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IN THE SUPREME COURT OF THE UNITED STATES

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JASON WOLFORD, ET AL.,)

Petitioners,)

v.) No. 24-1046

ANNE E. LOPEZ, ATTORNEY GENERAL)

OF HAWAII,)

Respondent.)

- - - - -

Washington, D.C.

Tuesday, January 20, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:10 a.m.

1 APPEARANCES:

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9 of the Respondent.

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P R O C E E D I N G S

(10:10 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 24-1046, Wolford versus Lopez.

Mr. Beck.

ORAL ARGUMENT OF ALAN A. BECK

ON BEHALF OF THE PETITIONERS

MR. BECK: Mr. Chief Justice, and may it please the Court:

Bruen holds the Second Amendment protects the right to publicly carry firearms. By banning people from carrying firearms on private property that is open to the public unless they first obtain affirmative permission, Hawaii has run roughshod over that constitutional right. The presumptive ban clearly implicates the Second Amendment's plain text because it regulates arms-bearing conduct. As such, the burden is on Hawaii to justify the presumptive ban with relevantly similar historical analogs reflecting a national historical tradition of firearms regulation.

Hawaii comes nowhere close to carrying the burden. Its presumptive ban defies a

1 national tradition allowing people to carry
2 onto private property open to the public unless
3 the owner objects. Hawaii's threshold position
4 that this Court should adopt a state-by-state
5 community standard lacks support in this
6 Court's precedent, and Hawaii's argument the
7 laws of the Kingdom of Hawaii should determine
8 Petitioners' Second Amendment rights is
9 completely without merit.

10 The presumptive ban is inconsistent
11 with our national historical tradition of
12 firearms regulation. Hawaii attempts to show a
13 national tradition by relying on black codes
14 expressly passed to discriminate against
15 African Americans in antipoaching laws. These
16 types of laws are nowhere near relevantly
17 similar. Because nothing in our nation's
18 historical tradition begins to support Hawaii's
19 effort to thwart the exercise of a fundamental
20 right, Hawaii's law cannot stand.

21 I welcome this Court's questions.

22 JUSTICE THOMAS: You argue that this
23 law prevents access to about 97 percent of
24 public areas. How do you arrive at that?

25 MR. BECK: We're not arguing that this

1 specific law is banning 97 percent, Your Honor.
2 The overall package of laws passed by Act 52
3 bans -- presumptively bans carry on
4 96.4 percent, and we arrived at that figure by
5 having a architecture firm do a -- go through
6 the public records of the County of Maui to
7 determine which areas were regulated by this
8 package of laws, Your Honor.

9 JUSTICE SOTOMAYOR: So that 94 -- I
10 think it was 94 or 97 per --

11 MR. BECK: Ninety-six point four, Your
12 Honor -- Justice. Justice.

13 JUSTICE SOTOMAYOR: That includes all
14 the areas the law bans, correct?

15 MR. BECK: Yes, Justice.

16 JUSTICE SOTOMAYOR: I understood that
17 much of Hawaii is state parks and state
18 property, correct?

19 MR. BECK: A portion of it, yes,
20 Justice.

21 JUSTICE SOTOMAYOR: Okay. A pretty
22 sizable portion. So that 94 is over-inclusive
23 of private property, correct?

24 MR. BECK: That -- it's -- it includes
25 parks and beaches, yes, Justice.

1 JUSTICE SOTOMAYOR: All right. Now --
2 and there are other areas, sensitive government
3 areas, et cetera, correct?

4 MR. BECK: That is correct, Justice.

5 JUSTICE SOTOMAYOR: All right. So you
6 say that there is a constitutional right to
7 carry a gun on private property?

8 MR. BECK: Yes, Justice.

9 JUSTICE SOTOMAYOR: I've never seen
10 that right. I mean, I understand that there is
11 a right to carry a gun on private property with
12 an owner's consent, express or implicit,
13 correct?

14 MR. BECK: The Second Amendment --

15 JUSTICE SOTOMAYOR: My question is
16 very simple. Is there a constitutional right
17 to enter private property with a gun without an
18 owner's express or implicit consent? The
19 answer has to be simply no. You can't own --
20 enter an owner's property without their
21 consent, correct, express or implicit?

22 MR. BECK: Correct, because that would
23 be a trespass, Your Honor.

24 JUSTICE SOTOMAYOR: All right. So, if
25 we start from there, then I start from the

1 simple proposition, you want to say that
2 there's a custom that permits you to go on
3 private property without the owner's express
4 consent, correct?

5 MR. BECK: Yes, Your Honor.

6 JUSTICE SOTOMAYOR: All right. So
7 Justice Scalia said that every statesman at the
8 founding knew that you could not enter private
9 property without permission. It's a trespass,
10 correct?

11 MR. BECK: It is -- it is -- you're
12 not allowed to come onto private property
13 that -- where you don't have permission to go
14 to.

15 JUSTICE SOTOMAYOR: All right. So, if
16 we're looking at a custom, I thought, under
17 McKee, Justice Holmes looked for evidence "that
18 a practice had prevailed in Missouri," where
19 the suit originated. Whether you could collect
20 shells in Missouri depended on whether there
21 was a custom in that jurisdiction, correct?

22 MR. BECK: The custom of the nation is
23 what McKee holds, Your Honor.

24 JUSTICE SOTOMAYOR: It didn't. It
25 looked at the custom of Missouri, where the

1 suit originated.

2 MR. BECK: McKee specifically talks
3 about the laws of the nation as being what's
4 dispositive.

5 JUSTICE SOTOMAYOR: McKee -- Justice
6 Scalia did in Jardines, but in McKee, Justice
7 Holmes wasn't talking about the tradition of
8 the nation. He was looking at whether the
9 tradition of Missouri permitted people to go
10 onto land to collect seashells.

11 MR. BECK: I'll have to disagree with
12 the words. "Nation" appears in that. It looks
13 at --

14 JUSTICE SOTOMAYOR: All right. Well,
15 I'll look at it more closely. But, at the time
16 of the founding or about the time, '71 -- 1721,
17 1722, up until the founding, there were at
18 least three states who prohibited hunting, as
19 you called it, or trespassing on private
20 property with a gun, correct? So there was not
21 a uniform national practice.

22 MR. BECK: There was, Your Honor, of
23 carrying on private property that's open to the
24 public. Every case that you're -- every law
25 that you're citing to deals with prohibitions

1 on enclosed lands, and enclosed lands, there
2 was a -- those laws deal with -- the enclosed
3 lands were closed to the public. You
4 couldn't --

5 JUSTICE SOTOMAYOR: Not necessarily.
6 Look at -- look at Mount Vernon, where George
7 Washington lived. There was a county shop
8 there.

9 MR. BECK: By definition, if I
10 reference --

11 JUSTICE SOTOMAYOR: That's a closed
12 land.

13 MR. BECK: Enclosed lands, I -- I'd
14 reference the amicus brief of the United
15 States. They reference a law review article by
16 Sigmon, and it goes into express detail that
17 enclosed lands are -- were closed to the
18 public.

19 JUSTICE BARRETT: Counsel, do you
20 agree, picking up on that, that Hawaii could
21 pass a law that prohibited the carry without
22 the express consent of the owner on lands that
23 were closed to the public, on private
24 residences?

25 MR. BECK: I do not, Your Honor.

1 JUSTICE BARRETT: Really? Like, so I
2 couldn't -- Hawaii can't have that law about,
3 you know, my house or Justice Gorsuch's house?

4 MR. BECK: Step -- step one of the
5 plain text would be implicated because we're
6 talking about Perry. And then Hawaii would
7 need to justify that with a national tradition.
8 And even assuming the three laws, I don't think
9 three laws is sufficient to demonstrate a
10 national tradition. So, based on --

11 JUSTICE BARRETT: But do you agree
12 that all of the business owners and -- and
13 maybe also private property owners in Hawaii
14 could get together and say we don't want this,
15 and they could not give consent -- let's say
16 the law is -- is flipped, says it's -- it's
17 illegal to enter if you have been denied
18 permission to carry a gun on the property.

19 You agree that all property owners
20 could get together and say: We're denying
21 permission and they could put such, you know,
22 placards up in their window and then you would
23 still not be able to carry a gun on 97 percent
24 of the property in Hawaii?

25 MR. BECK: Yes, Justice. Everyone --

1 every private property owner has the right to
2 affirmatively put up a sign or otherwise not
3 give permission for people to enter a property
4 with a firearm.

5 The crux of our argument is that
6 Hawaii has flipped that historical default from
7 them having to affirmatively say guns are not
8 allowed here to the current law.

9 JUSTICE JACKSON: But I guess my
10 question is, isn't that historical default that
11 you're referencing really a default that is
12 rooted in property law and not constitutional
13 law, not in the Second Amendment? I mean, the
14 argument that some have put forward is that
15 this is really a property case, not a Second
16 Amendment case.

17 Yes, it is about guns, but, the
18 argument goes, what's really going on here is
19 how states treat a private property owner's
20 consent under circumstances in which everyone
21 agrees that consent is required. You just
22 agreed that consent is required.

23 And so, fine, there are many states
24 and perhaps even most states that say we're
25 going to imply that a property owner who opens

1 his property to the public is giving consent
2 for people to carry a gun.

3 Hawaii has said no. What we're going
4 to do is we're going to say, even if you've
5 opened your property up to the public, you
6 still have to have express consent. We are not
7 going to make our own -- our property owners
8 put up signs or be the one that has to
9 affirmatively express. The person who comes on
10 has to have consent, as everybody agreed, and
11 in Hawaii, that consent is express.

12 Why isn't that and -- that and all the
13 cases that speak to it in the historical record
14 really about the property interests and
15 property rights and not about the Second
16 Amendment?

17 MR. BECK: Because, here, the law at
18 issue implicates arms-bearing conduct, Your
19 Honor, and --

20 JUSTICE JACKSON: But that doesn't
21 mean it implicates. I -- what I'm -- what I'm
22 suggesting is that it might affect, right,
23 and -- and the United States was here just last
24 term talking -- or sitting, talking about how
25 you could have rights and regulations that

1 affect someone's interests, but they actually
2 don't implicate their constitutional rights.

3 And so, here, I'm saying, yes, gun
4 owners are going to be affected because the
5 property owner says no, I don't want you to
6 bring your gun on unless you come to me and I
7 give you express consent. But that doesn't
8 mean it implicates their Second Amendment
9 rights for the purpose of Bruen.

10 MR. BECK: Well, in Bruen, the Court
11 said that there's a general right to carry. I
12 don't -- in --

13 JUSTICE JACKSON: A general right to
14 carry on public property.

15 MR. BECK: No --

16 JUSTICE JACKSON: Justice Barrett just
17 explored with you the fact that you don't have
18 a general right to carry on private property.

19 MR. BECK: It -- it's a right to carry
20 in public, Your Honor, not a right to --

21 JUSTICE JACKSON: Right.

22 MR. BECK: -- carry on public
23 property, and --

24 JUSTICE JACKSON: But -- but -- but --
25 but you do agree that there is no right to

1 carry on private property without someone's --
2 without the owner's consent, right?

3 MR. BECK: The -- here, the Second
4 Amendment is implicated, especially when you
5 carry -- anywhere you carry in public, and,
6 here, this lawsuit deals with private property
7 that is open to the public.

8 JUSTICE JACKSON: I understand, but
9 what -- what I'm suggesting is that let's --
10 let's -- suppose this lawsuit dealt with
11 someone's house and it's not open to the
12 public. Do you concede that there is no Second
13 Amendment right to carry a gun into someone
14 else's house?

15 MR. BECK: I do not, Your Honor,
16 because --

17 JUSTICE JACKSON: You do not concede?

18 MR. BECK: I do not. You -- you still
19 would be dealing with carry. If someone gives
20 me an invitation, a general invitation, to
21 enter into their home and there's a historical
22 presumption that you're allowed to carry a
23 firearm with you, then, if the government
24 passes a law that says -- that flips that
25 historical presumption to something --

1 JUSTICE JACKSON: Right. But
2 you're -- but -- but I'm just suggesting that
3 the historical presumption is about the
4 consent, not about your rights. We agreed at
5 the beginning, I thought -- I thought there was
6 a general consensus that your right to carry is
7 limited to the permission of the owner when
8 you're talking about private property.

9 Like, you've -- you've already agreed
10 that the Second Amendment right is -- is, I
11 would say, subordinate, but, you know, in
12 the -- in the panoply of rights, the right to
13 exclude is superior because the owner can say,
14 no, you can't bring this gun in here.

15 And so, once you've done that, these
16 laws that are about licensing or, you know,
17 implying that the owner has consented are all
18 in the realm of property law, I think, and not
19 in the realm of the Second Amendment anymore.

20 MR. BECK: I don't see it that way.

21 JUSTICE JACKSON: You disagree. All
22 right.

23 MR. BECK: Yes, Your Honor.

24 JUSTICE JACKSON: Thank you.

25 JUSTICE BARRETT: Counsel, do you

1 agree that the state as property owner could
2 exclude someone, not -- not this implied
3 consent law, but let's say that the state as
4 property owner -- put aside the fact that the
5 sensitive places here include state-owned
6 property. Assume that that's not so.

7 Could the state as a property owner
8 say that you can't carry a gun onto state-owned
9 property as a matter of consent under property
10 law?

11 MR. BECK: No, Your Honor. I think
12 that's a different analysis because --

13 JUSTICE BARRETT: Okay. Why?

14 MR. BECK: -- now we're dealing with
15 direct state action.

16 JUSTICE BARRETT: And the state
17 doesn't have the right as a property owner to
18 limit who carries a gun, say, into the
19 government -- governor's mansion?

20 MR. BECK: I -- I think that there are
21 certain locations that -- where the --

22 JUSTICE BARRETT: So it's all a matter
23 of sensitive places?

24 MR. BECK: Yes, Your Honor.

25 JUSTICE GORSUCH: Counsel, you make an

1 argument that Hawaii effectively destroys the
2 right to bear arms. You discussed that a
3 little bit with Justice Thomas and with Justice
4 Sotomayor. And I'm wondering where you fit --
5 think that -- that that analysis fits into the
6 two-step Bruen framework the Court announced?

7 MR. BECK: In this case, step one
8 merely deals with the fact that the state --
9 State of Hawaii -- that carry is implicated
10 here. And once we go to -- past -- once we
11 accept that carry is -- bearing a arm is at
12 issue here, everything else is dealt with under
13 step two, the historical analysis portion of
14 this analysis, Your Honor.

15 JUSTICE SOTOMAYOR: So it really
16 doesn't matter whether it was actually
17 96 percent, which we know it's not, because
18 you're dealing with the law as a whole.
19 There's no means-end scrutiny permitted by
20 Bruen, correct?

21 MR. BECK: The interest balancing has
22 been abrogated by -- yes.

23 JUSTICE SOTOMAYOR: By -- by Bruen?

24 MR. BECK: Yes, Your Honor.

25 JUSTICE SOTOMAYOR: So there's no

1 interest bearing. So, if, in fact -- if Hawaii
2 has a right to regulate a custom as opposed to
3 a constitutional right to bear an arm on
4 private property, then -- then tough luck,
5 correct?

6 MR. BECK: We have established in our
7 briefing, Your Honor, that --

8 JUSTICE SOTOMAYOR: Counsel, there's
9 no means-ends, so, if they over-regulate or
10 under-regulate, that's irrelevant. Is there a
11 right to carry a gun?

12 MR. BECK: As -- as we know from
13 Rahimi, there's a general principle that
14 dictates that you have a general right to
15 carry. When a -- the government violates that
16 right, then, because it violates that
17 principle, then the Second --

18 JUSTICE SOTOMAYOR: But that -- that's
19 the interesting part. There certainly was a
20 principle of the states regulating hunting on
21 private enclosed property. There was a history
22 of, in at least New York in 1763, just before
23 the founding, that prohibited trespassing and
24 hunting on other people's lands because
25 trampling on the land was destroying it.

1 So you don't need under Rahimi an
2 exact duplicate historically. You just need an
3 analogous principle. If the states could
4 regulate there, why can't they regulate here?

5 MR. BECK: Well, very simply, those
6 laws deal with just -- are not anywhere close
7 to the law at issue here. The state has
8 pointed to a number of antipoaching laws on
9 property that was not open to the public,
10 whereas, here, they're regulating a specific
11 type of carry for self-defense on private
12 property open to the public. I mean, the --
13 these laws are just plain not --

14 JUSTICE SOTOMAYOR: But what's open to
15 the public and the license that you have to use
16 that arm -- that land is subject to custom.

17 MR. BECK: It's subject to a national
18 tradition that we have at the -- at the time of
19 the founding, Your Honor. It's not, you know,
20 a specific custom that exists right now.

21 JUSTICE SOTOMAYOR: If means and ends
22 is not a part of our equation, I don't
23 understand what pertinence that has.

24 MR. BECK: Because, in order to do the
25 Bruen analysis, we look to see whether a law is

1 implicated by the Second Amendment right. Then
2 we look to see what the historical tradition
3 was in this country.

4 JUSTICE SOTOMAYOR: But that seems --

5 CHIEF JUSTICE ROBERTS: Counsel?

6 JUSTICE SOTOMAYOR: I'm sorry. I'm
7 sorry.

8 If you could regulate to not trespass,
9 trample the ground, if you could regulate not
10 to hunt, if it's not means and ends, why can't
11 you regulate simply to switch a presumption
12 that gives the owner the right it has to give
13 you express consent to say yea or nay to
14 carrying a gun?

15 MR. BECK: Well, for two reasons,
16 because that violates our nation's historical
17 tradition of firearms carry and, two, it
18 violates a principle that people have --

19 JUSTICE SOTOMAYOR: But we didn't
20 have --

21 CHIEF JUSTICE ROBERTS: Counsel, I --
22 I --

23 JUSTICE SOTOMAYOR: Go ahead.

24 CHIEF JUSTICE ROBERTS: -- see that
25 your red light is on.

1 MR. BECK: Yeah. Yes, Your Honor.

2 CHIEF JUSTICE ROBERTS: We've been
3 talking about private property and public
4 property. A gas station on the side of the
5 highway is private property. It's owned by the
6 gas company or whatever.

7 A -- is -- is -- do you assume that
8 you have the right to go on that private
9 property even without an express permission?

10 MR. BECK: Yes, Your Honor.

11 CHIEF JUSTICE ROBERTS: Even though
12 it's private property?

13 MR. BECK: Yes, absolutely, Your
14 Honor.

15 CHIEF JUSTICE ROBERTS: Is it a
16 different analysis or the same analysis when
17 you're talking about a dwelling along the side
18 of the --

19 MR. BECK: That's a --

20 CHIEF JUSTICE ROBERTS: -- of -- of a
21 road?

22 MR. BECK: That's a different
23 analysis, Your Honor. You have to see whether
24 there's some sort of invitation to come in
25 there.

1 CHIEF JUSTICE ROBERTS: Is there,
2 under our law, an invitation, for example, for
3 people solicitating, for people who want to
4 drop off pamphlets about a particular --

5 MR. BECK: Yes, Your Honor, up
6 until -- up to the doorknob or -- yeah, there
7 is.

8 CHIEF JUSTICE ROBERTS: Even though
9 it's private property?

10 MR. BECK: Yes, Your Honor.

11 CHIEF JUSTICE ROBERTS: A stranger can
12 walk off the sidewalk and go up to the door?

13 MR. BECK: Yes, up to the door, Your
14 Honor.

15 CHIEF JUSTICE ROBERTS: Thank you.

16 Justice Thomas?

17 Justice Alito?

18 JUSTICE ALITO: Under Hawaii law, are
19 there any other objects besides guns that a
20 person may not possess when that person enters
21 private property that is open to the public?

22 MR. BECK: Not to my knowledge, Your
23 Honor.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: In Hawaii, for 200
3 years, there's been no custom of carrying
4 weapons, correct, up until Bruen and Heller?

5 MR. BECK: Up until Bruen, you could
6 not get a license to carry a firearm, Your
7 Honor.

8 JUSTICE SOTOMAYOR: So 78 percent of
9 Hawaii residents and 64 percent of Hawaii gun
10 owners do not think that loaded concealed
11 weapons should be allowed into businesses at
12 all, correct?

13 MR. BECK: I -- I'm unaware of that
14 statistic, Your Honor.

15 JUSTICE SOTOMAYOR: I wasn't aware of
16 your 97 -- 96 point -- percent number either.

17 Nothing about Hawaii's customs,
18 tradition, or culture creates an expectation
19 that the general public carries guns wherever
20 they go, correct?

21 MR. BECK: Hawaii is part of the
22 United States, and as part of the United
23 States, our national tradition is that people
24 are allowed to carry on private property that
25 is open to the public.

1 JUSTICE SOTOMAYOR: This law is not
2 banning you from doing that. It's just
3 requiring you get -- to get the owner's
4 permission, correct?

5 MR. BECK: And, here, the law has
6 always been that you had an implied right to
7 enter onto a property.

8 JUSTICE SOTOMAYOR: Not in Hawaii.

9 MR. BECK: As -- Hawaii is part of the
10 United States, Your Honor, and as the --

11 JUSTICE SOTOMAYOR: But, if it's a
12 local custom that controls --

13 MR. BECK: It is not a local custom
14 that controls.

15 JUSTICE SOTOMAYOR: I -- I --

16 MR. BECK: It is the custom --

17 JUSTICE SOTOMAYOR: Where else in the
18 law have we permitted local custom to create a
19 constitutionally protected right?

20 MR. BECK: Bruen was very clear here
21 that we're dealing with our national tradition,
22 Your Honor. It is not local custom that
23 controls in this area of law.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: Mr. Beck, the various

1 statutes that Hawaii has cited as going to the
2 Bruen step two question, you say they're not
3 close enough, and I guess I want to know why.

4 I mean, I was struck by the fact that
5 there are quite a number of statutes that do
6 exactly what this law does. They flip a
7 default rule as to how explicit consent has to
8 be. You know, they recognize that you don't
9 have a right to go in without consent. You do
10 have a right to go in with consent. And then
11 the question is how do we determine consent and
12 what default rule do we start with.

13 And I guess what struck me about these
14 statutes and about how close they are is that
15 that's exactly what each of these statutes did.
16 So why isn't that pretty good evidence under
17 Bruen's step two that this is something that
18 states historically have done?

19 MR. BECK: The state has not cited to
20 a single case that is relevantly similar to the
21 one at issue here.

22 We've got basically two sets of laws.
23 One were the antipoaching laws that dealt with
24 private property that was not open to the
25 public, one, and part of that also is there

1 were exemptions for people to be able to carry
2 firearms onto those lands that -- for purposes
3 of self-defense. So land that's not open to
4 the public where you still have a self-defense
5 right isn't relevantly similar to the -- to the
6 law at issue here.

7 And the other sets of laws that have
8 been cited to are black codes, and those can't
9 be relevantly similar. As Justice Kavanaugh
10 said in *Rahimi*, you know, we've moved away from
11 that history. And, in addition, it dealt with
12 a very -- you know, discriminated against a
13 very small subsection of society rather than
14 pro- -- prohibitions on the general right to
15 carry. So --

16 JUSTICE KAGAN: Yeah. So, I mean, go
17 back to the first thing, the idea that these
18 are antipoaching laws. I mean, okay, Hawaii's
19 is not an antipoaching law. But I suppose I'm
20 sort of stuck on the fact that that doesn't
21 seem to me to be the relevant similarity.

22 In *Rahimi*, we said, you know, you can
23 go up a level of generality. You don't have to
24 have a historical twin. There can be
25 differences. In *Rahimi*, the essential

1 similarity that we thought controlled was just
2 that the guns were being used to protect
3 against people who would be violent with their
4 guns. And, you know, that's a pretty general
5 principle.

6 And, here, the general principle is --
7 is sort of similar. We think that there's a
8 danger of various injuries occurring when you
9 go onto private property with a gun. It might
10 have been, in the old days, poaching. It might
11 be something else now.

12 But, because that that's so, we -- we
13 are going to use a default rule that -- that --
14 that -- that -- that says to the property
15 owner, if you want this, okay, but you have to
16 say you want it. That's -- you know, it seems
17 to me the same. It's a different injury. It's
18 not poaching anymore. But it seems to me the
19 same state mechanism, the same kind of state
20 regulation.

21 MR. BECK: Yes, Your Honor, but one
22 dealt with private property that was not open
23 to the public, whereas this law is dealing with
24 private property that's open to the public.
25 And, in addition to that, the antipoaching laws

1 also gave you a right to be able to carry a
2 firearm for self-defense.

3 So I just simply don't see how -- the
4 level of generality there would simply swallow
5 the rule if this Court were to accept those
6 antipoaching laws as being relevantly similar
7 here, Your Honor.

8 JUSTICE KAGAN: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Gorsuch?

11 JUSTICE GORSUCH: Your friends on the
12 other side in the Ninth Circuit relied on two
13 statutes in particular. One was the 1771 New
14 Jersey law that you were just discussing with
15 Justice Kagan. But the other one that was left
16 unmentioned was an 1865 Louisiana statute that
17 was adopted immediately after the Civil War as
18 part of an effort, it appears, to disarm black
19 people. A Reconstruction governor later
20 explained that this law, of course, was aimed
21 at the freedmen.

22 Do you think the black codes, as
23 they're called, should inform this Court's
24 decision-making when trying to discern what is
25 this nation's traditions?

1 MR. BECK: I do not, Your Honor.

2 JUSTICE GORSUCH: Well, your friend on
3 the other side says it should and that the 1865
4 statute is a "dead ringer" for this statute.

5 MR. BECK: The 1865 law was expressly
6 passed to discriminate against African
7 Americans that were newly freed slaves. And I
8 just don't see how a law like that can be used
9 to be analogized to a modern-day law, this
10 modern-day law, Your Honor.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 Justice Barrett?

14 JUSTICE BARRETT: Do you agree with
15 everything in the government's brief?

16 MR. BECK: No, I do not, Your Honor.

17 JUSTICE BARRETT: The United States
18 Government, yeah.

19 MR. BECK: Yes. Yes, Your Honor.

20 JUSTICE BARRETT: Okay.

21 (Laughter.)

22 JUSTICE BARRETT: The government
23 that's on your same side.

24 MR. BECK: Yes, I understand.

25 (Laughter.)

1 MR. BECK: I agree with every --

2 JUSTICE BARRETT: I'm not asking you
3 to throw your case away.

4 (Laughter.)

5 MR. BECK: I fully endorse the United
6 States' brief, Your Honor.

7 JUSTICE BARRETT: Okay. And then I
8 just have one clarifying question.

9 When Justice Kagan was pressing you on
10 the analogies between the antipoaching laws and
11 Hawaii's law, one of the things that you used
12 to distinguish it was that the antipoaching
13 laws applied to private property and these
14 apply to property that's open to the public
15 albeit private.

16 But I thought you had initially told
17 me that Hawaii couldn't do this with respect to
18 property that was like a dwelling, a private
19 residence either, that was not open to the
20 public.

21 MR. BECK: Well, what I'm saying is
22 that that was simply -- that's a different
23 historical analysis. And if they were to
24 muster enough historical analysis to justify
25 the law, that might be true. I just don't

1 think that they have developed enough history
2 on this record to be able to justify that law,
3 Your Honor.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: The Chief Justice
7 asked you about a gas station on the side of
8 the highway, which is private property.
9 It's open to the public. And you said that we
10 presume that a person can go in under those
11 circumstances. Is that right?

12 MR. BECK: That's correct, Your Honor.

13 JUSTICE JACKSON: All right. I guess
14 what I'm positing is that the reason we presume
15 that a person can go in is not because they
16 have a constitutional right to go in under the
17 Second Amendment or anything else.

18 The reason we presume they can go
19 in is because property law implies that a gas
20 station owner who has private gas station and
21 opens it to the public has consented for people
22 to come in.

23 So it really is a function of property
24 law and the extent to which the consent is
25 being implied or, you know, expressed and the

1 state law governing that, right?

2 I mean, it's not -- you don't have a
3 right to go into private property. You're only
4 there because the owner has either -- either
5 implicitly or expressly consented.

6 MR. BECK: You have a constitutional
7 right to carry your firearm onto that specific
8 gas station.

9 JUSTICE JACKSON: You do? Where is
10 that? I thought --

11 MR. BECK: Because --

12 JUSTICE JACKSON: -- the reason why
13 this was all here in -- in -- is because you
14 had an implied license. I thought the
15 historical tradition required you to have a
16 license because you don't have a right to go
17 onto private property, and the tradition was
18 we're going to imply that you have a license
19 under these circumstances.

20 MR. BECK: The basis of this lawsuit
21 is that we're only discussing private property
22 where you have a right to enter onto that is
23 open to the public, and we're saying that once
24 that property is open to the public, we have a
25 right to carry a firearm onto it --

1 JUSTICE JACKSON: Okay.

2 MR. BECK: -- unless the government --

3 JUSTICE JACKSON: Okay. I think I
4 understand.

5 Let me just ask you about the black
6 codes. Justice Gorsuch raised it. And I guess
7 what I'm wondering -- your -- your answer to
8 him was they can't be and shouldn't be used.

9 And I guess I'm wondering whether that
10 doesn't signal a problem with the Bruen test,
11 that to the extent that we have a test that
12 relates to historical regulation, but all of
13 the history of regulation is not taken into
14 account, I -- I think there might be something
15 wrong with the test. So can you speak to that?

16 MR. BECK: There's nothing wrong
17 with the Bruen test, Your Honor. Just on a
18 fundamental level, the black codes can't be
19 used because they dealt to discriminate against
20 a small --

21 JUSTICE JACKSON: No, I understand why
22 you're saying they can't be used, but it's
23 because we've moved away from that history, not
24 because that history didn't exist.

25 And so, to the extent that the test

1 today is tying us to historical circumstances,
2 it would seem to me that all of history should
3 be on the table.

4 And if we start taking pieces off,
5 whether it's because we've moved away from it
6 or we don't agree with it anymore, I think
7 there's -- there's going to be a problem with
8 respect to the accuracy of our test.

9 MR. BECK: Your Honor, it's not just
10 because we don't agree with it anymore. It's
11 that the 1865 law is not relevantly similar
12 because it dealt with a very small segment of
13 society, those being discriminated against,
14 whereas, here, the law is a law of general
15 applicability. So the two --

16 JUSTICE JACKSON: To -- to people
17 other than the people in this small segment
18 that you're talking about, who were a part of
19 society, but I guess you're saying that for the
20 purpose of this test, we're not going to
21 consider what happened to them?

22 MR. BECK: No. What I'm saying is
23 that the -- the black codes dealt with a
24 very -- it wasn't a law of general
25 applicability. It was designed to discriminate

1 against -- it was a racist law designed to
2 discriminate against African Americans,
3 whereas, here, the law at issue here is a law
4 that applies to everyone.

5 We can't use a racist, discriminatory
6 law to justify a modern-day law that applies to
7 the general public, Your Honor.

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 MR. BECK: Thank you, Chief Justice.

12 CHIEF JUSTICE ROBERTS: Ms. Harris.

13 ORAL ARGUMENT OF SARAH M. HARRIS,
14 FOR THE UNITED STATES AS AMICUS
15 CURIAE, SUPPORTING PETITIONERS

16 MS. HARRIS: Mr. Chief Justice, and
17 may it please the Court:

18 Bruen held that states can't refuse
19 to license public carry. Hawaii can't gut
20 Bruen by presumptively banning everyone
21 licensed to carry from doing so at retail
22 establishments or other private property open
23 to the public absent the owner's express
24 consent. That novel law offends our history
25 and tradition.

1 First, pretextual restrictions are,
2 by definition, unconstitutional in why they
3 regulate. Here, the law's text belies Hawaii's
4 claim to protect property rights.

5 Hawaii subjects just one right, the
6 Second Amendment, and one class of people, the
7 people of Hawaii who had a license to carry
8 after Bruen, to its presumptive ban. Hawaii
9 lets everyone else, including target shooters
10 and hunters, bring firearms, machetes, and
11 other things absent the owner's objection.

12 Second, pretext aside, Hawaii can show
13 no tradition behind its law. Its best analog
14 is an unconstitutional black code. That's
15 because, from the founding, the tradition has
16 been that opening property to the public
17 authorizes carrying.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: What's your best
20 support for what appears to be your argument
21 that a pretextual regulation is per se
22 unconstitutional?

23 MS. HARRIS: I would start
24 historically with Blackstone and the meaning of
25 the word "infringed" in the text of the Second

1 Amendment. If you look to Blackstone, which is
2 one of the main sources underpinning what the
3 preexisting Second Amendment right meant, the
4 canonical example of a law that burdened
5 impermissibly the right -- right to bear arms
6 was the English game laws, which, under the
7 pretext of trying to preserve game, were
8 designed to prevent commoners from hunting.

9 And we know that was one of the
10 animating premises of the Second Amendment from
11 people like St. George Tucker, from Justice
12 Story. And, again, the very meaning of the
13 word "infringed" in the Second Amendment shows
14 this is part of the history and tradition
15 underlining -- lying the --

16 JUSTICE KAGAN: The analysis that
17 you're suggesting, Ms. Harris, is this part of
18 the Bruen test, or is it something separate
19 from the Bruen test?

20 MS. HARRIS: It is part and parcel of
21 the Bruen test. It goes to why the law is
22 regulating the way it does, in Bruen's words.
23 Or, in -- in the word of Rahimi, it goes to
24 whether there is a permissible reason. It
25 helps you tell whether the analog is really an

1 analog.

2 JUSTICE KAGAN: So you're -- you're on
3 step two of the Bruen test. You -- you -- you
4 think about pretext. Is -- is that what you're
5 saying?

6 MS. HARRIS: I think that's fair
7 because step one is are you regulating
8 arms-bearing conduct. And so one of the parts
9 of whether you tell is this part of the history
10 and tradition and are the potential analogs
11 really analogs is you say: Why is this modern
12 law regulating the way it is?

13 And if it's pretextual, by definition,
14 you're not going to have analogs because there
15 is not a history and tradition of pretextual
16 laws that negate the right.

17 JUSTICE KAVANAUGH: Why do we need --

18 JUSTICE KAGAN: Most --

19 JUSTICE KAVANAUGH: -- to make it --
20 well, go ahead.

21 JUSTICE KAGAN: Mostly, in our
22 constitutional law, I mean, there are
23 exceptions here and there, but mostly, in our
24 constitutional law, we've steered clear from
25 trying to evaluate motive, purpose, directly.

1 You know, we -- we -- we create rules that
2 maybe are meant to ferret out bad motive, but
3 we kind of think it's -- it's a bad road to
4 go down if we're going to ask about every
5 state's -- whether the state has acted
6 pretextually in doing one thing or another.

7 And I'm just wondering why we would
8 have a different thought with respect to this
9 right?

10 MS. HARRIS: Because, respectfully,
11 that's not our position. We're not saying
12 think about what's on people's minds; if you
13 have a bad motive, it's a bad law.

14 What we're saying is look at the text
15 and see if there is a fundamental mismatch. If
16 the law is gerrymandered textually, which is
17 the case here, in such a way that belies the
18 asserted motive, that is familiar --

19 JUSTICE KAGAN: So that -- that --
20 that -- that seems fair. But then it seems as
21 though that's classic means-ends scrutiny. You
22 know, look at over-inclusion, look at
23 under-inclusion. Is the state really
24 regulating what its interests would suggest
25 ought to be regulated?

1 So that's means-ends scrutiny, which I
2 thought Bruen was supposed to get us away from.

3 MS. HARRIS: So two points on this.
4 Respectfully, no, we don't think so. We think
5 just as Church of the Lukumi in the First
6 Amendment context is a case about pretext and
7 not sort of means-ends, it's about how do you
8 tell from the text of the law is it
9 gerrymandered in an impermissible way. That's
10 what we're asking for here.

11 And the Second Amendment of all
12 places, in terms of history and tradition, is
13 where this test would apply because, again, the
14 original meaning of the word "infringed" in
15 1791 -- and I would point you to the Daniel
16 Slate article on this, "infringed," what --
17 included the Blackstonian concept that if you
18 are regulating for a pretextual purpose that
19 is belied by the design of the law, that is a
20 classic means of infringement and was what --

21 JUSTICE KAVANAUGH: Why -- why are
22 we -- I'm sorry.

23 JUSTICE KAGAN: No, go ahead.

24 JUSTICE KAVANAUGH: Why are we making
25 it complicated? The text of the Second

1 Amendment covers arms. Part 3 of Heller says
2 that means what it -- Heller says it means what
3 it says, says what it means. Part 3 of Heller
4 says there are certain exceptions to that or
5 contours on that which are rooted, but they
6 have to be rooted in history.

7 Here, there's no sufficient history
8 supporting the regulation, end of case.

9 Isn't that kind of the straightforward
10 way rather than getting into this whole new
11 elaborate pretext analysis, which, as Justice
12 Kagan says, sounds like what we moved away
13 from?

14 MS. HARRIS: So absolutely, the
15 case -- the case could rise and fall on the
16 lack of history and tradition. I think the
17 one --

18 JUSTICE KAVANAUGH: It's pretty
19 simple, right? Your position is there are
20 no -- there are no sufficient analogs.
21 Usually, when -- as Heller says in Part 3, when
22 you're looking for a historical tradition that
23 justifies an exception to the textually
24 expressed right, it's got to be a deeply rooted
25 tradition broadly consistent over time and

1 broad among a lot of states. And you don't
2 have anything like that here. So it's just
3 kind of, from your perspective, you know,
4 pretty simple.

5 MS. HARRIS: From our perspective,
6 it's an overdetermined case. I think the
7 reason you might want to go and put --

8 JUSTICE KAVANAUGH: Why -- why not
9 just -- I mean, why didn't you lead with that?
10 I don't understand why you led with the other
11 argument, and -- and it may be neither here nor
12 there in the end -- at the end of the day, but
13 I -- I was trying to figure out why.

14 MS. HARRIS: I think two reasons. One
15 is because it would be a shame, I think, if the
16 Bruen inquiry discounts the idea that -- or
17 just doesn't account for pretextual laws given
18 how rooted the -- how antithetical they are to
19 the history and tradition.

20 JUSTICE KAVANAUGH: What -- what do
21 you mean by "pretext"? Because a government
22 often will look at one of our precedents and
23 say, well, we don't agree with that precedent,
24 but we want to regulate right up to the line of
25 that precedent. There might be some gray area

1 there.

2 I mean, that -- we don't call that
3 pretext every time when a state government does
4 that in the First Amendment context.

5 MS. HARRIS: No, and I understand. I
6 don't want to fight this too hard because I
7 think we are in agreement that this is an easy
8 case at the end of the day, and every single
9 way you look at it, there's no history and
10 tradition.

11 JUSTICE GORSUCH: Ms. Sarah --

12 MS. HARRIS: The reason --

13 JUSTICE GORSUCH: Ms. Harris, on -- on
14 that, moving to that, there's been some
15 suggestion that this is just, oh, redefining
16 property rights and it has nothing to do with
17 the Second Amendment.

18 And, of course, we don't allow
19 governments to redefine property rights in
20 other contexts that would infringe other
21 constitutional rights. I'm thinking here of
22 the Takings Clause in Tyler versus Hennepin
23 County, but I'd like you to respond to that
24 argument.

25 MS. HARRIS: That is exactly correct.

1 In no other context could you say that there's
2 an exemption to constitutional restrictions
3 just because you're trying to redefine the laws
4 of trespass. The state cannot -- and the First
5 Amendment's another example beyond the Takings
6 Clause. I think Lamont, for instance, is on
7 all fours. You could have very easily said in
8 that case no big deal, federal statute is just
9 flipping the presumption. Normally, the
10 default rule is recipients of mail get the mail
11 unless they say no. Just flipping the
12 presumption, now you don't get your mail if
13 it's on a certain topic unless you
14 affirmatively consent and send in a very
15 easy-to-send postcard. The Court absolutely
16 rejected that reasoning in the First Amendment.

17 JUSTICE JACKSON: But, Ms. Harris, can
18 we just be a little bit more specific about the
19 Second Amendment right that you say is being
20 infringed here? This is -- the -- the point
21 that I guess I'm still stuck on is whether or
22 not, in a world in which we all concede -- and
23 I think the United States is on board with
24 this -- that the Second Amendment yields to the
25 property interests of a private property owner

1 such that the private property owner gets to
2 consent as to whether or not you can carry a
3 gun on his property, when we're in that world,
4 what Second Amendment right is being infringed
5 when the property owner says no or when the
6 state says the property owner's consent has to
7 be expressed?

8 MS. HARRIS: So let me unpack that
9 both in terms of the methodology and the
10 ultimate answer. I think, when you collapse
11 the whole inquiry into a specific question of
12 what happens vis-à-vis property rights, you're
13 backing away from the Bruen framework. The two
14 steps are, one --

15 JUSTICE JACKSON: No, I am backing
16 away because the Bruen framework only applies
17 where the Second Amendment is implicated. And
18 what I'm suggesting is that the Second
19 Amendment right is not being implicated when
20 the regulation is about the property owner's
21 consent, the form of it. Can it be implicit or
22 must it be express in a world in which we've
23 said that consent already takes precedent over
24 the Second Amendment right?

25 MS. HARRIS: So what we're answering

1 here is what is the scope of the right to
2 publicly carry under the Second Amendment. And
3 I don't think states can get out of
4 constitutional scrutiny by -- by -- by
5 trivializing what they're doing if they're
6 getting --

7 JUSTICE JACKSON: But hadn't you
8 already agreed that the Second Amendment right
9 yields to the property owner's consent?

10 MS. HARRIS: Of course, we're not
11 saying that you override what property owners
12 are saying. But what we're saying is, when a
13 restriction parts ways, when it redefines the
14 concept of trespass to essentially say, for
15 this one category of people, people licensed to
16 carry, you are no longer presumptively allowed
17 to carry at gas stations or laundromats, et
18 cetera --

19 JUSTICE JACKSON: But you're only
20 presumptively allowed because the presumption
21 goes to the consent, not to your right.

22 MS. HARRIS: I understand --

23 JUSTICE JACKSON: You're presumptively
24 allowed because we're presuming that, in this
25 situation, the owner is consenting.

1 MS. HARRIS: And this goes back to the
2 colloquy with Justice Gorsuch, which is, when
3 states are trying to redefine property
4 concepts, that doesn't take them out of
5 constitutional scrutiny. Quite the contrary.
6 In both the First Amendment context and the
7 Takings Clause context, the rule is, when the
8 states are departing from the default in a way
9 that implicates other constitutional rights,
10 they can't do that. The Takings Clause may be
11 an outer limit in sort of what exactly states
12 can do, but we -- I mean, just the floodgates
13 would open if the position were all that's
14 going on here is just tweaking how you consent.

15 Just think about in -- I think, in the
16 First Amendment context, you would say no big
17 deal, you are now going from a world where
18 candidates can go door to door and -- for a
19 campaign speech, but now you have to have a big
20 sign in your yard that says political speech
21 welcome for someone to go in. Or, in the
22 Second Amendment context, Hawaii's same
23 reasoning would lead to a rule that it's fine
24 to ban tenants from owning guns in self-defense
25 unless the landlord in the contract expressly

1 consents to doing so.

2 And I really think the concept that
3 this is just tweaking consent elides the burden
4 that Hawaii is imposing here of presumptively
5 banning open carry, banning --

6 CHIEF JUSTICE ROBERTS: Thank you.

7 MS. HARRIS: -- public carry.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas, anything further?

11 Justice Alito?

12 JUSTICE ALITO: Would you explain why
13 the antipoaching laws that Justice Kagan was
14 talked about are not in your view an
15 appropriate analog?

16 MS. HARRIS: Absolutely. Those
17 poaching laws, as the Sigmon article and other
18 sources and the -- the text of the laws
19 themselves exemplify, show the opposite of the
20 tradition Hawaii is trying to show. They show
21 that for property closed to the public, that
22 people have taken steps to enclose for
23 improvements, to protect the fields from being
24 trampled by hunters, for that special category,
25 there was -- were laws that said you have to

1 affirm -- get affirmative consent, sort of like
2 Justice Barrett's questions about you do need
3 affirmative consent to go into dwellings.

4 The rule for other property, property
5 open to the public, open fields, was the exact
6 opposite. There was a conscious decision at
7 the founding because hunting was an incredibly
8 important issue that if you did not enclose
9 your lands, it was an open invitation to carry.
10 And that's consistent with the tradition at the
11 founding of public carry that the NRA amicus,
12 for instance, details.

13 The idea that Hawaii's law is a
14 relevant analog would just abstract -- just
15 take away the -- take the level of generality
16 to justify the opposite of the tradition. It
17 would have been profoundly disturbing to the
18 founding generation to hear that in order to
19 travel to inns or taverns or anywhere else
20 people commonly carried arms that they had to,
21 like, get the affirmative consent of each sort
22 of tavern and hope that they weren't
23 trespassing if they were traveling and -- and
24 their carriage had to stop somewhere.

25 JUSTICE ALITO: And in order to

1 determine whether an analog is adequate for
2 Bruen purposes, is it possible to disregard --
3 how do you choose the level of -- of
4 generality? What is the principle that tells
5 you what is the -- the relevant level of
6 generality?

7 MS. HARRIS: I think, here, the
8 relevant level of generality does revert to
9 some -- the -- the property law concepts. If
10 you're talking about property open to the
11 public, the relevant comparator is property
12 open to the public because there is a relevant
13 common law tradition of certain permissions
14 that go there. And when the state is
15 essentially presumptively banning or switching
16 the tradition, I think that is -- that is an
17 issue.

18 So I think that's relevant. And to
19 disregard the clear text of these statutes,
20 which are focused both on property -- that
21 distinction between property closed to the
22 public and open to the public and the specific
23 question of hunting, would allow you to
24 abstract out everything. It's the same thing
25 the Court rejected in Bruen, that just because

1 some places, for instance, might be sensitive
2 places, every place could be a sensitive place
3 on the same reasoning at too high of a level of
4 generality.

5 JUSTICE ALITO: What do you think is
6 the purpose of the Second Amendment right?

7 MS. HARRIS: The purpose of the Second
8 Amendment right is to allow citizens -- to
9 allow citizens to bear arms for self-defense
10 and other lawful purposes.

11 JUSTICE ALITO: And other lawful
12 purposes?

13 MS. HARRIS: Yes.

14 JUSTICE ALITO: Not just self-defense.
15 Did Heller say that?

16 MS. HARRIS: I don't think Heller
17 excludes it, and I don't think the Court has to
18 decide is it self-defense and other things.
19 But it would be, again, sort of strange to
20 think that you cannot use arms for any other
21 purposes when the founding generation used --
22 considered arms important not just for
23 self-defense but, for instance, for having --
24 for making sure that people were proficient in
25 arms to be able to defend the country. So I

1 don't think that there is sort of necessary --
2 but I don't think the case presents that
3 problem.

4 JUSTICE ALITO: Do you think it's
5 possible to ignore the purpose of the Second
6 Amendment in determining the level of
7 generality that's appropriate?

8 MS. HARRIS: I think that it depends
9 on the case. For this particular case, I don't
10 think the Court has to resolve it because the
11 point here is Hawaii is saying its law is
12 supposed to protect private property rights,
13 and it's essentially trying to negate people's
14 right to publicly carry everywhere.

15 JUSTICE ALITO: All right. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Sotomayor?

18 JUSTICE SOTOMAYOR: There's been a
19 number of church shootings recently. Does a
20 state or the federal government, does it bar
21 from saying you can't go into a church without
22 a gun -- with a gun without the owner's
23 permission, the church's permission?

24 MS. HARRIS: So --

25 JUSTICE SOTOMAYOR: Is that illegal?

1 MS. HARRIS: -- the answer to that
2 question would go into the sensitive places
3 inquiry, which is different from this case
4 because that is sort of place-specific. So the
5 question would be is there a history and
6 tradition of allowing restrictions on people
7 carrying in churches that we --

8 JUSTICE SOTOMAYOR: I -- I suspect
9 there isn't. So I -- I suspect. I could be
10 wrong. I never read about that.

11 But, if we're not looking at property
12 rights in a government's right to regulate a
13 presumption, then what would give the
14 government the right to think that flipping the
15 presumption in that case is reasonable?

16 MS. HARRIS: Again, I think it goes --

17 JUSTICE SOTOMAYOR: Just as here,
18 where most property owners for 200 years didn't
19 carry weapons in this state without an owner's
20 consent. That's the presumption of the
21 Hawaiian people.

22 MS. HARRIS: So two points on that,
23 one with respect to the presumption of the
24 Hawaiian people. As Petitioner notes, there is
25 no Second Amendment for every single state in

1 the union that's different. It is a national
2 tradition, and states cannot retain their
3 pre-statehood traditions as sort of a -- a veto
4 for the Second Amendment national tradition.
5 If you look --

6 JUSTICE SOTOMAYOR: It's not a -- it's
7 not a -- it's not a veto. No one's vetoing an
8 owner's right explicitly or expressly to
9 consent to carrying guns. The owner's the one
10 with the right.

11 MS. HARRIS: So, to be clear, what I
12 mean by that is you can't use local customs to
13 say that each state gets its own Second
14 Amendment. The Court has rejected that very
15 type of analysis in the Takings Clause, for
16 instance, in *Hennepin County, in Cedar Point*,
17 where the Court said, even if California has a
18 kind of unusual way of defining easements or
19 Minnesota has a strange way of defining
20 property interests, that doesn't mean that that
21 sort of individual thing --

22 JUSTICE SOTOMAYOR: But there's
23 nothing unusual about here -- about this. This
24 is simply a presumption.

25 MS. HARRIS: Respectfully, this is

1 highly unusual, as the Ayers article itself
2 acknowledges. In all 50 states and the
3 District of Columbia, up until Bruen, the
4 universal rule, and this does trace to the
5 founding, is that when you have property open
6 to the public, you are inviting people to go on
7 it with arms unless the owner says otherwise.

8 We think that implicates the
9 Constitution, the Second Amendment for the same
10 reasons it implicates other amendments in other
11 contexts.

12 JUSTICE SOTOMAYOR: Presumption
13 doesn't change that. The presumption lets the
14 owner choose.

15 MS. HARRIS: But the presumption is
16 that you're trespassing. It treats -- just for
17 one class of people, it turns essentially
18 property open to the public like a gas station
19 into the equivalent of someone's house, where
20 you're committing a crime under Hawaii law if
21 you actually go onto it without consent.

22 JUSTICE SOTOMAYOR: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 JUSTICE KAGAN: Can you imagine, Ms.
25 Harris, any modern analogs of these

1 antipoaching laws? I mean, I guess what I'm
2 asking you to do is to say is there -- are
3 there any modern laws that sort of use this
4 kind of authority over, you know, consent and
5 licensing and so forth but that don't have to
6 do with hunting that would be permissible
7 because they're very much like these
8 antipoaching laws?

9 MS. HARRIS: So two answers. One is,
10 obviously, these laws themselves have endured
11 throughout, which is why I think maintaining
12 the distinction is important. But, two, you
13 could say it's not that distant, but there is a
14 separate tradition with respect to property
15 closed to the public, like your house.

16 What are the relevant permissions,
17 what's the default for property closed to the
18 public, setting aside hunting? And I -- I
19 think that's consistent with the way these laws
20 work. I mean, Justice Sotomayor mentioned the
21 1763 New York law, and that's talking about
22 enclosed property like orchards or gardens or
23 other stuff and saying, if you carry arms on
24 that land, that's a trespass.

25 But it's also saying you can't

1 trespass generally in those places. So I think
2 it's getting to the idea of, if you have
3 particular property that's closed to the
4 public, you might not want people with arms on
5 it. That is what these sort of founding-era
6 laws say.

7 You don't want them trampling your
8 cornfield and destroying your improvements
9 because it's closed to the public, similarly to
10 you might be able to say, you know, if I --
11 and, again, this is a matter of, like, what the
12 history would actually show, so I'm just
13 speculating --

14 JUSTICE KAGAN: So, if I can -- your
15 objection to the use of these old laws really
16 is just that the Hawaii law applies to all --
17 although it's private property, it applies to
18 property that is entirely open to the public
19 for -- you know, for all other purposes and
20 with respect to all other activities.

21 And that's your view of why Hawaii is
22 different. And if the Hawaii law was narrower
23 than that or if some some other state's were,
24 then you would have a different question?

25 MS. HARRIS: I think it would present

1 different questions. And, yes, that is our
2 main objection. And the reason is Hawaii is
3 trying to use laws that actually show the
4 opposite tradition, which is laws closed to the
5 public, you might need affirmative consent in
6 order to be able to hunt on them.

7 Property open to the public, though,
8 is the exact opposite rule from the founding on
9 otherwise in order to ensure that people could
10 publicly carry absent objection.

11 And so, yes, I think that that is the
12 most critical point about these laws. The fact
13 that they concern hunting, I think, is a
14 relevant additional factor that goes into what
15 was the point of the presumptions, but the fact
16 that it's hunting and also sort of other forms
17 of trespass, I think, is the bottom line.

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Gorsuch?

21 JUSTICE GORSUCH: There's been the
22 suggestion that this is just flipping a
23 presumption about the implied license and that
24 that's just a matter of property law and not
25 the Second Amendment, but how do we think about

1 that given that it flips the presumption on the
2 longstanding implied license only with respect
3 to firearms, not knives, not solicitation, not
4 politicking, not anything else?

5 MS. HARRIS: That's exactly right. I
6 think there's two ways to think about it. One
7 is we do think that that makes it much more
8 like the kind of pretextual laws that the
9 founding generation thought were anathema to --
10 to the Second Amendment because you're singling
11 out a particular right and a particular group
12 who's committing trespass when everyone else
13 isn't.

14 But, two, just going back to this
15 concept, you can't just say, you know, you're
16 tweaking how to give consent and you're out of
17 the Constitution.

18 When a state is saying you're
19 presumptively banned, you're committing a crime
20 unless you get consent, that is a much bigger
21 deal than just sort of tweaking the edges of
22 property law, and in no other context has the
23 Court said no big deal, the Constitution
24 doesn't apply, this doesn't even implicate the
25 relevant constitutional inquiry.

1 JUSTICE GORSUCH: And what are the
2 implications? Hawaii allows oral consent to be
3 sufficient. California had a law requiring a
4 posted sign. The Ninth Circuit struck that
5 down while allowing Hawaii's law, but I'm not
6 sure I understand the distinction between the
7 two.

8 Why couldn't a state require
9 affirmative signs? Why -- why couldn't it
10 perhaps create an irrebuttable presumption
11 against consent?

12 MS. HARRIS: I think that is exactly
13 where Hawaii's position leads. I don't think
14 there's any principled distinction between
15 those two things.

16 And, again, it's not just sort of, oh,
17 is it easy to get one person's consent, how
18 hard is it? That's kind of interest balancing
19 at the outset.

20 But, as a practical matter, in order
21 to run your errands, you have to run the table
22 of -- of knowing you're not trespassing on
23 private property to, like, pick up your dry
24 cleaning and catch a cup of coffee.

25 And if you run out of gas and you're

1 trying to find a gas station, you can't get gas
2 unless you know you're in your car, you have --
3 you have your gun in your purse, and you're not
4 actually committing a crime by stepping on the
5 gas station property.

6 Now Hawaii is trying to say it's a
7 little easier than that, but the text of its
8 law says just entering the property without
9 permission is a crime.

10 JUSTICE GORSUCH: And then, lastly,
11 there's been some discussion about the black
12 codes, and maybe they should be relevant and
13 maybe we really should consider them as
14 significant here. In fact, they're a dead
15 ringer. Thoughts?

16 MS. HARRIS: It is 2026 and it is
17 somewhat astonishing that black codes, which
18 are unconstitutional, are being offered as
19 evidence of what our tradition of
20 constitutionally permissible firearm regulation
21 looks like.

22 Those laws are dead ringers only in
23 the sense that this law too is an
24 unconstitutional pretext. The black codes were
25 offered, as you mentioned, by states before

1 their readmission to the union. It is not an
2 indictment of the Bruen framework to say that
3 unconstitutional laws do not count in
4 illuminating a valid tradition.

5 As Bruen and Rahimi themselves say,
6 you're looking for laws that illustrate aren't
7 outliers. They illustrate what the national
8 tradition entails. And so it is no indictment
9 but, frankly, an endorsement of our history and
10 tradition that when you look at the
11 founding-era laws, they are very different from
12 the black codes and that these black codes
13 themselves are complete departures from what
14 the laws in Louisiana and other states were
15 like before, which was to allow people to
16 presumptively go about in public on -- on
17 property open to the public without consent.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh?

21 JUSTICE KAVANAUGH: For purposes of
22 the textual and historical tradition analysis
23 specified by Heller and elaborated upon by
24 Bruen, Heller's Part 3 on exceptions remains
25 very important, I think, in my view at least.

1 Do you agree with Part 3 of Heller,
2 accept Part 3 of Heller?

3 MS. HARRIS: Yes. We do -- are not
4 trying to depart from anything that this Court
5 has said with respect to its Second Amendment
6 precedents.

7 JUSTICE KAVANAUGH: And then, in Part
8 3 of Heller, the Court said that nothing in our
9 opinion should be taken to cast doubt on laws
10 forbidding the carrying of firearms in
11 sensitive places, such as schools and
12 government buildings.

13 Do you agree with that?

14 MS. HARRIS: We agree with that. And
15 we -- I think, as -- as elaborated by Bruen,
16 there is -- I think the question is how do you
17 define "relevant sensitive places" at the
18 correct level of generality so that not every
19 place is a sensitive place and so that you are
20 looking to the right historical analogs.

21 JUSTICE KAVANAUGH: Understood.
22 But you -- you agree with the principle as
23 stated there that I just read?

24 MS. HARRIS: We agree with the
25 principle as stated that there are obviously

1 sensitive places. You determine them with
2 respect to the history of firearm regulation.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett?

6 JUSTICE BARRETT: Ms. Harris, I'd like
7 to talk about the relevant analog in these
8 antipoaching laws, and one question that I have
9 is along the same lines as Justice Kagan, which
10 is, when you're thinking about these
11 antipoaching laws, you're thinking about a
12 problem that arose at the time. So, at the
13 time, poaching was a problem, and so
14 legislatures enacted this regulation to address
15 the problem. In an agrarian area, an agrarian
16 society, you know, that was it.

17 Let's imagine that Hawaii, rather than
18 just flipping this default categorically,
19 instead is experiencing, say, a rash of gas
20 station robberies and, you know, doesn't want
21 to make the argument that gas stations are
22 sensitive places. That would be a tough one.
23 So instead flips the presumption, like the
24 antipoaching laws, just with respect to gas
25 stations. Is that okay?

1 MS. HARRIS: Not okay, and it still
2 runs up in the basic distinction that we're
3 seeing, which is, when the history and
4 tradition is for the type of property, property
5 open to the public, to have an implied license
6 to go onto the property, when the state is
7 trying to load the dice, when it's trying to
8 say you generally can't go there, it has to
9 point to relevantly similar analogs that are
10 doing the same for the how and why.

11 And the antipoaching laws, it's not
12 just that they're about hunting; it's about
13 that they are this specific part of land. It's
14 almost like they're the exception to the
15 general rule that on property open to the
16 public, you can generally carry; on property
17 closed to the public, you were --

18 JUSTICE BARRETT: How do you know
19 that's the relevant distinction? I mean, it
20 could just be that, well, that is an incidental
21 of the problem. I mean, that just happens to
22 be where the problem of poaching arose, which
23 was on enclosed lands because those are the
24 people who were trying to protect themselves
25 from poachers. But, I mean, there might have

1 been poaching on open lands too, and -- and
2 then the legislature might have responded
3 differently.

4 I think this is this problem of just
5 because the legislature didn't address a
6 problem because it didn't exist at the time,
7 why does that mean that the analog ties the
8 legislature's hands now?

9 MS. HARRIS: And I think the answer is
10 that is under -- you look to the broader
11 articles and I think history of what was going
12 on with the antipoaching laws. It's not that,
13 you know, poaching on or hunting on open --
14 lands open to the public wasn't a problem. It
15 was actually -- at the founding, it was a
16 hugely politically salient and highly debated
17 issue, so important it was in state
18 constitutions, that this was a sort of
19 elemental distinction to the founding
20 generation that's carried in our property law,
21 that property open to the public is not --
22 you're not trespassing if you're hunting on
23 that land. On property closed to the public,
24 you want to protect the improvements and so you
25 are allowed to restrict it with -- by -- by

1 changing the rules so that you have to
2 affirmatively consent.

3 And I think you know that from the
4 laws themselves actually. I think the laws
5 themselves make that distinction. I would
6 point you to the New York 1763 law. The 1771
7 New Jersey law is of a piece with that, and the
8 Sigmon article sort of canvasses the history.
9 But, like, I think this is not just, well, it's
10 sort of strange they were focused on this
11 particular type of land. What do you draw from
12 it? It is they were extremely focused on this
13 because it was a huge political topic about --

14 JUSTICE BARRETT: Okay. But,
15 Ms. Harris, then that -- that -- that raises
16 this question for me. In Footnote 1 of your
17 brief, you say this case does not concern
18 property closed to the public, so the Court
19 need not address state laws that prohibit
20 carrying a firearm into a private residence
21 without the owner's affirmative consent.

22 But both and you Mr. Beck are drawing
23 this distinction in antipoaching laws between
24 property that is open to the public and
25 property that is closed to the public. So I

1 guess I don't understand how, if you win this
2 case -- and we do the history and tradition
3 analysis and you win, how is the Court supposed
4 to distinguish that analog in the way that
5 you're proposing we do without deciding this
6 question you tell us we shouldn't be deciding?

7 MS. HARRIS: Right. So I think two
8 things are important. One is, when you're
9 deciding whether the analogs are on all fours,
10 it's inescapable and it runs throughout the
11 position that there are different permissions,
12 different common law traditions applicable to
13 property open to the public and property closed
14 to the public.

15 I don't think that is a complete
16 answer. And the reason we're saying it's just
17 not presented, is it's not the question
18 presented, to whether property closed to the
19 public, what the range of permissions is. For
20 instance, if I invite someone to my house, what
21 is -- what is the -- what is the tradition with
22 respect to the --

23 JUSTICE BARRETT: So maybe the state
24 could flip the presumption in the way Hawaii
25 has done here but just with respect to private

1 residences? Mr. Beck said no to that.

2 MS. HARRIS: We're leaving that open
3 because it just -- we're thinking of this as,
4 again, different property traditions, and so
5 they would have to show a relevant history and
6 tradition. Again, I think that would be likely
7 easy for -- easier for them because the rules
8 regarding property closed to the public have
9 always been different than property open to the
10 public, and so --

11 JUSTICE BARRETT: Okay. Last
12 question. On your broader argument, you state
13 the rule pretty broadly. I'm looking at page
14 11 of your brief. You say: "A law is per se
15 unconstitutional if it broadly prevents
16 ordinary Americans from carrying protected
17 firearms in public."

18 Who is an ordinary American? And
19 why -- kind of throughout your brief, you used
20 that formulation, but, as I recall in Heller,
21 it says ordinary law-abiding Americans. Why
22 not the law-abiding and what is an ordinary
23 American?

24 MS. HARRIS: I don't think we're
25 trying to suggest any difference between

1 ourselves and Heller in our position here. I
2 think we're -- we're, frankly, using it as a
3 shorthand.

4 JUSTICE BARRETT: Okay. Thanks.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: So I guess I really
8 don't understand your response to Justice
9 Gorsuch on the black codes. I mean, I thought
10 the black codes were being offered here under
11 the Bruen test to determine the
12 constitutionality of this regulation, and it's
13 because we have a test that asks us to look at
14 the history and tradition.

15 The fact that the black codes were at
16 some later point determined themselves to be
17 unconstitutional doesn't seem to me to be
18 relevant to the assessment that Bruen is asking
19 us to make. So can you say more about that?

20 MS. HARRIS: Absolutely. Black codes
21 were unconstitutional from the moment of their
22 inception because they are pretextual laws that
23 are designed to ensure that newly freed slaves
24 are returned to a condition of sharecropping --

25 JUSTICE JACKSON: Okay. Let me stop

1 you there. They were not deemed
2 unconstitutional at the time that they were
3 enacted. They were part of the history and
4 tradition of the country. And when we have a
5 test now that's asking us to look at what
6 people were doing back then, I don't understand
7 why they should be excluded.

8 MS. HARRIS: Because they are
9 outliers. They are by definition
10 unconstitutional. They have been --

11 JUSTICE JACKSON: That was later.

12 MS. HARRIS: -- found
13 unconstitutional.

14 JUSTICE JACKSON: Afterwards, not at
15 the time. And if the test says what's
16 happening at the time tells us what's
17 constitutional for this purpose, why aren't
18 they in?

19 MS. HARRIS: Respectfully, a law is
20 always unconstitutional when it -- from its
21 inception, it's -- when it's --

22 JUSTICE JACKSON: So the history
23 doesn't matter?

24 MS. HARRIS: No.

25 JUSTICE JACKSON: We shouldn't care

1 about the history then?

2 MS. HARRIS: We should deeply care
3 about the history, but the whole point of the
4 Bruen framework is as follows: The history and
5 tradition of the Second Amendment are
6 particularly important because it is codifying
7 a preexisting right. To figure out in sort of
8 common law fashion what the national history
9 and tradition are, you throw out outliers. And
10 I can -- can think of no greater outlier than
11 blatantly unconstitutional laws that flipped
12 what had been the tradition in states like
13 Louisiana and during the period before those
14 states were readmitted to the union for the
15 purpose of trying to reduce newly freed slaves
16 back to conditions of servitude, made it a new
17 crime, new trespass in order to go about armed
18 on private property. Those are obvious
19 outliers --

20 JUSTICE JACKSON: All right. Mr. --

21 MS. HARRIS: -- that should not count
22 under the whole point of Bruen.

23 JUSTICE JACKSON: Mr. Katyal will
24 address it. I just have one more question.

25 I -- I'm trying to understand whether

1 there is a Second Amendment problem in the
2 following circumstance: So what if a state
3 that's trying and hoping to dissuade gun
4 rights, so it fits your view of, like, a state
5 acting in a pretextual way, passes a law
6 providing for free "no gun" signs to every
7 business, and they're really very invested in
8 this, so much so that their law offers to send
9 these signs to every business, offers to send
10 someone out to put the signs up at the business
11 owner's request?

12 Do we have a Second Amendment problem
13 in that situation?

14 MS. HARRIS: If you're just -- no, I
15 don't think so. You're not having a law that's
16 regulating arms-bearing conduct. You're -- I
17 think the premise of the hypothetical is you
18 retain the rule --

19 JUSTICE JACKSON: But it affects -- it
20 affects arms-bearing conduct perhaps in even a
21 more egregious way than what you're talking
22 about here today.

23 MS. HARRIS: I think we go back to
24 the -- the words of Bruen and Rahimi, which
25 is --

1 JUSTICE JACKSON: And their purpose is
2 to dissuade. That was part of the
3 hypothetical.

4 MS. HARRIS: I understand.

5 JUSTICE JACKSON: So your -- your test
6 was about the purpose of the state. We have
7 the purpose here. We have the effect here.
8 Ninety-seven percent of the businesses, let's
9 say, in Hawaii under the test that I'm -- or
10 the law that I'm positing accepts this offer.

11 MS. HARRIS: Yes. And what I'm trying
12 to distinguish is I think your hypothetical
13 really illustrates what we're not doing, which
14 is a bad legislative motive, purpose, and sort
15 of effects test, whereas what we're saying is
16 our pretext argument is very firmly rooted in
17 the idea --

18 JUSTICE JACKSON: Right. I just want
19 to know is the Second Amendment implicated, and
20 I think you're saying no. And I don't
21 understand why it wouldn't be in this situation
22 if it is in the situation here.

23 MS. HARRIS: Because, in the law that
24 Hawaii is enacting, it is regulating
25 arms-bearing conduct by saying, if I carry my

1 gun to a gas station, I am presumptively
2 committing a crime. That is a direct
3 regulation of where and how you can bear arms,
4 under what circumstances.

5 You are hypothesizing a situation in
6 which the state is merely subsidizing certain
7 types of speech. That might have other
8 constitutional problems, but the problem is not
9 going to be with respect to regulating
10 arms-bearing conduct --

11 JUSTICE JACKSON: Thank you.

12 MS. HARRIS: -- in the way that we
13 think Bruen is talking about.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Mr. Katyal.

17 ORAL ARGUMENT OF NEAL K. KATYAL

18 ON BEHALF OF THE RESPONDENT

19 MR. KATYAL: Thank you, Mr. Chief
20 Justice, and may it please the Court:

21 This case is about two fundamental
22 rights, the right to bear arms and the property
23 right to exclude. And there's lots of
24 agreement among how -- among the parties about
25 how those rights interact. Everyone agrees

1 there's a right to carry on private property if
2 the owner wants guns on his property. That was
3 elicited by Justice Sotomayor to my friends.
4 And everyone also agrees there's also no such
5 right if the owner doesn't want guns.

6 The only question is whether there's a
7 Second Amendment right to assume the owner
8 wants guns on his property when he's been --
9 when he's been silent. There is not. There is
10 no constitutional right to assume that every
11 invitation to enter private property includes
12 an invitation to bring a gun.

13 The Constitution protects the right to
14 keep and bear arms. It doesn't create implied
15 consent to bring those arms onto another's
16 property. At bottom, that is Petitioners'
17 theory, and yet they have zero support for
18 this, zero support from the founding or for the
19 next 200 years, no treatise, no commentator, no
20 court.

21 Not only is there zero affirmative
22 support, it runs counter to our traditions of
23 implied consent. From the founding in
24 Federalist Paper 45 on, states have used law
25 and custom to clarify the rules around consent.

1 In some states, it's natural to say,
2 when a homeowner invites you in, they're fine
3 with you bringing your gun unless they say
4 otherwise. But, in others, it's pretty obvious
5 that if you bring your gun to someone's house,
6 you have to ask.

7 And the same is true for stores. In
8 some places, it's reasonable to assume guns are
9 welcome. In others, it's pretty clear an
10 invitation to shop is not an invitation to
11 bring your Glock.

12 It's reasonable for a state to clarify
13 these defaults, passing laws that say you can't
14 assume -- that you can assume consent absent
15 permission or, as here, that you can't assume
16 it.

17 The Constitution permits this type of
18 democratic flexibility and states functioning
19 as laboratories. Before rigidly
20 constitutionalizing one type of property
21 default rule, this Court should insist on at
22 least some evidence that the Second Amendment
23 so requires it.

24 I welcome the Court's questions.

25 JUSTICE THOMAS: Are there any other

1 constitutional rights that you can place -- on
2 which you could place similar limitations?

3 MR. KATYAL: Sure. I think -- you
4 know, I think -- I think the general
5 proposition of the law is that property rights,
6 you know, are --

7 JUSTICE THOMAS: Open to the public,
8 always add that part. We're not talking about
9 private homes. We're talking about
10 restaurants, we're talking about malls, things
11 like that.

12 MR. KATYAL: Yeah. So -- so I do
13 think -- I mean, first of all, I do think they
14 are talking about private homes. That's what I
15 think ultimately my friend conceded to Justice
16 Barrett earlier in the -- in the questioning,
17 but --

18 JUSTICE THOMAS: I thought he made
19 the distinction between private homes versus
20 property, private property open to the public
21 as opposed to closed to the public.

22 MR. KATYAL: Justice Thomas, his brief
23 made that distinction, but at least as I
24 understood what he was saying at argument, that
25 his rule would apply even there. And I think

1 this is what's so dangerous about his rule,
2 because he's saying, look, you know, as long as
3 something has to do with guns, then we go right
4 to Bruen step two, where the burden has
5 shifted. And I think this Court --

6 JUSTICE THOMAS: Well, that's, you
7 know, the -- I'm not going to argue that point,
8 but I do want to know if there are other
9 constitutional rights in similar circumstances
10 on which you could place similar limitations.

11 MR. KATYAL: I do think that there
12 are. I mean, I think, here, you know, this
13 case concerns guns, but sometimes, like, for
14 example, this Court's decision in Breard
15 recognized, for some First Amendment
16 restrictions, you could have a change in the
17 default rule and that was understood as
18 constitutional.

19 Here, we're just following the long --

20 JUSTICE KAGAN: So suppose --

21 CHIEF JUSTICE ROBERTS: Well --

22 JUSTICE KAGAN: -- there were a -- a
23 state that said: We're going to flip the
24 default rule so that you cannot leaflet in
25 shopping centers unless you secure permission

1 first.

2 MR. KATYAL: Yeah.

3 JUSTICE KAGAN: Would that be
4 constitutionally problematic or not?

5 MR. KATYAL: The -- the -- the problem
6 there is that oftentimes, in the First
7 Amendment context, the First Amendment rules
8 are different than the Second Amendment because
9 they forbid content discrimination and
10 viewpoint discrimination. And a leafleting law
11 often will have some sort of illicit thumb on
12 the scale for a certain set of viewpoints. And
13 so that's what --

14 JUSTICE KAGAN: Well, but, like any
15 leafleting for anybody --

16 MR. KATYAL: Yeah. So, in that --

17 JUSTICE KAGAN: -- on any subject.

18 MR. KATYAL: Right. In that
19 circumstance, you know, it -- it may -- it's --
20 this Court's precedents on viewpoint and
21 content are so broad, it might encompass that.
22 But, even if that were -- even if you could
23 jump past that, you'd still have to at least
24 have rational basis review.

25 This Court, in Free Speech Coalition

1 versus Paxton, recently said, even for stuff
2 that has not -- isn't encompassed in the First
3 Amendment, you still have to have at least some
4 rational basis. Your example would flunk that.

5 Here, Hawaii's done the opposite.
6 There have been no guns, effectively, in Hawaii
7 for 200 years. The underlying, you know,
8 expectations and local custom, as Justice
9 Sotomayor was saying, was that nobody had to
10 think about guns.

11 What the Hawaii legislature said here
12 in the wake of this Court's Bruen decision is
13 Bruen's a real game-changer and, as a result,
14 some shop owners are going to be caught
15 unaware. They're not going to realize that
16 someone might have a concealed Glock on them
17 and the like.

18 And so, to vindicate those
19 expectations, they said, we are placing the
20 default rule there on the property owner to say
21 whether they wanted to affirmatively invite
22 guns in. And in choosing where to place that
23 responsibility and that burden, I think it is
24 absolutely reasonable for the state to place it
25 with private property owners, whose consent is

1 required.

2 JUSTICE BARRETT: Well, counsel --

3 CHIEF JUSTICE ROBERTS: Counsel, I
4 just want to understand because one of the
5 motivating concerns, and you can see it in --
6 in our decisions under the Second Amendment, is
7 that it is a disfavored right.

8 And it strikes me that one of the
9 things that your side of the case has to come
10 to grips with is that it is a very clear
11 constitutional right under the First Amendment
12 if I, for example, as a candidate for office,
13 want to walk up to your door on private
14 property and knock on the door and say, here,
15 you know, give me your vote, that's exercising
16 a First Amendment right.

17 But you say that it's different when
18 it comes to the Second Amendment, that you can
19 walk up -- one of the candidates wants to walk
20 up and he's carrying a gun, is -- is -- what --
21 what exactly is the basis for the distinction?

22 Because part of, again, what -- what
23 our precedents talk about in this area is that
24 the Second Amendment has been treated as sort
25 of, you know, a second-level right. And that's

1 one area where I -- given this law, I don't
2 really see the basis for the distinction.

3 MR. KATYAL: So we totally agree, the
4 Second Amendment has no disfavored right. At
5 the same time, there are rules about the Second
6 Amendment and I think rules that this Court
7 laid down in Bruen in which you've said the
8 relevant question is whether or not the scope
9 of the Second Amendment's text as informed by
10 history would say that there is a violation of
11 the right.

12 With the First Amendment, you've got
13 burden tests and all sorts of stuff that this
14 Court disclaimed in Bruen at page 22. And so
15 it's just going to apply somewhat differently.

16 But our fundamental point to you is,
17 yes, this is -- this is a law that goes --
18 which traces back to the founding with other
19 laws like New Jersey in 1721 -- in 1771, laws
20 that basically said, look, when you're bringing
21 guns onto property, even property open to the
22 public, that states are free to flip the
23 default rules.

24 Indeed, that is what happened,
25 although going back all the way to -- all the

1 way to those early examples. And my friend on
2 the other side is, I think, selectively reading
3 those to say, oh -- the Solicitor General is
4 saying, oh, these laws are just about poaching
5 and the like. Absolutely not. They have no
6 answer to what we said in our red brief, which
7 is that these laws dealt with improved lands.
8 And improved lands were, as Professor Hartog
9 says, stores, seed stores, and things like
10 that.

11 CHIEF JUSTICE ROBERTS: Right. But
12 let me just switch gears a little bit. We
13 talked about the tradition in -- in Hawaii.

14 Hawaii, given its obvious origins and
15 its -- its admission to -- to the United States
16 fairly recently, has a totally different, in
17 some areas, tradition and practice. The law of
18 property in particular in Hawaii, I mean, for
19 the longest time, I don't know, maybe it's
20 still the case, is that you don't own property,
21 you get it on long-term lease as if you were,
22 you know, a bank in a skyscraper in New York.
23 That was the common method.

24 And I wonder, I thought, you know, as
25 mentioned earlier, it is part of the United

1 States.

2 And do we isolate, do we have
3 different traditions in different states when
4 it comes to applying Bruen?

5 MR. KATYAL: No, Your Honor. I think
6 my friend on the other side has
7 mischaracterized our argument. Our argument is
8 that the Second Amendment means the exact same
9 thing in every state: No Second Amendment
10 right to enter private property without an
11 owner's consent.

12 What varies is what the definition of
13 consent is from state -- from state to state.
14 And local law and custom help inform that.
15 That's what I think that Justice Holmes's
16 opinion in McKee recognizes.

17 So just to take a simple example --

18 CHIEF JUSTICE ROBERTS: Well, just
19 before -- I don't want to lose the -- the
20 thought.

21 You said part of the history and
22 tradition is there's no right to enter private
23 property without the owner's consent, right?

24 MR. KATYAL: Mm-hmm.

25 CHIEF JUSTICE ROBERTS: Well, we know

1 that that's not a through line, right, because
2 you do have a right to enter the owner's
3 private property if you want to exercise your
4 First Amendment rights, right?

5 MR. KATYAL: So not without their
6 consent, Your Honor.

7 CHIEF JUSTICE ROBERTS: Sure. I don't
8 have to have a sign on -- on the -- the --
9 the -- the sidewalk before you enter my
10 property saying okay to come on if you're going
11 to give me some leaflet or okay to come on if
12 you're a candidate.

13 The assumption is that there is a
14 First Amendment right. Yes, you can -- you can
15 withdraw it. And, again, I'm just trying to
16 figure out exactly what the difference is
17 between the First Amendment and the Second
18 Amendment.

19 MR. KATYAL: What I think what's doing
20 the work in your hypothetical about the
21 leafleting or something is the government is
22 putting its thumb on the scale of some sort of
23 speech and saying they're worried about some
24 type of leaflet or the like.

25 To the extent that they just ban it

1 entirely, it would flunk rational basis review.

2 The relevant right there is not
3 located in the property, property and the place
4 it's spoken, but, rather, the government is
5 coming in and affirmatively taking a position
6 on the --

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 MR. KATYAL: And --

10 JUSTICE BARRETT: Well, Mr. Katyal, I
11 don't understand why you're resisting the First
12 Amendment -- well, I do understand why you're
13 resisting it, but let's say there's no content
14 discrimination. It's just a ban on leafletting
15 and it's a ban because people don't like
16 solicitation, so they just don't want people
17 passing out pamphlets. It's not aimed at
18 Jehovah's Witnesses or anything like that, like
19 some of our old cases. Why would that fail
20 rational basis review?

21 MR. KATYAL: So I think it might
22 because, as this Court said in Free Speech
23 versus Paxton, you still have to have some
24 underlying rationality for it.

25 JUSTICE BARRETT: Yeah. People find

1 it annoying. They don't like it. They think
2 it affects their businesses, and people don't
3 want to go to businesses if they're going to be
4 accosted by pamphleteers.

5 MR. KATYAL: It may be a rational
6 basis problem, but I don't think it's a First
7 Amendment problem. This Court in Rowan said
8 that "the right to engage in expressive
9 activity generally stops at the outer boundary
10 of every person's domain."

11 JUSTICE JACKSON: And that's the
12 point, right, of --

13 JUSTICE BARRETT: Let me get -- let
14 me -- one more --

15 JUSTICE JACKSON: Mm-hmm.

16 JUSTICE BARRETT: -- one more
17 question. So let me take it out of the First
18 Amendment for you. I mean, let -- let's
19 pretend that public accommodation laws don't
20 exist. Because the Fourteenth Amendment
21 doesn't apply to private action, only state
22 action, let's say that a state, in the absence
23 of public accommodation laws, decides to flip
24 the default and say, unless the owner
25 affirmatively consents, black people cannot

1 enter your home.

2 MR. KATYAL: Yeah. So I think that's
3 a -- that's one which would be
4 unconstitutional --

5 JUSTICE BARRETT: Why?

6 MR. KATYAL: -- every day of the week
7 because it would violate the Equal Protection
8 Clause because the government on its face is
9 making a racial classification. So --

10 JUSTICE BARRETT: Because there's
11 state action in the way the government is
12 adjusting its property defaults?

13 MR. KATYAL: Absolutely.

14 JUSTICE BARRETT: Even if there's a
15 long history and tradition, say, in
16 Louisiana --

17 MR. KATYAL: Yeah.

18 JUSTICE BARRETT: -- of this kind of
19 discrimination at the doorstep?

20 MR. KATYAL: Right. It would still
21 violate the equal protection.

22 JUSTICE BARRETT: Why isn't there
23 state action here when the state is flipping
24 the default? It's not just a matter of
25 property law.

1 MR. KATYAL: Right. Our point is not
2 whether there's state action or not. It's that
3 there's no underlying right. My friend
4 assumes -- has -- has conceded this. He said
5 there is no right to come onto private property
6 absent consent. And so the only question is
7 whether the state can fill in the conditions --

8 JUSTICE BARRETT: Yeah, there's no
9 right --

10 MR. KATYAL: -- of that consent.

11 JUSTICE BARRETT: -- to come onto
12 private property without consent. So my public
13 accommodations example is right. I mean,
14 absent a public accommodations law or in a
15 private residence, you could turn someone away
16 on the basis of race.

17 MR. KATYAL: But there is no
18 antidiscrimination component in the Second
19 Amendment the way there is with the Equal
20 Protection Clause.

21 JUSTICE BARRETT: Okay.

22 MR. KATYAL: And so that's why it
23 functions --

24 JUSTICE JACKSON: So, Mr. Katyal,
25 going back to --

1 JUSTICE ALITO: Mr. Katyal, you're
2 just -- you're just relegating the Second
3 Amendment to second-class status. I don't see
4 how you can get away from that.

5 If someone owns a store -- or let's
6 say it's a little restaurant and this person
7 has very strong political opinions and does not
8 want anybody in that restaurant who is wearing
9 attire that is expressing approval of a
10 particular political candidate. That person --
11 the owner of that store -- restaurant has the
12 right to say you can't come in, right?

13 MR. KATYAL: Yes.

14 JUSTICE ALITO: All right. Now could
15 Hawaii enact a statute that says that if you
16 are wearing the attire, attire expressing
17 approval of a particular political candidate,
18 you can't come in unless you get express
19 consent from the owner of the restaurant?

20 MR. KATYAL: Again, that's viewpoint
21 discrimination and prohibited by --

22 JUSTICE ALITO: It's a violation of
23 the First Amendment. We have a violation of
24 the First Amendment and what is -- and a
25 violation of the right that the Court held is

1 protected by the Second Amendment in Bruen,
2 which is the right of law-abiding citizens to
3 carry a firearm for purposes -- outside of the
4 home for purposes of self-defense.

5 MR. KATYAL: I quite agree with much
6 of what you're saying. I think what's the
7 difference is that the Second Amendment, it's
8 not a second-class right. It just has --
9 doesn't have the same components of viewpoint
10 discrimination or antidiscrimination for the
11 Fourteenth Amendment. And it's just not in the
12 Second Amendment.

13 And I think the key point here is the
14 Court -- if you accept my friend's invitation,
15 you for the first time would be saying there is
16 some sort of right here which no commentators
17 recognize, no treatises recognize, no court has
18 ever recognized. Compare this to Bruen in
19 which you had St. George Tucker, you had many
20 state decisions in the 18th and 19th centuries
21 that said laws like the New York one were
22 unconstitutional.

23 JUSTICE ALITO: Justice Sotomayor
24 cited a poll about what the people of Hawaii
25 think about the possession of guns. I'm not

1 aware of the poll, but let's assume it's
2 correct. Let's assume that 78 percent or
3 whatever the figure was in the poll that she
4 cited really don't like guns.

5 So what then is the big deal about
6 this statute? Why does it matter if store
7 owners and owners of private property that
8 is -- that are generally open to the public
9 don't like guns, why is it a big deal to say
10 they want people carrying guns to stay out,
11 just put up a sign?

12 MR. KATYAL: Yeah. So --

13 JUSTICE ALITO: Why does Hawaii have
14 to have this law?

15 MR. KATYAL: So I think Hawaii has --
16 like all state legislatures, has the right to
17 put a default rule in that says -- that tracks
18 the expectations of its people, and --

19 JUSTICE GORSUCH: But, if that's true,
20 then what's wrong with California's law, which
21 flipped the default rule and said it can only
22 be overcome with a sign?

23 MR. KATYAL: Right. So I do think
24 California's law would probably be
25 constitutional, but our argument doesn't depend

1 on it --

2 JUSTICE GORSUCH: So you --

3 MR. KATYAL: -- because Hawaii

4 here --

5 JUSTICE GORSUCH: -- you disagree with
6 the Ninth Circuit's decision on that score?

7 MR. KATYAL: I do, but I think that
8 here --

9 JUSTICE GORSUCH: And so a result
10 here, you -- you'd admit, would logically
11 entail permitting California's law or ones like
12 it to pass?

13 MR. KATYAL: No, you -- you don't have
14 to go that far. You can say --

15 JUSTICE GORSUCH: Oh, I know I don't
16 have to go that far, but you just said you
17 would go that far.

18 MR. KATYAL: I personally would --

19 JUSTICE GORSUCH: Yeah. Okay.

20 MR. KATYAL: -- but I don't think you
21 do, Justice Gorsuch.

22 (Laughter.)

23 MR. KATYAL: So -- and the -- and
24 the -- and the reason for that --

25 JUSTICE GORSUCH: No, I appreciate

1 your candor about the extent of where your
2 argument leads. And so it seems to me that,
3 you know, you could have a state law that
4 doesn't just flip the presumption and require
5 express oral consent but requires express
6 written consent, maybe a sign, maybe an
7 irrebuttable presumption of flipping -- I
8 appreciate your candor on that.

9 The other question I want to ask you
10 is the black codes. I -- I struggle to see
11 what relevance laws that are outliers -- and in
12 Bruen, we're not supposed to consider outliers.
13 They're put aside under our test. We're
14 looking for the mainstream and a significant
15 tradition.

16 And you rely very heavily on an 1865
17 black code law in Louisiana. You say it's a
18 dead ringer and a reason alone to affirm the
19 judgment. And I really -- I -- I really want
20 to understand how that could be.

21 MR. KATYAL: So let me take those in
22 turn. So, first, with respect to the
23 California law, I think it's really important
24 to understand here the Hawaii law has a much
25 broader definition of consent, a much more

1 general --

2 JUSTICE GORSUCH: I know it does.

3 MR. KATYAL: And --

4 JUSTICE GORSUCH: That wasn't the
5 question. Why don't you answer the question
6 posed.

7 MR. KATYAL: About the California law
8 or the --

9 JUSTICE GORSUCH: Yeah. No. I want
10 to understand how you think black codes --

11 MR. KATYAL: Okay.

12 JUSTICE GORSUCH: -- should inform
13 this Court's decision-making.

14 MR. KATYAL: Right.

15 JUSTICE GORSUCH: It's quite an
16 astonishing claim to me.

17 MR. KATYAL: So -- so the black codes
18 are undoubtedly a shameful part of our history,
19 but that doesn't at all mean that this
20 particular law is irrelevant to Second
21 Amendment analysis for two reasons.

22 First, the Solicitor General says
23 correctly, as she did just now, that Louisiana
24 wasn't a state in 1865. The relevant point is
25 what happened in 1868, when Louisiana was

1 admitted to be a state. The Act of June 22nd,
2 1868, admitted Louisiana as a state. That was
3 the radical Reconstruction Congress. It
4 examined the Louisiana laws, including this
5 specific statute, and Louisiana was admitted
6 into the union by the Reconstruction Congress.
7 There were many laws that the Louisiana --

8 JUSTICE GORSUCH: You're not answering
9 the question. The question is it's an outlier,
10 and -- and you just called it a shameful
11 outlier. And I -- I agree with that.

12 And Bruen was supposed to look at the
13 mainstream of our tradition and history, not
14 outlying statutes that were unconstitutional
15 the moment they were passed and, yes, when
16 Louisiana was admitted to the union.

17 MR. KATYAL: So, Justice Gorsuch, when
18 I said it wasn't --

19 JUSTICE GORSUCH: I understand a lot
20 of people like to cite the black codes who
21 promote gun restrictions, who would --
22 otherwise, they would be garlic in front of a
23 vampire in front of them. But, here, they --
24 they like them, they embrace them, and I'm
25 really interested in why.

1 MR. KATYAL: So, Justice Gorsuch, when
2 I said the black codes were a shameful period,
3 there are parts of the black codes like this
4 particular statute which were race-neutral,
5 which the Congress of the United States, the --
6 the same Congress that ratified the Fourteenth
7 Amendment, implicitly blessed by admitting
8 Louisiana back in. It didn't treat that with
9 the same -- with respect to other laws from
10 other states, but it did here.

11 And, most importantly, even the
12 opponents of the black codes recognized, as the
13 Sickles general order says, that you have no
14 right to carry a firearm onto someone's
15 property absent their consent.

16 JUSTICE KAVANAUGH: We said in
17 Ramos --

18 JUSTICE ALITO: Mr. -- Mr. Katyal,
19 wasn't the purpose of the laws in the post- --
20 in the post-Reconstruction South that disarmed
21 black people precisely to prevent them from
22 doing what the Second Amendment is designed to
23 protect, which is to defend yourself against
24 attacks? They didn't want the -- they wanted
25 to disarm the black population in order to help

1 the Klan terrorize them and other -- and law
2 enforcement officers in that period in that
3 region, they wanted to put them at the mercy of
4 racist law enforcement officers.

5 So is it not the height of irony to
6 cite a law that was enacted for exactly the
7 purpose of preventing someone from exercising
8 the Second Amendment right to cite this as an
9 example of what the Second Amendment protects?

10 MR. KATYAL: So, Justice Alito, we
11 quite agree with you that parts of the black
12 codes were motivated by and had exactly that
13 operation. Our point to you is this consent
14 requirement did not operate that way.

15 Indeed, if anything, it protected
16 black churches and black-owned businesses and
17 the like by insisting on this consent rule.
18 And that is why the radical Reconstruction
19 Congress admitted Louisiana back in. They said
20 no to various laws, but they never did that
21 with respect to this. And this law stayed on
22 the books for a long time.

23 More generally, of course, we've
24 obviously for good reason taken all this time
25 on Louisiana, but remember our argument, if we

1 were to get to the historical analogs and the
2 like, we don't think you even need to, but if
3 you got there, you wouldn't just look to
4 Louisiana in 1865. You'd start with New Jersey
5 in 1771.

6 JUSTICE KAVANAUGH: Well, on -- on
7 Louisiana, in -- in Ramos, on the jury trial
8 right, the question of whether he had a right
9 to a unanimous jury, there were Louisiana and
10 Oregon precedents going way back that allowed
11 non-unanimous juries.

12 And we flatly rejected that historical
13 example for the exact reason that Justice Alito
14 and Justice Gorsuch have been mentioning.
15 Those were rooted in racial prejudice designed
16 to prevent black jurors from having their votes
17 counted on juries in the wake of a decision
18 like Strauder in 1880.

19 And we just said no, that's -- that's
20 inadmissible to account for that as somehow
21 justifying an exception to the constitutional
22 right. It seems like the same kind of thing
23 here. What's different?

24 MR. KATYAL: Well, Justice Kavanaugh,
25 we just disagree with the idea that that

1 applies to this particular law from Louisiana
2 in 1865. But, regardless, our tradition goes
3 way back before that.

4 New Jersey in 1771, 1721 Pennsylvania,
5 the law said, "you cannot carry any gun or hunt
6 on the improved or enclosed lands of any
7 plantation."

8 The 1763 New York law, which my -- the
9 Solicitor General only read part of, says that
10 it was unlawful to carry, shoot, or discharge
11 any musket or other firearm whatsoever into any
12 orchard, garden, or other enclosed land
13 whatsoever.

14 And there's other statute after
15 statute. There's no allegation by anyone that
16 those were motivated by any sort of racist
17 concerns or the like. And what they've said
18 is, oh, no, that was just limited to poaching.
19 That's just wrong.

20 There's two parts, for example, to the
21 New Jersey law. Part 2 is about poaching.

22 JUSTICE KAVANAUGH: And on those --

23 MR. KATYAL: Part 1 is --

24 JUSTICE KAVANAUGH: -- laws, a couple
25 of them that you cite, it seems to me you're

1 approaching the whole analysis upside down from
2 how the Court's cases have approached it. The
3 Court's cases have started with the text, which
4 declares an individual right.

5 And then, in Heller and in Bruen, the
6 Court has elaborated on, of course, there -- as
7 there are with all rights, as Heller said, some
8 exceptions, but those exceptions, to be
9 recognized, must be historically rooted, deep
10 tradition, a broad tradition, widely
11 recognized, commonly recognized, not isolated
12 examples, particularly not ones from the black
13 codes. But even apart from that, not isolated
14 examples.

15 And I just don't see the kind of broad
16 tradition of the regulation here that you see
17 with the other things specified in Heller, for
18 example.

19 MR. KATYAL: Right. So I agree with
20 some of what you're saying. So I completely
21 agree that the relevant test under Bruen is
22 text, and then the next words you used were "as
23 informed by history."

24 And so the question is whether or not
25 there is some sort of right at the framing,

1 whether the right to keep and bear arms was
2 understood, the right to assume an owner's
3 consent to bring arms.

4 That's where we think this case --
5 their case falls apart because, for the first
6 time, you'd be saying, if you accept their
7 invitation, in the absence of any affirmative
8 evidence whatsoever, a commentator, a court,
9 anything, that said that -- that there was a
10 right to imply consent, there's just nothing.
11 There is precious zero on that.

12 And here's why it's so important. You
13 heard my friend when he stood up, he said, and
14 under -- under questioning from Justice
15 Barrett, hey, is your rule going to apply to
16 private homes? Because lots of states even
17 today have those, Alaska, you know, and
18 Arkansas and the like.

19 And he ultimately said yeah because
20 the burden-shifting, you wouldn't be able to
21 defend the law under the burden-shifting of
22 step two of Bruen in which you have to have
23 demonstrated historical analogs and the like.

24 That gets everything undone entirely.
25 I mean, this Court has a general rule, Justice

1 Alito wrote about it in Kennedy versus
2 Louisiana, which is, when you are coming in to
3 challenge a state law, you bear a heavy
4 presumption that your challenge is invalid,
5 that there's a presumption of good faith and
6 presumption of regularity on the part of the
7 legislature.

8 If you just jump to Bruen step two and
9 say, oh, this law deals with guns, therefore,
10 the burden flips to the government, then, yeah,
11 you're going to have a really difficult time
12 defending laws every state is like the ones
13 that deal with gun consent on private homes and
14 the like.

15 JUSTICE BARRETT: Well, which is why
16 you don't want to get to step two because it's
17 a lot harder for you at step two. But I think
18 what Justice Kavanaugh is asking is, I have the
19 same question, is how can you avoid step two?
20 Because the text encompasses it. And that
21 leads you to step two, where you have all the
22 difficulties you were just saying.

23 MR. KATYAL: Because, if you read
24 Bruen as only about the text, okay, I agree
25 with you, you could say, well, maybe it's the

1 right to keep and bear arms as implicated by
2 these implied default rules, but it is the text
3 as informed by history.

4 And when you ask yourself text as
5 informed by history, where has anyone ever said
6 there's a right to presume consent of the owner
7 in the absence of an explicit statement? It
8 just doesn't exist.

9 JUSTICE BARRETT: But that's the
10 second step when you're looking at the history.
11 I mean, I could see history being relevant at
12 the first step if you're talking about what is
13 the meaning of arms, for example.

14 But, when you're talking about things
15 that kind of go to what is the core of the
16 right or is it included and you're talking
17 about history and tradition, I guess I don't
18 see how it's the first step.

19 MR. KATYAL: Well, I think it -- it's
20 got to be. Otherwise, I think you run into the
21 problem that you've now flipped the burden for
22 every firearms regulation. As long as it deals
23 with guns, then the -- then the state has to
24 come in or the federal government has to come
25 in with an affirmative thing. And we have all

1 sorts of laws that --

2 JUSTICE KAVANAUGH: That's exactly
3 what the cases say.

4 MR. KATYAL: Oh --

5 JUSTICE KAVANAUGH: I -- I mean, I
6 thought that's what the cases say. If it deals
7 with arms, and this is what Heller Part 3 says,
8 then the government comes in and shows there's
9 a historical tradition. And to get ahead of
10 all this, Heller actually went through and
11 specified a number of kinds of regulations that
12 would be permissible because they are so
13 broadly and deeply rooted.

14 At least -- I mean, what's wrong with
15 that reading of our precedent?

16 MR. KATYAL: Because then it would
17 really, as the Everytown brief says, threaten
18 gun regulation more generally in ways this
19 Court has so far not reached because you have
20 all sorts of times in which, like, take 920 --
21 the 922 statute, 11 different categories of
22 things that are singled out as gun regulation.

23 If every single time the state had to
24 defend the burden on each of those things and
25 say you've got to find, you know, historical

1 analogs, that really does undo, I think, the
2 much more limited nature of the inquiry that --

3 JUSTICE JACKSON: Mr. Katyal --

4 MR. KATYAL: -- Bruen recognized at
5 step one.

6 JUSTICE JACKSON: -- I thought your
7 answer to Justice Barrett and Justice Kavanaugh
8 is that really step one is trying to help us to
9 understand what the scope of the right is.

10 MR. KATYAL: Correct.

11 JUSTICE JACKSON: The Second Amendment
12 right, is it really being implicated here?

13 MR. KATYAL: Correct.

14 JUSTICE JACKSON: And so that when you
15 have a situation like this one in which there
16 is broad consensus, everybody agrees that there
17 is some limit to the Second Amendment right,
18 and you read a case that said that limit was
19 geography in the sense that you don't have a
20 Second Amendment right to bring your gun onto
21 someone else's private property, they have to
22 consent for you to be able to do that.

23 We have already limited the scope of
24 the Second Amendment right for purposes of this
25 discussion because we're talking about a right

1 that doesn't just freely exist.

2 So, in the Chief Justice's leafletting
3 example, it's -- it's similar. Like, I don't
4 see the Second Amendment operating differently
5 than, say, the First Amendment because, in the
6 leafletting example, the reason why you get to
7 go up to the person's door is not because you
8 have a First Amendment right to do that.

9 You get to go up to the -- the
10 person's door because there is a custom and
11 tradition of implying the person's consent --

12 MR. KATYAL: Yes.

13 JUSTICE JACKSON: -- for you to do
14 that in that situation, that -- that -- that
15 all the states, everybody says, when you come
16 for the purpose of passing a leaflet, we are
17 going to assume, we're going to imply that the
18 owner is allowing you to do that.

19 He doesn't have to put up a sign that
20 says please come. We're going to -- but
21 it's -- it's operating around property rights,
22 not that your First Amendment right is what is
23 getting you onto his property.

24 MR. KATYAL: That --

25 JUSTICE JACKSON: Similarly, the

1 Second Amendment right is not getting you onto
2 someone's property in this way if it's a
3 private property, even the property open to the
4 public. It's the implicit consent that many
5 states have allowed that is what is doing the
6 work of allowing you to carry your gun in that
7 gas station.

8 Am I right about that?

9 MR. KATYAL: That's exactly right.

10 And the one thing I would add is that what I
11 think is doing the work in my friend's argument
12 is some sort of insinuation that Hawaii has
13 singled out and is hostile to guns or the
14 Second Amendment and the like.

15 And I'd point you to two reasons why
16 that's wrong. Number one, Hawaii has these
17 very same laws about implied consent and
18 changing the default rules for other things
19 besides guns. So 445115 has it for cards and
20 banners and placards, akin to the example that
21 you're mentioning before. 339-4 is about
22 litter and bringing it on. 291C is about
23 vehicles and the like.

24 JUSTICE JACKSON: And what you're
25 saying, I think, is that there is no Second

1 Amendment right to assume implicit consent.

2 MR. KATYAL: Yes.

3 JUSTICE JACKSON: There is no -- to
4 the extent we're talking about is this about
5 consent, and I think we are because you don't
6 have a right to go on without consent, then is
7 the Second Amendment doing work with respect to
8 allowing you to say I have a constitutional
9 right to assume that I'm allowed to be here?
10 And you're saying they have no case, no
11 history, no nothing that establishes that
12 principle.

13 MR. KATYAL: That's exactly right.
14 And the other thing I'd point to about this
15 motivation attack by my friend on the other
16 side is that, you know, the -- you know,
17 Hawaii, the legislature, took Bruen seriously.
18 This statute's all about making sure the right
19 of Bruen is vindicated.

20 And just last year, for example,
21 Hawaii issued 2207 concealed permit -- permits
22 for firearms.

23 CHIEF JUSTICE ROBERTS: Thank --

24 MR. KATYAL: You know, they only
25 denied 119 applications, and the majority of

1 those were denied because people didn't fill
2 out the application in full or they got it out
3 of time.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas?

7 JUSTICE THOMAS: If you're going to
8 cite the Louisiana black codes of 1865, don't
9 you also have to cite the subsequent adoption
10 of the Fourteenth Amendment that was in part
11 generated because of laws like that?

12 MR. KATYAL: Right. So that is
13 exactly our point, that the Reconstruction
14 Congress that ratified the Fourteenth
15 Amendment, this is the unusual case in which
16 you have those folks saying effectively
17 Louisiana should come in. And many of the
18 parts of the black codes, including parts that
19 Justice Alito were referring to that were
20 racially discriminatory about firearms, were
21 struck from the Louisiana law. But this law
22 stayed in effect.

23 And so, yes, we do think it is
24 relevant history. We don't think our argument
25 depends on it because there's statute after

1 statute from the founding on. And the idea
2 that those -- that the number of statutes we've
3 provided isn't enough, I think, is -- is very
4 hard to reconcile when you have zero tradition,
5 zero evidence on the other side saying these
6 statutes were problematic.

7 I mean, these statutes were around.
8 You would have thought someone, if this was an
9 infringement on the right to keep and bear
10 arms, would have had a court case, a
11 commentator, anything like what you had in
12 Bruen. You've got none of that.

13 JUSTICE THOMAS: Well, actually, there
14 was quite -- as I said in my McDonald opinion,
15 quite a bit of discussion of these sorts of
16 laws and the consideration of some that they
17 thought that the privilege -- or Immunities
18 Clause in the Fourteenth Amendment preempted
19 these.

20 MR. KATYAL: So --

21 JUSTICE THOMAS: That's simply my
22 point.

23 MR. KATYAL: So, Justice Thomas, I
24 agree with you about what you said there, but I
25 don't think it applied to this specific

1 question, which is private property default
2 rules. I think what -- the evidence you were
3 talking about there dealt with other aspects of
4 state regulation over firearms.

5 CHIEF JUSTICE ROBERTS: Justice Alito?
6 Justice Sotomayor?

7 JUSTICE SOTOMAYOR: A three-part
8 question. In one or two sentences, could you
9 answer -- finish answering the California point
10 that Justice Gorsuch raised?

11 Number two, finish your list on where
12 else the State of Hawaii has flipped the
13 presumption. You -- you got up to littering,
14 and then you were cut off.

15 And then, number three, I have never
16 quite understood the Court's recent
17 jurisprudence on outliers don't count. I don't
18 know how much outliers mean.

19 MR. KATYAL: Yeah.

20 JUSTICE SOTOMAYOR: Meaning, at the
21 founding, there were 13 states. I don't know
22 how many territories at the time because I
23 don't remember off the top of my head. But
24 there were at least four states that had
25 flipped the presumption: New Jersey, New York,

1 Maryland, then -- and Pennsylvania. And then
2 later there was Massachusetts in 1790 at least
3 for a group of islands. And then you don't
4 have just the black codes; you have Oregon and
5 Florida flipping the presumption a little later
6 on.

7 So it seems to me that you can't call
8 all of these laws out -- this many outliers --
9 outliers. And so the custom and tradition that
10 existed was you -- the license you had and
11 whether you presumed or didn't presume
12 permission could be flipped, correct?

13 MR. KATYAL: Yeah. Correct. So --

14 JUSTICE SOTOMAYOR: So why don't you
15 answer the other two questions.

16 MR. KATYAL: Yeah. So, on the
17 California thing, the -- the one thing I would
18 just add to the -- my prior discussion with
19 Justice Gorsuch is just I think the overall
20 understand -- overall history of what the
21 Hawaii legislature did here was relevant.

22 They weren't trying to attack a
23 second-class right or something like that.
24 They were rather trying to take Bruen seriously
25 by opening up what counts as consent, unlike

1 California, deviating even from the old
2 historical laws like New Jersey in 1771, which
3 required written consent.

4 And I think what did the work in my
5 friend's argument in his opening statement was
6 this idea that 96.4 percent of Hawaii is now
7 encompassed. You pointed out that dealt with
8 sensitive places.

9 But there is a much more fundamental
10 problem and it has infected this case from the
11 start. If you read page 1 of his brief, it
12 says quote -- it says 96.4 percent of the
13 publicly accessible land in Hawaii is impacted
14 by this law -- by -- by this law. The map he's
15 got isn't even about Hawaii. It's about one
16 county in Hawaii and not even the most populous
17 county in Hawaii and it's a map he drew
18 himself.

19 So I'd just caution the Court into
20 saying -- because, if you read these briefs, it
21 does sound like, oh, the government of Hawaii
22 is out to get guns or something like that.
23 Nothing could be farther from the truth.
24 They've taken Bruen seriously, as the permit
25 statistics I read to you say.

1 With respect to Hawaii singling out
2 firearms, there's statute after statute. I was
3 reading 291-112, which is that you can't use a
4 vehicle for habit -- for habitation on private
5 property "without the authorization of the
6 owner." There's also 633-16, that you can't
7 remove shopping carts without the written
8 consent of the owner. There's statute after
9 statute like this.

10 And the amicus briefs from the
11 property law professors goes through and says
12 this is true not just in Hawaii but in state
13 after state. They flip default rules all the
14 time.

15 Your last question was about outliers.
16 And I think, here, our most important point is
17 we don't think that there's some sort of
18 mechanistic formula for how many states is
19 enough or anything like that. We do think it's
20 relevant that there are a number of states at
21 the founding that do have this.

22 This Court on the sensitive places
23 part of Bruen said legislative assemblies may
24 be a -- a sensitive place. There was only one
25 state in the founding that had that. That was

1 Maryland, and it passed two separate laws five
2 years apart during the Colonial era. That was
3 enough to count as an analog.

4 We certainly think the larger, much
5 larger, number here is enough to count as an
6 analog because these laws actually did the same
7 thing as what the Hawaii law does. It said
8 for -- with respect to property that is open to
9 the public, like plantations, like premises,
10 like enclosed land, Professor Hartog says that
11 includes seed stores, other retail
12 establishments, akin to the kinds of things
13 that my friend is challenging here, there is
14 historical precedent for all of that. We think
15 that's certainly enough to make this
16 constitutional.

17 CHIEF JUSTICE ROBERTS: Justice Kagan?

18 JUSTICE KAGAN: So just on your last
19 point, Mr. Katyal, I -- I took Ms. Harris to be
20 saying with respect to your analogs at Bruen
21 step two that her principal point was, look,
22 it's not about, like, is it about poaching, but
23 the difference between those laws and this law
24 is that those laws were about lands that were
25 closed to the public. And that was her

1 principal point that -- that made that, like,
2 just a different category.

3 MR. KATYAL: Right. And it just blows
4 off the word "improved" in the statutes. It's
5 not just about unfenced -- it's not just about
6 fenced land but improved land. For improved
7 land, the statutes did change the default rule
8 and say you couldn't imply the consent of the
9 owner.

10 And as Professor Hartog said, that
11 applied to stores. It applied to plantations.
12 Indeed, that's the definition of plantations.
13 And it applied to premises, which is another
14 word used in some of these statutes.

15 And so the idea that it didn't apply
16 to these types of things that are just like
17 what my friends are challenging is just wrong.

18 JUSTICE KAGAN: Okay. And on -- on
19 this -- your step one inquiry, which I -- I
20 find interesting and difficult, I mean, I think
21 somebody could say: Look, what these
22 consent-flipping, default-flipping rules do,
23 they do burden the carrying of firearms and --
24 and that's what they are, and to incorporate
25 the burden into one's understanding of the

1 scope of the right is a kind of category
2 mistake, that the burden is supposed to be at
3 step two, and these are burdens on the carrying
4 of firearms.

5 MR. KATYAL: So two things. One,
6 factually, we just fundamentally disagree that
7 this burdens firearms. As Justice Alito was
8 saying earlier, if people in Hawaii don't want
9 to have the guns anyway, they're always going
10 to be able to, even under their rule, say, you
11 know, have signs that say no guns allowed. So,
12 either way, you could have that burden.

13 The second thing is, legally, this
14 Court has made clear as day at page 22 of Bruen
15 you can't ask that burden test. Here's the
16 language. You said: "Heller and McDonald
17 expressly rejected the application of any
18 judge-empowering, interest-balancing inquiry
19 that asks whether the statute burdens a
20 protected interest in a way."

21 And so, you know, that which my friend
22 is definitely trying to say, that this burdens
23 the right, that is not a Second Amendment
24 violation. That's going down the road of undue
25 burdens that this Court has criticized in a

1 separate number of contexts in saying that's a
2 smoke screen for policy judges' preferences.
3 Rather, the inquiry at Bruen step one has
4 always been text is informed by history.

5 And when you ask yourself what in the
6 text informed by history this Hawaii law
7 violates, the answer is precious zero. No
8 commentator, no treatise, no court, no one's
9 ever said you have a right to imply consent of
10 the private property owner. And rather, the
11 fundamental tradition, which Justice Sotomayor
12 was saying earlier, that Justice Scalia
13 recognized in the Jardines opinion is that
14 there's a fundamental right to exclude, and
15 that right to exclude has always meant, at the
16 time of taverns and the like, you can exclude
17 people for violating the terms on which they
18 come in even if your tavern's open to the
19 public.

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 JUSTICE GORSUCH: Near as I can tell,
24 the movement to flip the burden in -- with
25 respect to firearms began in the states in

1 2020. Is that right?

2 MR. KATYAL: The burden to flip the
3 firearms with respect -- with laws like this, I
4 think that was after Bruen. I think that was
5 when this Court's decision in Bruen happened.
6 And then laws like -- the states like Hawaii in
7 which there was no tradition at all of carrying
8 had to deal with this question for the first
9 time.

10 JUSTICE GORSUCH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: How many states
14 have laws like Hawaii's with respect to
15 firearms on property?

16 MR. KATYAL: So I think five states
17 have enacted those laws just in the few short
18 years since the Bruen decision.

19 I think other states, there's one, a
20 brief for you from D.C. saying some other
21 states are considering it.

22 Our point is the Constitution permits
23 both types of rules. It doesn't -- there's --
24 it's not constitutionally compelled that you
25 have to use the Hawaii rule. States function

1 as laboratories. They can do either -- they
2 can pick either default rule. Neither is an
3 infringement on the Second Amendment right to
4 keep and bear arms.

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Barrett?

8 Justice Jackson?

9 JUSTICE JACKSON: And it's not an
10 indictment necessarily that this arose after
11 Bruen. It was in response to Bruen because
12 Bruen gave rise to the need for clarity about
13 property owners.

14 Once Bruen said you can carry the
15 gun outside of your home and there was an
16 alternative, you know, well-established
17 principle that private property owners can
18 exclude people, I think the states were trying
19 to make sure that property owners had the
20 opportunity to do that.

21 And that only became necessary once
22 Bruen allowed people to carry their guns
23 anywhere, right?

24 MR. KATYAL: That's exactly right.

25 JUSTICE JACKSON: I mean, it wasn't

1 like they were necessarily trying to keep
2 people from carrying the guns. They were
3 giving property owners the right to exclude by
4 making sure that they were asked: Do you want
5 this gun in your store?

6 MR. KATYAL: Exactly. And I was
7 saying to Justice Gorsuch, with respect to
8 California law, Hawaii took it far more
9 seriously. They said: We want to make sure
10 that you have the opportunity to get
11 on-the-spot oral consent, which is why the
12 gas station hypothetical that the Chief Justice
13 used and the others, it is not an issue under
14 the Hawaii law because you do have the ability
15 to go and ask for consent even if there's no
16 posted -- no sign one way or the other.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Rebuttal, Mr. Beck.

21 REBUTTAL ARGUMENT OF ALAN A. BECK

22 ON BEHALF OF THE PETITIONERS

23 MR. BECK: Your Honor, this -- as the
24 NRA's amicus brief makes very clear, this is
25 a historical tradition of carrying on private

1 property open to the public.

2 This whole legal theory regarding the
3 presumptive ban, default rules, started off
4 with a Law Review article that was published in
5 2020, and the premise of that Law Review
6 article is putting in a presumptive ban like
7 Hawaii has would lessen people from carrying.

8 The State of New York adopted that law
9 first, and the governor of New York said the
10 express reason they were doing that was to
11 undermine the Bruen opinion.

12 There's no -- there's a clear body of
13 evidence here that this was done to undermine
14 Bruen and to undermine the Second Amendment
15 right, and, thus, this law very clearly
16 implicates the Second Amendment.

17 And the state has simply failed in its
18 burden to justify this law through relevantly
19 similar historical analogs. Therefore, this
20 Court should rule in our favor.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 The case is submitted.

24 (Whereupon, at 12:01 p.m., the case
25 was submitted.)

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