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

REPLY BRIEF OF PETITIONERS

KEVIN O'GRADY
ATTORNEY AT LAW
1164 Bishop Street,
Suite 1605
Honolulu, HI 96813
(808) 521-3367
kevin@kevinogradylaw.com

ALAN ALEXANDER BECK
Counsel of Record
ATTORNEY AT LAW
2692 Harcourt Drive
San Diego, CA 92123
(619) 905-9105
alan.alexander.beck@gmail.com

MARK W. PENNAK
MARYLAND SHALL ISSUE, INC.
9613 Harford Road,
Ste C #1015
Baltimore, MD 21234
(301) 873-3671
m.pennak@me.com

Counsel for Petitioners

January 9, 2026

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COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1, 33 (2022), holds that "the Second Amendment guarantees a general right to public carry." Through the enactment of its default rule, Hawaii has effectively destroyed that right. That broad prohibitory regime cannot be justified under this Nation's historical tradition and the "balance struck by the founding generation," as required by *Bruen* and *United States v. Rahimi*, 602 U.S. 680, 692 (2024). The default rule is incompatible with the text, history and tradition of the Second Amendment and is thus unconstitutional.

Hawaii concedes there is a general implied license to enter private property open to the public but contends that at the Founding this implied license did not extend to armed entry onto private property without the owner's prior consent. That assertion is both unsupported and contrary to actual practice during the Founding era. Undaunted, Hawaii argues that the scope of this implied license is governed exclusively by "local law and customs" thus leaving Hawaii free to define the scope by reference to the 19th century royal decrees of King Kamehameha and unique Hawaiian traditions. But *Bruen* and *Rahimi* make clear the Second Amendment right is controlled by this *Nation's* historical tradition and the balance struck by *the founding generation*, not by the fiats of King Kamehameha or by historical outliers like Hawaii. The Ninth Circuit erred in holding that State law challenges are subject to a different, lesser standard.

Hawaii argues, in the alternative, that this Nation's historical traditions support its default rule. But the analogues on which the State relies all fail the "how and why" inquiry mandated by *Bruen* and *Rahimi*. Each of those supposed analogues was an anti-poaching law and was aimed at "trespassing" and hunting on enclosed lands *closed* to the public. Worse still, Hawaii insists that Reconstruction era Black Code laws, designed to subjugate newly freed slaves, may be used as proper analogues. This Court should reject that shameful notion categorically.

Hawaii agrees with Petitioners that the default rule is not a sensitive places law, but Hawaii nonetheless seeks to apply the same sort of "sensitive places" reasoning that the Ninth Circuit followed in extending the court's flawed "sensitive places" rulings to the default rule. Hawaii does not deny that the court below engaged in impermissible interest balancing in distinguishing Hawaii's rule from California's. This Court should correct these erroneous rulings, all of which are in blatant defiance of this Court's precedents.

ARGUMENT

I. CARRYING OUTSIDE THE HOME FALLS WITHIN THE TEXT OF THE SECOND AMENDMENT

A. The Default Rule Regulates Arms-Bearing Conduct

We start, as always, with the text: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. *Bruen* holds that the text "guarantees a general right to public carry." 597 U.S. at 33. "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 31. In such cases, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 17. The only question at the threshold, then, is whether a law "regulate[s] arms-bearing conduct." *Rahimi*, 602 U.S. at 691.

Here, the textual inquiry is simple. *Bruen* already unequivocably held that the plain text of the Second Amendment "presumptively guarantees a general right to public carry" and that right extends to "locations frequented by the general community." 597 U.S. at 33, 56. Hawaii's default rule is covered by the text because it prohibits people from carrying firearms in all manner of places open to the public as they go about their daily lives. That is the end of the textual inquiry, for "when the Government regulates arms-bearing conduct, as when the Government

regulates other constitutional rights, it bears the burden to 'justify its regulation.'" *Rahimi*, 602 U.S. at 691, quoting *Bruen* 597 U.S. at 24.

Hawaii attempts to avoid this commonsense conclusion by arguing that there is no right to enter private property while armed without the owner's prior consent and thus the default rule does not regulate conduct protected by the Second Amendment. Hawaii Br. 13-20. The question before this Court addresses application of the default rule with respect to private property *held open to the public*. Hawaii does not dispute (nor could it) that the public has an implied license to enter such property. See Pet. Br. at 26-27; Brief of Amicus United States at 25-27. Such property is part of the public space to which the right applies.[1]

Nothing in the caselaw on which Hawaii relies is to the contrary. *Florida v. Jardines*, 569 U.S. 1, 8 (2013), recognized that "'[a] license may be implied from the habits of the country,'" but held such a license did not include the use by police of a drug sniffing dog within "the boundaries of the curtilage" of the home. 569 U.S. at 7-8. *Jardines* recognized an "implicit license" for "the visitor to approach the home by the front path, knock promptly, wait briefly to be received." *Id.* at 8. See also *McKee v. Gratz*, 260 U.S. 127, 136 (1922) ("[a] license may be implied from the habits of the country"). Hawaii's default rule bans *all*

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[1] This Court need not address whether carry on private property not held open to the public falls within the text of the Second Amendment.

entry even for the limited purpose of asking permission.

Hawaii also errs in its reliance (Br. at 23) on *Breard v. City of Alexandria*, 341 U.S. 622 (1951). *Breard* held that a locality could prohibit door-to-door solicitation without the owner's consent, but *Village of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 631 (1980), cabined *Breard* to laws regulating commercial speech. The Court in *Village of Schaumberg* thus struck down an ordinance banning door-to-door solicitation by charities because it was "a direct and substantial limitation on protected activity." *Id*. at 636. Hawaii's default rule imposes the same sort of burden on "activity" protected by the Second Amendment.

Hawaii's reliance (Br. at 17) on *Rowan v. USPO*, 397 U.S. 728 (1970), fails for similar reasons. There, the Court sustained the constitutionality of a federal statute authorizing the Post Office to issue an order banning senders from mailing pandering advertisements to a particular addressee where such restriction had been formally requested by the addressee. The Court held that the sender's First Amendment right was "circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer." *Id.* at 737. That holding might help Hawaii if it was supporting a private owner's decision to exclude firearms. But it lends no support to Hawaii's effort to prohibit constitutionally protected activity on private property when the owner has made no such decision.

Again, Petitioners do not contest the right of the private owner to choose to exclude firearms from the owner's property. But that right belongs to the owner, not the State. Private property does not "lose its private character merely because the public is generally invited to use it for designated purposes." *Lloyd Corp. v. Tanner,* 407 U.S. 551, 569 (1972). Here, Petitioners seek to enter private property only "for the designated purposes" for which the property is being held open to the public (*e.g.,* shopping). Petitioners merely wish to exercise "the general right to publicly carry arms for self-defense" while doing so. *Bruen*, 597 U.S. at 31. The text of the Second Amendment covers that conduct.

B. National Traditions Are Controlling

Hawaii asserts its default rule does not regulate the right to keep and bear arms at step one of *Bruen* because the scope of the implied license is determined by "state law and local custom." Hawaii Br. 20. Hawaii thus contends there is no implied license in this case because Hawaii's "unique history—including its long pre-statehood existence as an independent kingdom—means its residents never developed a practice of bringing guns into shops, convenience stores, and the like." *Id*. at 21. That argument is transparently wrong.

Again, step one of *Bruen* turns on whether "the Second Amendment's plain text covers an individual's conduct" and *Bruen* squarely holds that the text includes "the general right to publicly carry arms for self-defense." 597 U.S. at 17, 31. The meaning of the text cannot vary State-by-State. The historical

traditions of a particular State are relevant only at *Bruen*'s step two and only then to the extent they form part of "*the Nation's* historical tradition of firearm regulations." *Id.* at 24 (emphasis added). See also *Rahimi*, at 689 (1924) (same). The "balance by the founding generation" is controlling. *Id*. at 692. These principles preclude Hawaii's reliance on the unique history of "the Kingdom of Hawai'i" or the 19th century royal fiats imposed by King Kamehameha. Hawaii Br. 21. King Kamehameha was not part of the "founding generation" and his laws are not part of "the Nation's historical tradition." Hawaii is an historical outlier.

Hawaii's attempt to impose a State-by-State inquiry is akin to the Ninth Circuit's erroneous adoption of a special rule for adjudicating State cases. See Pet. Br. at 42-44. Hawaii does not defend that ruling and its reliance on Hawaii's history fails for the same reasons the Ninth Circuit's holding fails. *Id.* That approach is a direct contravention of *Bruen*'s holding that "individual rights enumerated in the Bill of Rights and made applicable against the States … have the same scope as against the Federal Government." 597 U.S. at 37. *Bruen* and *Heller* both applied a single standard in rejecting outlier State restrictions. *Bruen,* 597 U.S. at 30, 65, 70; *Heller*, 554 U.S. at 629. Whether a given State law is an "outlier" is judged by reference to *National* traditions, not outlier *State* traditions.

Hawaii claims its reliance on Hawaii's unique history at *Bruen*'s step one "does not mean that the scope of the Second Amendment varies by state." Hawaii Br. 21. But that is exactly what it would mean.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634-35.[2] The Second Amendment "is not a second-class right subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 597 U.S. at 70, quoting *McDonald v. City of Chicago*, 561 U.S, 742, 780 (2010) (plurality opinion).

States are not free to gut federal constitutional rights by redefining well-established property rights. See, e.g., *Tyler v. Hennepin County*, 598 U.S. 631, 638 (2023) ("[T]he Takings Clause would be a dead letter if a state could simply exclude from its definition of property any interest that the state wished to take.") (citation omitted); *Moore v. Harper*, 600 U.S. 1, 34-35 (2023) ("States 'may not sidestep the Takings Clause by disavowing traditional property interests'") (citation omitted). Allowing States to do so would effectively create a special rule for the Second Amendment, the very result this Court rejected in *Bruen*. 597 U.S. at 70.

Hawaii is also not entitled to the special treatment it seeks. The Constitution embodies "a 'fundamental principle of equal sovereignty' among the States." *Shelby County v. Holder*, 570 U.S. 529, 544 (2013). The United States "is a union of States, equal in

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[2] See also *Ramos v. Louisiana*, 590 U.S. 83, 90-92 (2020) (Sixth Amendment); *Timbs v. Indiana,* 586 U.S. 146, 150 (2019) (Eight Amendment); *Gamble v. United States,* 587 U.S. 678, 702 (2019) (Fifth Amendment); *Virginia v. Moore,* 553 U.S. 164, 168 (2008) (Fourth Amendment); *Espinoza v. Mont. Dep't of Rev.*, 591 U.S. 464, 482 (2020) (Establishment Clause).

power, dignity, and authority." *Coyle v. Smith*, 221 U.S. 559, 567 (1911). Under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, States "are bound to follow federal law" regardless of their contrary historical traditions. *Doe v. Dynamic Physical Therapy, LLC*, No. 25–180, ---- S.Ct.----, 2025 WL 3506945 (Dec. 8, 2025) (per curiam).

Indeed, "'the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.'" *Shelby Co.,* 570 U.S. at 544, quoting *Coyle*, 221 U.S. at 580. See also *Commonwealth of Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 69 n.4 (2016)("a new State, upon entry, necessarily becomes vested with all the legal characteristics and capabilities of the first 13"). The scope of the Second Amendment in Hawaii is controlled by the "Nation's historical tradition" and "the balance struck by the founding generation" no less than in any other State. "The public mischiefs that would attend such a state of things would be truly deplorable; and it cannot be believed that they would have escaped the enlightened convention which formed the [C]onstitution." *Martin v. Hunter's Lessee*, 14 U.S. 304, 348 (1816) (Story, J.).

Finally, Hawaii's approach is unworkable. On Hawaii's theory, the scope of the Second Amendment's text in Alaska would be determined by reference to the laws of the Tsar of Russia from whom Alaska was purchased in 1867. https://bit.ly/4jgl8iT (last viewed Jan. 8, 2026). Residents of twelve States west of the Mississippi would be governed by the traditions of France from which the United States purchased 828,000 square miles of territory in 1803 in the

Louisiana Purchase. https://bit.ly/4q3TjwS (last viewed Jan. 8, 2026). And Floridians would be controlled by the traditions of Spain which conveyed much of modern-day Florida to the United States in 1819 in the Adams-Onis Treaty. https://bit.ly/44QpnvA (last viewed Jan. 8, 2026). *Bruen* rejected reliance on Territorial laws for good reasons. 597 U.S. at 67-68. Hawaii, which became a Territory in 1900,[3] is no exception.

II. HAWAII HAS NOT MET ITS BURDEN OF PROVING THAT ITS LAW IS CONSISTENT WITH OUR NATION'S HISTORICAL TRADITION OF FIREARMS REGULATION

A. Any Law That Effectively Negates The Right Is Not Enacted For A "Permissible Reason"

Hawaii's default rule is part of Hawaii's attempt to nullify *Bruen*'s holding that the Second Amendment includes the "general right" to carry in public for self-defense. Pet. Br. at 17-20; Br. of Amicus United States at 7-13. Any such nullification is not "a permissible reason," *Rahimi*, 602 U.S. at 692, as it uses regulations for "abusive ends." *Bruen*, 597 U.S. at 38 n.9. Such legislation thus fails at the outset without more. *Id*. at 36 ("to the extent later history contradicts what the text says, the text controls"); *Id.* at 31 ("exempt[ing] cities from the Second Amendment ... would eviscerate the general right to publicly carry arms for self-defense").

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[3] See https://bit.ly/49uPKsx (last viewed Jan. 8, 2026).

Hawaii's assertion that it "respects the Second Amendment right to bear arms" (Br. 39) is risible. In fact, Hawaii has massively resisted the right at every turn.[4] Hawaii argues the default rule serves the

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[4] See *Nelson v. City and Cnty. of Honolulu,* 1:24-cv-00100-MWJS-RT Doc. No. [25] (stipulated injunction which compelled Honolulu to stop its policy of excessive delays of over one year to issue concealed carry permits); *Fotoudis v. City and Cnty. of Honolulu*, 54 F. Supp. 3d 1136 (D. Haw. 2014) (overturning Hawaii's ban on green card holders owning firearms); *Yukutake v. Conners*, 554 F. Supp. 3d 1074 (D. Haw. 2021) (overturned two of Hawaii's firearm registration law and via settlement removed two County of Honolulu firearm policies); *Kealoha v Cnty. of Hawaii,* 1:25-cv-00281 Doc. No. [14] (stipulated injunction prohibiting County of Hawaii from using police investigations to prohibit ownership of firearms); *Shiroma v. Hawaii Cnty.*, 1:25-CV-00181 JAO-WRP Doc. No. [23] (stipulated injunction prohibiting County of Hawaii from enforcing a lifetime ban on firearm ownership for misdemeanor crime); *Santucci v. City and Cnty. of Honolulu*, No. 22-CV-00142-DKW-KJM, 2022 WL 17176902 (D. Haw. Nov. 23, 2022) (enjoining Honolulu's firearms mental health policy); *Choda v. Hawaii Cnty.,* 1:21-cv-00384-DKW-RT Doc. No. [14] (stipulated injunction as to the County of Hawaii's policy which prohibited firearms ownership for those convicted of certain nonviolent crimes); *Roa v. City and Cnty. of Honolulu,* 1:21-cv-00333-DKW-KJM Doc. No. [14] (stipulated injunction enjoined Honolulu from prohibiting firearms ownership for certain infractions); *Nickel v. Connors*, 1:20-cv-00330-JMS-RT Doc. No. [22] (stipulated injunction enjoining Hawaii's ban on U.S. Nationals owning firearms); *Maui Ammo & Gun Supply v. Maui Cnty.,* 1:22CV00138 (Maui's removed its restrictions on the sale of electric gun after the onset of litigation); *Roberts v. Connors*, 1:19CV00165 Doc. No. [25] (settlement compelling the State to allow green card holder to apply for a concealed carry license); *Roberts v. City and Cnty. of Honolulu*, 1:15CV00467 Doc. No. [11-1] (settlement compelling Honolulu County to remove its restrictions on U.S. green card holders owning firearms); *Pagba v. City and*

supposedly legitimate purpose of protecting Hawaii's unique "tradition" of banning firearms by "striking a careful balance designed to protect public safety and vindicate the rights of private-property owners." Hawaii Br. 6. Hawaii contends that purpose "is plainly legitimate" and that this Court should not "look behind" this assertion to discern the "mental states" of individual legislators. *Id.* at 41-42. That argument fails.

First, *Bruen* does not permit State legislatures to "balance" away the general right to carry for self-defense by reference to its notions of "public safety" or the "rights of private-property owners." This Court

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Cnty. of Honolulu, 1:22CV00521 (removal of Hawaii's lifetime ban on firearm ownership for convictions for misdemeanor crimes after onset of litigation); *Grell v. County of Hawaii* CV 23-00328 JAO-RT Doc. No. [20] (stipulated injunction requiring County of Hawaii to remove its required waiver of all privileges including attorney client privilege); *Day v. Cnty. of Hawaii,* 1:23-cv-00576-LEK-RT Doc. No. [19] (stipulated injunction regarding County of Hawaii's concealed carry permit policies); *Yukutake v. Shikada,* 1:22-cv-00323-JAO-KJM Doc. No. [41] (stipulated injunction which enjoined Hawaii's ban on billy club carry); *Roa v. Lopez, 1*:23-cv-00079-MWJS-RT (Hawaii removed its ban on switchblades after the onset of litigation); *Thompson v. Hawaii,* 1:24-cv-00333-DKW-WRP Doc. No. [20] (stipulated injunction regarding County of Hawaii's mental health policy regarding firearms ownership); *Peter v. Lopez,* 1:24-cv-00508-MWJS-RT Doc. No [18] (stipulated injunction enjoining Hawaii's ban on possession of firearms by individuals residing in Hawaii pursuant to the Compact of Free Association); *Roberts v. Ballard*, 1:18CV00125 (legalized electric weapons after the onset of litigation); *Teter v. Lopez*, 125 F.4th 1301 (9th Cir. 2025) (legalizing possession of butterfly knives after the onset of litigation); *Young v. Hawaii* 1:12-cv-00336-HG-BMK (removing "may issue" concealed carry system after the onset of litigation).

expressly prohibited such balancing in rejecting "means-ends scrutiny." 597 U.S. at 24. As the Court explained, "[t]he Second Amendment 'is the very *product* of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense." *Id.* at 26, quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Hawaii does not dispute that the Ninth Circuit used the same kind of impermissible interest balancing in distinguishing between California's default rule, which the court struck down, and Hawaii's rule, which it sustained. Pet. Br. at 38-39. All such resort to interest balancing is barred by *Bruen*.

Second, the impermissible purpose of the default rule is objectively obvious. Faced with *Bruen*'s invalidation of Hawaii's "may issue" licensing regime that disarmed law-abiding persons everywhere in public,[5] Hawaii objectively accomplished "the same feat by banning most places *where* someone may carry." Pet.App. at 178a (VanDyke, J., dissenting from the denial of rehearing en banc). The result is to exclude carry by licensees "on 96.4% of the publicly accessible land in Maui County." *Id.* at 174a. That objective reality does not involve any inquiry into the subjective motivations of Hawaiian legislators. See *Lynce v. Mathis*, 519 U.S. 433, 442-43 (1997); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 558 (1993) (Scalia, J., concurring in part and

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[5] See *Bruen*, 597 U.S. 15 n.2 (listing Hawaii as among the States imposing "'proper cause' analogues" for carry permits. Hawaii does not dispute that it almost never issued carry permits prior to *Bruen*. See Pet. Br. at 1.

concurring in the judgment) (noting the difference between "the object of the laws at issue" and "the subjective motivation of the *lawmakers*").

Hawaii asserts (Br. 42-43) its default rule reflects property owners' reasonable expectations. That argument is both unsupported and fails because nothing in our Nation's historical tradition supports such regulation for that purpose. Section 134-9.5 textually applies *only* to *licensees* who may not carry or possess "a loaded or unloaded firearm" on private property. Yet, Hawaii allows the possession and transport of firearms on or through private property by *non*-licensed persons, as allowed by H.R.S. §§ 134-5(a); 134-25, or by persons exempted from the default rule under Section 134-9.5(d), or by out-of-state police officers and retirees who may carry without a State license under 18 U.S.C. §§ 926B, 926C. This disparate treatment of licensees makes clear Hawaii's asserted justification is pretextual and that the licensing requirement is being used for "abusive ends." *Bruen*, 597 U.S. at 38 n.9.

Hawaii erroneously claims that Petitioners are "free to bring a gun into any business so long as an employee gives them the okay." Hawaii Br. 40. Permission may only be accorded by "the owner, lessee, operator, or manager of the property, or agent thereof," § 134-9-5(b)(2), not by any "employee" who may not have authority to act as "agent" for these purposes. See *State v. Hoshijo ex rel. White*, 102 Haw. 307, 76 P.3d 550, 562 (2003) (scope of agency is a factual question). Such individuals are unlikely to be available at outer edge of the property, particularly where that property includes an adjoining private

parking lot. While authorization may also be given by signage, Hawaii does not dispute that owners have little incentive to deviate from the default rule, even if they have no objection to firearms. As the Ninth Circuit ruled, "that reality was 'the impetus' for Hawaii's rule." Pet.App.57a. That conclusion is supported by the record, a point Hawaii also does not dispute. See Pet. Br. at 20; Pet. App. 383a-428a.

Hawaii is also wrong in asserting the licensee could bring a firearm onto private property if "stored appropriately in the vehicle." Hawaii Br. 12. First, allowing vehicle storage would hardly make the statute constitutional. To the contrary, Hawaii requires a "safe storage depository" in a vehicle, H.R.S. § 134-9.3, which negates the right to have the firearm "operable for the purpose of immediate self-defense." *Heller*, 554 U.S. at 635.

Second, and in any event, Section 134-9.5(b) requires prior authorization "to carry *or possess* a firearm on private property," thus prohibiting all possession, including in a vehicle. (Emphasis added). See *State v. Foster*, 128 Haw. 18, 282 P.3d 560, 571 (2012) (applying Hawaii's law of constructive possession to include a firearm in a vehicle). Cf. *Muscarello v. United States*, 524 U.S. 125, 126-127 (1998) (interpreting "the phrase 'carries a firearm'" in a federal statute to cover "convey[ing] firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies").

Third, Section 134-9.5(a) provides that a licensee may not "*enter* or remain on private property of another person … unless the person has been given

express authorization." (Emphasis added). That prohibition bars *any* entry, even in a vehicle and even for the purpose of asking permission. The statute's use of the present-perfect tense ("has been given") makes clear that the person must receive authorization *before* "enter[ing]" private property. See *Barrett v. United States*, 423 U.S. 212, 216 (1976) ("the present perfect tense … denot[es] an act that has been completed"). Grammar matters. See Scalia & Gardner, *Reading Law: The Interpretation of Legal Texts*, 140-43 (2012).

Finally, vehicle storage is addressed in Section 134-9.1(b)(7), as an exception for the "sensitive places" bans imposed by Section 134-9.1(a) and that exception is further limited to "carrying a firearm … in the immediate area surrounding the person's vehicle within a parking area." That exception does not allow "entry" into "sensitive places" and does not apply *at all* to the bans on entering or possessing a firearm on private property separately imposed by Section 134-9.5, which contains no such exception. Where a legislature "includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning." *Bittner v. United States*, 598 U.S. 85, 94 (2023) (collecting case law). In short, even if it made a constitutional difference, there is no storage or vehicle exception under the default rule.

B. The Implied License To Enter Does Not Exclude Firearms

Bruen found an "overwhelming evidence of an … enduring American tradition permitting public carry." 597 U.S. at 67. Hawaii does not dispute that firearms were carried in shops and taverns and many other places open to the public at the Founding. See NRA Amicus Br. at 5-21; Pet.App.191a-97a (VanDyke, J., dissenting from the denial of rehearing en banc). Instead, Hawaii argues that this tradition does not apply to places "designed for purposes at odds with the carry of firearms, such as toy stores, places of worship, and meditation." Hawaii Br. 24. That argument is akin to the Ninth Circuit's erroneous application of a patently defective "sensitive places" methodology to its default rule holding and fails for the same reasons. See Pet. Br. at 40-42. Hawaii does not address that ruling.

Bruen recognized an exception for "sensitive places" such as "legislative assemblies, polling places, and courthouses," as well as the possibility of "analogies to those historical regulations." 597 U.S. at 30. But the underlying "principle" *Rahimi*, 602 U.S. at 681, is that such locations are limited to "exceptional circumstances" *Bruen*, 597 U.S. at 38, such as where the deliberative business of governance is conducted. See Kopel & Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 Charleston L. Rev. 203, 205 (2018). See Pet. Br. at 39-40. Hawaii does not deny it. That "principle" is obviously inapplicable to private property open to the public. Recent events confirm that violent attacks necessitating armed self-defense can occur anywhere

in public, including in shops and places of worship. See, e.g., https://bit.ly/4snXLYz (last viewed Jan. 8, 2026). See also *Bruen*, 597 U.S. at 74-75 (Alito, J. concurring). Hawaii has no response to this reality.

In particular, the "founding generation," *Rahimi*, 602 U.S. at 692, would have been surprised to hear that it is inappropriate to carry firearms in places of worship. "[C]olonial-era enactments […] mandated such carry at places of worship." *Hardaway v. Nigrelli*, 639 F. Supp. 3d 422, 442 (W.D.N.Y. 2022), *affirmed in part, vacated in part*, *Antonyuk v. James,* 120 F.4th 941 (2d Cir. 2024) *cert. denied*, 145 S.Ct. 1900 (2025).[6] The Ninth Circuit below affirmed the district court's preliminary injunction in the California cases on that point, holding that the California plaintiffs "are likely to succeed" on their challenge to California's ban on carry in places of worship. Pet.App. at 64a-67a. Hawaii ignores that holding.

C. Anti-Poaching Laws Are Not Analogous.

Hawaii relies on a few anti-poaching laws (Br. 35), but such laws cannot be proper analogues because they fail the "how and why" inquiry. *Bruen,* 597 U.S. at 29. See Pet. Br. at 29. These anti-poaching laws applied to trespass on enclosed private lands not held open to the public, not to "unenclosed and uncultivated land" which was open to the public "until

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[6] The Second Circuit held in *Antonyuk* that the challenge to the original ban on carry in places of worship imposed by New York in that case was mooted by a subsequent amendment to the statute under which carry was permitted in places of worship for "those persons responsible for security." 120 F.4th at 1014.

the owner sees fit to prohibit it." *McKee*, 260 U.S. at 136. See Pet. Br. at 33. Hawaii admits that such unenclosed private land was historically open to the public to hunt and treat "as communal." Hawaii Br. 33-34. "Poaching" or "trespass" cannot take place on such lands.

Given that undisputed historical understanding, it is not surprising that nothing in the anti-poaching laws applied to property open to the public. The New Jersey 1771 statute focuses on hunting concerns: "for the Preservation of Deer and other Game and to prevent *trespassing* with Guns, Traps, and Dogs." Act of Dec. 21, 1771, preamble, Laws of New Jersey 25 (1821). (Emphasis added). The statute contains none of the usual exceptions for peace officers or those responding to the hue and cry, exceptions that one would expect if this were a broad ban on carrying firearms on any premises for any reason. Cf. Statute of Northampton, 2 Edw. 3 c. 3 (1328) (excepting "the King's servants in his presence, and his ministers in executing of the King's precepts ... and also upon a cry made for arms to keep the peace").

While Colonial societies may have wished to curb poaching, nothing suggests that they wanted to ban firearms carried for self-defense on property open to the public. As the Third Circuit has explained, "[t]he 1721 statute appears to be primarily focused on preventing Pennsylvanians from hunting on their neighbors' land, not on restricting the right to publicly carry a gun." *Lara v. Comm'r Pa. State Police*, 125 F.4th 428, 443 (3d Cir. 2025). Indeed, that statute was later repealed and replaced in 1760 with a law that prevented "'fir[ing] a gun on or near any of the King's

highways,' which indicates that carrying a firearm in public places was generally not restricted." *Id.* (citation omitted).

The State argues that "the 1771 New Jersey law was enacted 'to prevent trespassing with guns.'" Hawaii Br. 36. That argument does not help Hawaii; a person entering private property open to the public simply is not "trespassing." Hawaii claims the 1721 Pennsylvania and 1722 New Jersey laws "were adopted because carrying firearms on someone else's property without their consent caused 'divers Abuses, Damages, and Inconveniencies.'" Hawaii Br. 37. These statutes were all aimed at preventing the "damages and inconveniencies" caused "by persons carrying guns and presuming to hunt on other people's land." *Antonyuk,* 120 F.4th 1046. Similarly, the 1763 New York law cited by Hawaii (Br. 37) was passed to "'more effectually [] punish and prevent' the 'Practice of Great Numbers of idle and disorderly persons ... to hunt with Fire-Arms.'" *Antonyuk,* 120 F.4th at 1046.

"These colonial anti-poaching laws were neither general prohibitions on public carry nor designed to protect a 'sensitive place' in *Heller's* and *Bruen's* sense of that term." *Koons v. Attorney Gen. N.J.*, 156 F.4th 210, 297 (3d Cir. 2025), *rehearing en banc granted*, Nos. 23-1900, 23-2043, --- F.4th ----, 2025 WL 3552513 (Dec. 11, 2025) (Porter, J., concurring in the judgment in part and dissenting in part.) "Colonial anti-poaching laws shed no light on the constitutional right to carry

firearms for reasons unrelated to unlicensed hunting and poaching, such as self-defense." *Id.*[7]

Hawaii's contention (Br. 35-36) that the term "gun" historically included pistols is just wrong. "That 'gun' did not include 'pistol' is demonstrated by the number of statutes that include both 'gun' and 'pistol' on a list of arms." Cramer & Olson, *Pistols, Crime, and Public Safety in Early America*, 44 Willamette L. Rev. 1-2 (2008) (listing colonial statutes and advertisements that differentiated between the two). "The term 'fire-arm'" was also more restricted in meaning than today. Contemporary documents from as early as 1775, and as late as 1806 made clear that the term "fire-arm" included "muskets, but not pistols, or blunderbusses." *Id.* at 3. Like a pistol, the blunderbuss was a "close range, antipersonnel weapon" not suitable for hunting. Parks, *Joint Service Combat Shotgun Program*, The Army Lawyer 17 (Oct. 1997).[8] Hawaii's sources do not contradict that point. Weapons suitable only for self-defense were not covered by these laws. In short, these laws are not "relevantly similar." *Bruen*, 597 U.S. at 29.

Hawaii also relies on Reconstruction era laws from Florida and Texas and an 1893 Oregon law. Hawaii Br. 32-33. The district court below properly rejected

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[7] The Third Circuit recently granted rehearing en banc in *Koons* on plaintiffs' petitions. Nos. 23-1900, 23-2043, ECF Dkt ## 158, 159 (Oct. 6, 8, 2025). New Jersey did not seek rehearing from the panel's decision striking down New Jersey's default rule. See *Koons*, 156 F.4th at 251-52.

[8] Available through PACER in *Young v. Hawaii*, No. 12-17808 (9th Cir.) at Dkt. # 16-2 (filed March 27, 2013).

these laws, Pet. App. at 153a-154a, as did the Ninth Circuit. *Id.* at 60a. Like the Second Circuit in *Antonyuk* and the Third Circuit in *Koons*, the Ninth Circuit held that "those laws likely did not apply to property that was generally open to the public" and were aimed at preventing "poaching." *Id.* at 61a. See *Antonyuk*, 120 F.4th at 1047; *Koons*, 156 F.4th at 251-52; Pet. Br. at 31. Again, such laws do not satisfy the "how and why" requirement imposed by *Bruen* and *Rahimi*. "To the extent that there are multiple plausible interpretations" of this history, the interpretation allowing carry is "more consistent with the Second Amendment's command." *Bruen*, 597 U.S. at 44 n.11.

In addition to applying only to "enclosed premises or lands,"[9] the 1893 Oregon law is also far too late. *Bruen* acknowledged that the "late-19th century" was one in which there was an "uptick in gun regulation," but stated that "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." 597 U.S. at 66. Hawaii argues this Court need not decide the appropriate time-period for historical analysis. Hawaii Br. 38. But if Reconstruction era and latter laws are relevant only where confirmatory of Founding era practices, as Petitioners contend (Pet. Br. at 29, 37-38), then Hawaii's reliance on such laws is misplaced. By the same token, the Ninth Circuit's reasoning is reduced to a flawed reliance on a single law, the 1771 New Jersey statute that regulated hunting with "guns" on enclosed lands not held open to the public. See Pet. Br. at 33-36. Not even Hawaii

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[9] Act of Feb. 20, 1893, 1893 Or. Laws 79.

contends that a single law can be anything other than an impermissible outlier. *Id.* at 28-29, 37.

D. Black Codes Cannot Be Proper Analogues

Hawaii acknowledges that the 1865 Louisiana law is a Black Code but, remarkably, endorses its use as an historical analogue. Hawaii Br. 37. That view must be rejected outright. See Pet. Br. at 31-33; *Baird v. Bonta*, No. 24-565, --- F.4th ----, 2026 WL 17404 at *15 (9th Cir. Jan. 2, 2026) ("Reliance on such racially odious laws in this case is both conceptually suspect and inconsistent with a proper application of *Bruen*."). The whole point of the Black Codes was to suppress the civil rights of freed slaves. As this Court stated in *Rahimi*, "Congress's desire to enable the newly freed slaves to defend themselves against former Confederates helped inspire the passage of the Fourteenth Amendment, which secured the right to bear arms against interference by the States." 602 U.S. at 690. A Black Code cannot be a legitimate historical analogue. See Amicus Br. of NAAGA at 10-31; Amicus Br. of J. Joel Alicea at 25-26; Amicus Br. of NSSF at 25-26; Amicus Br. of FPC at 26-27.

Particularly misplaced is Hawaii's reliance on the Reconstruction era order of General D.E. Sickles. Hawaii Br. 37-38. That order provided that the "rights of all loyal and well-disposed inhabitants to keep and bear arms will not be infringed, nevertheless this shall not … authorize any person to enter with arms on the premises of another against his consent." *Id.* Petitioners do not seek to enter private property "against" the "consent" of any private property owner. The whole point of an implied license to enter private

property open to the public is that the owner has already given "consent." General Sickles' order has no application to property held open to the public unless the proprietor has expressly *forbidden* entry with a firearm.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

KEVIN O'GRADY
Attorney at Law
1164 Bishop Street
Suite 1605
Honolulu, HI 96813
(808) 521-3367
Kevin@
KevinOGradyLaw.com

ALAN ALEXANDER BECK
**Counsel of Record*
Attorney at Law
2692 Harcourt Drive
San Diego, CA 92123
(619) 905-9105
Alan.Alexander.Beck
@gmail.com

MARK W. PENNAK
Maryland Shall Issue, Inc.
9613 Harford Road,
Ste C #1015
Baltimore, MD 21234
(301) 873-3671
M.Pennak@me.com

Counsel for Petitioners

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