 Tenn. Pub. Acts, ch. 130, § 1, 216–17. Delaware similarly repealed its public accommodations law and passed a statute that gave businesses held open to the public the authority to refuse to service "persons whose reception or entertainment . . . would be offensive to the major part of his customers and would injure his business." 15 Del. Laws 322 (1875).

The end of the Reconstruction Era resulted in even more repeals of state public accommodations laws and a further contraction of the right of access in different jurisdictions across the United States. *See* Lisa Gabrielle Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodations Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215, 239 (1978) ("[M]ost Southern states and Delaware passed laws during the last quarter of the nineteenth century which permitted or required separation of blacks and whites."). Courts affirmed this default right to exclude by ruling that certain businesses were not subject to the public accommodations laws. *See*, *e.g.*, *Bowlin v. Lyon*, 25 N.W. 766, 768 (Iowa 1885) (holding a skating rink had no duty to serve the public); *Commonwealth v. Sylvester,* 95 Mass. 247, 248 (1866) (holding the public accommodations laws only applied to "licensed" places of public amusement).

This principle holds true today. Absent specific constitutional or statutory prohibitions, such as the

Fourteenth Amendment[3] or civil rights laws, courts have almost uniformly affirmed that private businesses have an absolute right to exclude members of the public. *See* Singer et al., *Property Law* at 28 ("Virtually all other modern courts have . . . affirm[ed] the right of owners to exclude others from their commercial property for any reason not specifically prohibited by, for example, civil rights laws."); *Madden v. Queens Cnty. Jockey Club, Inc.*, 72 N.E.2d 697, 698 (N.Y. 1947) (holding that a race track operator "has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition, as long as the exclusion is not founded on race, creed, color or national origin"); *see also Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 375 (N.J. 1982) (while public accommodations cannot "unreasonably exclud[e] particular members of the public when they open their premises for public use," they can exclude those who "disrupt the regular and essential operations" of the facility or who "threaten the security of the premises and its occupants"). In addition, an overwhelming number of states (45 in total) have enacted public accommodation statutes altering or codifying common law rules regarding access to businesses and nonprofit organizations open

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[3] Of course, the authority of states to impose default rules consistent with local customs does not permit states to restrict access to property in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (holding that enforcing racially restricted covenants abridged "the equal protection of the laws guaranteed by the Fourteenth Amendment" and noting "it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment").

to the public, a further illustration of states' well-established authority to alter property law to both expand and contract the right to exclude. *See* Joseph William Singer, *Living Property*, 49 Seattle U. L. Rev. 111, 181 n.326 (2025) (collecting statutes); *see also Cedar Point Nursery v. Hassid*, 594 U.S. 139, 156 (2021) (affirming statutes as constitutional).

CONCLUSION

As reflected in these hunting, grazing, and public accommodations contexts, in which property rights varied by region and over time, legislative amendments to default rules governing the rights of access and exclusion are not novel. State and local legislatures across the United States have historically and repeatedly modified such rules, and have continued to do so to the present day—including through the modified default rule at issue in this case.

The Hawaii legislature properly codified the state's property law norms and customs in Hawaii Act 52. The Ninth Circuit rightly rejected Petitioners' challenge to that law, and so should this Court.

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This Court should affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Timothy C. Hester
Counsel of Record
Hassan Ahmad
Rachel Bercovitz
William Meyer
Cameron Bakkar
Andrew White
COVINGTON & BURLING LLP
850 10th Street, NW
Washington, DC 20001
(202) 662-6000
thester@cov.com

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Counsel for Amici Curiae