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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 JASON WOLFORD, ET AL.,)
4 Petitioners,)
5 v.) No. 24-1046
6 ANNE E. LOPEZ, ATTORNEY GENERAL)
7 OF HAWAII,)
8 Respondent.)
9 - - - - -

10

11 Washington, D.C.
12 Tuesday, January 20, 2026

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

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1 P R O C E E D I N G S

2 (10:10 a.m.)

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

6 Mr. Beck.

7 ORAL ARGUMENT OF ALAN A. BECK

8 ON BEHALF OF THE PETITIONERS

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

11 Bruen holds the Second Amendment
12 protects the right to publicly carry firearms.
13 By banning people from carrying firearms on
14 private property that is open to the public
15 unless they first obtain affirmative
16 permission, Hawaii has run roughshod over that
17 constitutional right. The presumptive ban
18 clearly inflates the Second Amendment's plain
19 text because it regulates arms-bearing conduct.
20 As such, the burden is on Hawaii to justify the
21 presumptive ban with relevantly similar
22 historical analogues reflecting a national
23 historical tradition of firearms regulation.

24 Hawaii comes nowhere close to carrying
25 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: 96.4, Your Honor --
12 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 the
19 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 closed lands, and closed lands, there was
2 a -- those laws deal with -- the closed lands
3 were closed to the public. You couldn't --

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

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

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

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

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

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

25 JUSTICE BARRETT: Really? Like, so I

1 couldn't -- Hawaii can't have that law about,
2 you know, my house or Justice Gorsuch's house?

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

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

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

24 MR. BECK: Yes, Justice. Everyone --
25 every private property owner has the right to

1 affirmatively put up a sign or otherwise not
2 give permission for people to enter property
3 with a firearm.

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

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

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

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

1 for people to carry a gun.

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

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

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

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

1 don't implicate their constitutional rights.

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

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

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

14 MR. BECK: No --

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

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

20 JUSTICE JACKSON: Right.

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

23 JUSTICE JACKSON: But -- but -- but --
24 but you do agree that there is no right to
25 carry on private property without someone's --

1 without the owner's consent, right?

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

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

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

16 JUSTICE JACKSON: You do not concede?

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

25 JUSTICE JACKSON: Right. But

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

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

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

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

20 JUSTICE JACKSON: You disagree. All
21 right.

22 MR. BECK: Yes, Your Honor.

23 JUSTICE JACKSON: Thank you.

24 JUSTICE BARRETT: Counsel, do you
25 agree that the state as property owner could

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

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

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

12 JUSTICE BARRETT: Okay. Why?

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

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

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

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

23 MR. BECK: Yes, Your Honor.

24 JUSTICE GORSUCH: Counsel, you make an
25 argument that Hawaii effectively destroys the

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

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

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

20 MR. BECK: Interest balancing has been
21 abrogated by -- yes.

22 JUSTICE SOTOMAYOR: By -- by Bruen?

23 MR. BECK: Yes, Your Honor.

24 JUSTICE SOTOMAYOR: So there's no
25 interest bearing. So, if, in fact -- if Hawaii

1 has a right to regulate a custom as opposed to
2 a constitutional right to bear an arm on
3 private property, then -- then tough luck,
4 correct?

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

7 JUSTICE SOTOMAYOR: Counsel, there's
8 no means ends, so, if they overregulate or
9 underregulate, that's irrelevant. Is there a
10 right to carry a gun?

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

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

25 So you don't need under Rahimi an

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

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

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

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

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

23 MR. BECK: Because, in order to do the
24 Bruen analysis, we look to see whether a law is
25 implicated by the Second Amendment right. Then

1 we look to see what the historical tradition
2 was in this country.

3 JUSTICE SOTOMAYOR: But that seems --

4 CHIEF JUSTICE ROBERTS: Counsel?

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

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

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

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

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

22 JUSTICE SOTOMAYOR: Go ahead.

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

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

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

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

9 MR. BECK: Yes, Your Honor.

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

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

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

18 MR. BECK: That's a --

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

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

25 CHIEF JUSTICE ROBERTS: Is there,

1 under our law, an invitation, for example, for
2 people solicitating, for people who want to
3 drop off pamphlets about a particular --

4 MR. BECK: Yes, Your Honor, up
5 until -- up to the doorknob or -- you know,
6 there is.

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

9 MR. BECK: Yes, Your Honor.

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

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

14 CHIEF JUSTICE ROBERTS: Thank you.
15 Justice Thomas?

16 Justice Alito?

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

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

23 JUSTICE ALITO: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor?

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

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

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

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

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

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

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

25 JUSTICE SOTOMAYOR: This law is not

1 banning you from doing that. It's just
2 requiring you get -- to get the owner's
3 permission, correct?

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

7 JUSTICE SOTOMAYOR: Not in Hawaii.

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

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

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

14 JUSTICE SOTOMAYOR: I -- I --

15 MR. BECK: It is the custom --

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

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

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 JUSTICE KAGAN: Mr. Beck, the various
25 statutes that Hawaii has cited as going to the

1 Bruen step two question, you say they're not
2 close enough, and I guess I want to know why.

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

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

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

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

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

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

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

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

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

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

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

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

1 firearms for self-defense.

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

7 JUSTICE KAGAN: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

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

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

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

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

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

10 CHIEF JUSTICE ROBERTS: Justice
11 Kavanaugh?

12 Justice Barrett?

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

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

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

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

19 JUSTICE BARRETT: Okay.

20 (Laughter.)

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

23 MR. BECK: Yes, I understand.

24 (Laughter.)

25 MR. BECK: I agree with every --

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

3 (Laughter.)

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

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

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

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

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

1 on this record to be able to justify that law,
2 Your Honor.

3 CHIEF JUSTICE ROBERTS: Justice
4 Jackson?

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

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

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

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

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

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

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

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

10 MR. BECK: Because --

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

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

25 JUSTICE JACKSON: Okay.

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

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

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

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

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

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

24 And so, to the extent that the test
25 today is tying us to historical circumstances,

1 it would seem to me that all of history should
2 be on the table.

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

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

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

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

1 discriminate against African Americans,
2 whereas, here, the law at issue here is a law
3 that applies to everyone.

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

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 MR. BECK: Thank you, Chief Justice.

11 CHIEF JUSTICE ROBERTS: Mr. Harris.

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

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

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

25 First, pretextual restrictions are,

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

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

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

17 I welcome the Court's questions.

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

22 MS. HARRIS: I would start
23 historically with Blackstone and the meaning of
24 the word "infringed" in the text of the Second
25 Amendment. If you look to Blackstone, which is

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

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

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

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

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

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

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

16 JUSTICE KAVANAUGH: Why do we need --

17 JUSTICE KAGAN: Most --

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

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

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

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

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

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

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

25 So that's means-ends scrutiny, which I

1 thought Bruen was supposed to get us away from.

2 MS. HARRIS: So two points on this.

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

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

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

22 JUSTICE KAGAN: No, go ahead.

23 JUSTICE KAVANAUGH: Why are we making
24 it complicated? The text of the Second
25 Amendment covers arms.

1 Part 3 of Heller says that means what
2 it -- Heller says it means what it says, says
3 what it means. Part 3 of Heller says there are
4 certain exceptions to that or contours on that
5 which are rooted, but they have to be rooted in
6 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 no
20 -- there are no sufficient analogues. Usually,
21 when -- as Heller says in Part III, when you're
22 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. You don't have
2 anything like that here. So it's just kind of,
3 from your perspective, you know, pretty simple.

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

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

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

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

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

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

10 JUSTICE GORSUCH: Ms. Sarah --

11 MS. HARRIS: The reason --

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

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

24 MS. HARRIS: That is exactly correct.
25 In no other context could you say that there's

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

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

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

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

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

24 MS. HARRIS: So what we're answering
25 here is what is the scope of the right to

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

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

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

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

21 MS. HARRIS: I understand --

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

25 MS. HARRIS: And this goes back to the

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

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

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

5 CHIEF JUSTICE ROBERTS: Thank you.

6 MS. HARRIS: -- public carry.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas, anything further?

10 Justice Alito?

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

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

1 Barrett's questions about you do need
2 affirmative consent to go into dwellings.

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

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

24 JUSTICE ALITO: And in order to
25 determine whether an analogue is adequate for

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

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

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

1 on the same reasoning at too high of a level of
2 generality.

3 JUSTICE ALITO: What do you think is
4 the purpose of the Second Amendment right?

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

9 JUSTICE ALITO: And other lawful
10 purposes?

11 MS. HARRIS: Yes.

12 JUSTICE ALITO: Not just self-defense.
13 Did Heller say that?

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

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

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

12 JUSTICE ALITO: All right. Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

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

21 MS. HARRIS: So --

22 JUSTICE SOTOMAYOR: Is that illegal?

23 MS. HARRIS: -- the answer to that
24 question would go into the sensitive places
25 inquiry, which is different from this case

1 because that is sort of place-specific. So the
2 question would be is there a history and
3 tradition of allowing restrictions on people
4 carrying in churches that we --

5 JUSTICE SOTOMAYOR: I -- I suspect
6 there isn't. So I -- I suspect. I could be
7 wrong. I never read about that.

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

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

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

19 MS. HARRIS: So two points on that,
20 one with respect to the presumption of the
21 Hawaiian people. As Petitioner notes, there is
22 no Second Amendment for every single state in
23 the union that's different. It is a national
24 tradition, and states cannot retain their
25 pre-statehood traditions as sort of a -- a veto

1 for the Second Amendment national tradition.

2 If you look --

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

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

19 JUSTICE SOTOMAYOR: But there's
20 nothing unusual about here -- about this. This
21 is simply a presumption.

22 MS. HARRIS: Respectfully, this is
23 highly unusual, as the Ayers article itself
24 acknowledges. In all 50 states and the
25 District of Columbia, up until Bruen, the

1 universal rule, and this does trace to the
2 founding, is that when you have property open
3 to the public, you are inviting people to go on
4 it with arms unless the owner says otherwise.

5 We think that implicates the
6 Constitution, the Second Amendment for the same
7 reasons it implicates other amendments in other
8 contexts.

9 JUSTICE SOTOMAYOR: Presumption
10 doesn't change that. The presumption lets the
11 owner choose.

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

19 JUSTICE SOTOMAYOR: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 JUSTICE KAGAN: Can you imagine, Ms.
22 Harris, any modern analogs of these
23 antipoaching laws? I mean, I guess what I'm
24 asking you to do is to say is there -- are
25 there any modern laws that sort of use this

1 kind of authority over, you know, consent and
2 licensing and so forth but that don't have to
3 do with hunting that would be permissible
4 because they're very much like these
5 antipoaching laws?

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

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

22 But it's also saying you can't
23 trespass generally in those places. So I think
24 it's getting to the idea of, if you have
25 particular property that's closed to the

1 public, you might not want people with arms on
2 it. That is what these sort of founding-era
3 laws say.

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

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

18 And that's your view of why Hawaii is
19 different. And if the Hawaii law was narrower
20 than that or if some some other states were,
21 then you would have a different question?

22 MS. HARRIS: I think it would present
23 different questions. And, yes, that is our
24 main objection. And the reason is Hawaii is
25 trying to use laws that actually show the

1 opposite tradition, which is laws closed to the
2 public, you might need affirmative consent in
3 order to be able to hunt on them.

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

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

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 JUSTICE GORSUCH: There's been the
19 suggestion that this is just flipping a
20 presumption about the implied license and that
21 that's just a matter of property law and not
22 the Second Amendment, but how do we think about
23 that given that it flips the presumption on the
24 longstanding implied license only with respect
25 to firearms, not knives, not solicitation, not

1 politicking, not anything else?

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

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

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

23 JUSTICE GORSUCH: And what are the
24 implications? Hawaii allows oral consent to be
25 sufficient. California had a law requiring a

1 posted sign. The Ninth Circuit struck that
2 down while allowing Hawaii's law, but I'm not
3 sure I understand the distinction between the
4 two.

5 Why couldn't a state require
6 affirmative signs? Why -- why couldn't it
7 perhaps create an irrebuttable presumption
8 against consent?

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

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

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

22 And if you run out of gas and you're
23 trying to find a gas station, you can't get gas
24 unless you know you're in your car, you have --
25 you have your gun in your purse, and you're not

1 actually committing a crime by stepping on the
2 gas station property.

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

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

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

19 Those laws are dead ringers only in
20 the sense that this law too is an
21 unconstitutional pretext. The black codes were
22 offered, as you mentioned, by states before
23 their readmission to the union. It is not an
24 indictment of the Bruen framework to say that
25 unconstitutional laws do not count in

1 illuminating a valid tradition.

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

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh?

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

23 Do you agree with part 3 of Heller,
24 accept part 3 of Heller?

25 MS. HARRIS: Yes. We do -- are not

1 trying to depart from anything that this Court
2 has said with respect to its Second Amendment
3 precedents.

4 JUSTICE KAVANAUGH: And then, in part
5 3 of Heller, the Court said that nothing in our
6 opinion should be taken to cast doubt on laws
7 forbidding the carrying of firearms in
8 sensitive places, such as schools and
9 government buildings.

10 Do you agree with that?

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

18 JUSTICE KAVANAUGH: Understood.
19 But you -- you agree with the principle as
20 stated there that I just read?

21 MS. HARRIS: We agree with the
22 principle as stated that there are obviously
23 sensitive places. You determine them with
24 respect to the history of firearm regulation.

25 JUSTICE KAVANAUGH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

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

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

23 MS. HARRIS: Not okay, and it still
24 runs up in the basic distinction that we're
25 seeing, which is when the history and tradition

1 is for the type of property, property open to
2 the public, to have an implied license to go
3 onto the property, when the state is trying to
4 load the dice, when it's trying to say you
5 generally can't go there, it has to point to
6 relevantly similar analogues that are doing the
7 same for the how and why.

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

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

1 I think this is this problem of just
2 because the legislature didn't address a
3 problem because it didn't exist at the time,
4 why does that mean that that the analogue ties
5 the legislature's hands now?

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

24 And I think you know that from the
25 laws themselves, actually. I think the laws

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

10 JUSTICE BARRETT: But, Ms. Harris,
11 then that -- that raise this question for me.
12 In footnote 1 of your brief, you say this case
13 does not concern property closed to the public.
14 So the Court need not address state laws that
15 prohibit carrying a firearm into a private
16 residence without the owner's affirmative
17 consent.

18 But both and you Mr. Beck are drawing
19 this distinction in anti-poaching laws between
20 property that is open to the public and
21 property that is closed to the public. So I
22 guess I don't understand how, if you win this
23 case -- and we do the history and tradition
24 analysis and you win, how is the Court supposed
25 to distinguish that analogue in the way that

1 you're proposing we do without deciding this
2 question you tell us we shouldn't be deciding?

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

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

19 JUSTICE BARRETT: So maybe the state
20 could flip the presumption in the way Hawaii
21 has done here but just with respect to private
22 residences?

23 MS. HARRIS: And --

24 JUSTICE BARRETT: Mr. Beck said no to
25 that.

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

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

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

23 MS. HARRIS: I don't think we're
24 trying to suggest any difference between
25 ourselves and Heller and our position here. I

1 think we're -- we're frankly using it as a
2 shorthand.

3 JUSTICE BARRETT: Okay. Thanks.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

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

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

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

24 JUSTICE JACKSON: Okay. Let me stop
25 you there. They were not deemed

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

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

10 JUSTICE JACKSON: That was later.

11 MS. HARRIS: -- found unconstitutional.

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

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

20 JUSTICE JACKSON: So the history
21 doesn't matter?

22 MS. HARRIS: No.

23 JUSTICE JACKSON: We shouldn't care
24 about the history, then?

25 MS. HARRIS: We should deeply care

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

18 JUSTICE JACKSON: All right. Mr. --

19 MS. HARRIS: So it doesn't count under
20 the whole point of Bruen.

21 JUSTICE JACKSON: Mr. Katyal will
22 address it. I just have one more question.

23 I'm trying to understand whether there
24 is a Second Amendment problem in the following
25 circumstance: So what if a state that's trying

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

9 Do we have a Second Amendment problem
10 in that situation?

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

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

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

22 JUSTICE JACKSON: And their purpose is
23 to dissuade. That was part of the
24 hypothetical.

25 MS. HARRIS: I understand.

1 JUSTICE JACKSON: So your -- your test
2 was about the purpose of the state. We have
3 the purpose here. We have the effect here.
4 97 percent of the businesses, let's say, in
5 Hawaii under the test that I'm -- or the law
6 that I'm positing accepts this offer.

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

14 JUSTICE JACKSON: Right. I just want
15 to know, is the Second Amendment implicated?
16 And I think you're saying no. And I don't
17 understand why it wouldn't be in this situation
18 if it is in the situation here.

19 MS. HARRIS: Because in the law that
20 Hawaii is enacting, it is regulating
21 arms-bearing conduct by saying if I carry my
22 gun to a gas station, I am presumptively
23 committing a crime. That is a direct
24 regulation of where and how you can bear arms,
25 under what circumstances.

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

7 JUSTICE JACKSON: Thank you.

8 MS. HARRIS: -- in the way that we
9 think Bruen is talking about.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Katyal.

13 ORAL ARGUMENT OF NEAL K. KATYAL
14 ON BEHALF OF THE RESPONDENT

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

17 This case is about two fundamental
18 rights, the right to bear arms and the property
19 right to exclude. And there's lots of
20 agreement among how -- among the parties about
21 how those rights interact. Everyone agrees
22 there's a right to carry on private property if
23 the owner wants guns on his property. That was
24 elicited by Justice Sotomayor to my friends.
25 And everyone also agrees there's also no such

1 right if the owner doesn't want guns.

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

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

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

22 In some states, it's natural to say,
23 when a homeowner invites you in, they're fine
24 with you bringing your gun unless they say
25 otherwise. But, in others, it's pretty obvious

1 that if you bring your gun to someone's house,
2 you have to ask.

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

8 It's reasonable for a state to clarify
9 these defaults, passing laws that say you can't
10 assume -- that you can assume consent absent
11 permission or, as here, that you can't assume
12 it.

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

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Are there any other
22 constitutional rights that you can place -- on
23 which you could place similar limitations?

24 MR. KATYAL: Sure. I think -- you
25 know, I think -- I think the general

1 proposition of the law is that property rights,
2 you know, are --

3 JUSTICE THOMAS: Open to the public,
4 always add that part. We're not talking about
5 private homes. We're talking about
6 restaurants, we're talking about malls, things
7 like that.

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

14 JUSTICE THOMAS: I thought he made
15 the distinction between private homes versus
16 property, private property open to the public
17 as opposed to closed to the public.

18 MR. KATYAL: Justice Thomas, his brief
19 made that distinction, but at least as I
20 understood what he was saying at argument, that
21 his rule would apply even there. And I think
22 this is what's so dangerous about his rule
23 because he's saying, look, you know, as long as
24 something has to do with guns, then we go right
25 to Bruen step two, where the burden has

1 shifted. And I think this Court --

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

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

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

16 JUSTICE KAGAN: So suppose --

17 CHIEF JUSTICE ROBERTS: Well --

18 JUSTICE KAGAN: -- there were a -- a
19 state that said: We're going to flip the
20 default rule so that you cannot leaflet in
21 shopping centers unless you secure permission
22 first.

23 MR. KATYAL: Yeah.

24 JUSTICE KAGAN: Would that be
25 constitutionally problematic or not?

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

10 JUSTICE KAGAN: Well, but, like any
11 leafleting for anybody --

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

13 JUSTICE KAGAN: -- on any subject.

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

21 This Court, in Free Speech Coalition
22 versus Paxton, recently said, even for stuff
23 that has not -- isn't encompassed in the First
24 Amendment, you still have to have at least some
25 rational basis. Your example would flunk that.

1 Here, Hawaii has done the opposite.
2 There have been no guns, effectively, in Hawaii
3 for 200 years. The underlying, you know,
4 expectations and local custom, as Justice
5 Sotomayor was saying, was that nobody had to
6 think about guns.

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

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

23 JUSTICE BARRETT: Well, counsel --

24 CHIEF JUSTICE ROBERTS: Counsel, I
25 just want to understand because one of the

1 motivating concerns, and you can see it in --
2 in our decisions under the Second Amendment, is
3 that it is a disfavored right.

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

13 But you say that it's different when
14 it comes to the Second Amendment, that you can
15 walk up -- when the candidate wants to walk up
16 and he's carrying a gun, is -- what exactly is
17 the basis for the distinction?

18 Because part of, again, what -- what
19 our precedents talk about in this area is that
20 the Second Amendment has been treated as sort
21 of, you know, a second-level right. And that's
22 one area where I -- given this law, I don't
23 really see the basis for the distinction.

24 MR. KATYAL: So we totally agree, the
25 Second Amendment has no disfavored right. At

1 the same time, there are rules about the Second
2 Amendment and I think rules that this Court
3 laid down in Bruen in which you've said the
4 relevant question is whether or not the scope
5 of the Second Amendment's text as informed by
6 history would say that there is a violation of
7 the right.

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

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

20 Indeed, that is what happened,
21 although going back all the way to -- all the
22 way to those early examples. And my friend on
23 the other side is, I think, selectively reading
24 those to say, oh -- the Solicitor General is
25 saying, oh, these laws are just about poaching

1 and the like. Absolutely not. They have no
2 answer to what we said in our red brief, which
3 is that these laws dealt with improved lands.
4 And improved lands were, as Professor Hertog
5 says, stores, seed stores, and things like
6 that.

7 CHIEF JUSTICE ROBERTS: Right. But
8 let me just switch gears a little bit. You
9 talked about the tradition in -- in Hawaii.

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

20 And I wonder, I thought, you know, as
21 mentioned earlier, it is part of the United
22 States.

23 And do we isolate, do we have
24 different traditions in different states when
25 it comes to applying Bruen?

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

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

13 So just to take a simple example --

14 CHIEF JUSTICE ROBERTS: Well, just
15 before -- I don't want to lose the -- the
16 thought.

17 You said part of the history and
18 tradition is there's no right to enter private
19 property without the owner's consent, right?

20 MR. KATYAL: Mm-hmm.

21 CHIEF JUSTICE ROBERTS: Well, we know
22 that that's not a through line, right, because
23 you do have a right to enter the owner's
24 private property if you want to exercise your
25 First Amendment rights, right?

1 MR. KATYAL: So not without their
2 consent, Your Honor.

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

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

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

21 To the extent that they just ban it
22 entirely, it would flunk rational basis review.

23 The relevant right there is not
24 located in the property, property and the place
25 it's spoken, but, rather, the government is

1 coming in and affirmatively taking a position
2 on the --

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

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

16 MR. KATYAL: So I think it might
17 because, as this Court said in Free Speech
18 versus Paxton, you still have to have some
19 underlying rationality for it.

20 JUSTICE BARRETT: Yeah. People find
21 it annoying. They don't like it. They think
22 it affects their businesses, and people don't
23 want to go to businesses if they're going to be
24 accosted by pamphleteers.

25 MR. KATYAL: It may be a rational

1 basis problem, but I don't think it's a First
2 Amendment problem. This Court in Rowan said
3 that "the right to engage in expressive
4 activity generally stops at the outer boundary
5 of every person's domain."

6 JUSTICE JACKSON: And that's the
7 point, right, of --

8 JUSTICE BARRETT: Let me get -- let
9 me -- one more --

10 JUSTICE JACKSON: Mm-hmm.

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

22 MR. KATYAL: Yeah. So I think that's
23 a -- that's one which would be
24 unconstitutional --

25 JUSTICE BARRETT: Why?

1 MR. KATYAL: -- every day of the week
2 because it would violate the Equal Protection
3 Clause because the government on its face is
4 making a racial classification. So --

5 JUSTICE BARRETT: Because there's
6 state action in the way the government is
7 adjusting its property defaults?

8 MR. KATYAL: Absolutely.

9 JUSTICE BARRETT: Even if there's a
10 long history and tradition, say, in
11 Louisiana --

12 MR. KATYAL: Yeah.

13 JUSTICE BARRETT: -- of this kind of
14 discrimination at the doorstep?

15 MR. KATYAL: Right. It would still
16 violate the equal protection.

17 JUSTICE BARRETT: Why isn't there
18 state action here when the state is flipping
19 the default? It's not just a matter of
20 property law.

21 MR. KATYAL: Right. Our point is not
22 whether there's state action or not. It's that
23 there's no underlying right. My friend
24 assumes -- has -- has conceded this. He said
25 there is no right to come onto private property

1 absent consent. And so the only question is
2 whether the state can fill in the conditions --

3 JUSTICE BARRETT: Yeah, there's no
4 right --

5 MR. KATYAL: -- of that consent.

6 JUSTICE BARRETT: -- to come onto
7 private property without consent. So my public
8 accommodations example is right. I mean,
9 absent a public accommodations law or in a
10 private residence, you could turn someone away
11 on the basis of race.

12 MR. KATYAL: But there is no
13 antidiscrimination component in the Second
14 Amendment the way there is with the Equal
15 Protection Clause.

16 JUSTICE BARRETT: Okay.

17 MR. KATYAL: And so that's why it
18 functions --

19 JUSTICE JACKSON: So, Mr. Katyal,
20 going back to --

21 JUSTICE ALITO: Mr. Katyal, you're
22 just -- you're just relegating the Second
23 Amendment to second-class status. I don't see
24 how you can get away from that.

25 If someone owns a store -- or let's

1 say it's a little restaurant and this person
2 has very strong political opinions and does not
3 want anybody in that restaurant who is wearing
4 attire that is expressing approval of a
5 particular political candidate. That person --
6 the owner of that store -- restaurant has the
7 right to say you can't come in, right?

8 MR. KATYAL: Yes.

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

15 MR. KATYAL: Again, that's viewpoint
16 discrimination and prohibited by the --

17 JUSTICE ALITO: It's a violation of
18 the First Amendment. We have a violation of
19 the First Amendment and what is -- and a
20 violation of the right that the Court held is
21 protected by the Second Amendment in Bruen,
22 which is the right of law-abiding citizens to
23 carry a firearm for purposes -- outside of the
24 home for purposes of self-defense.

25 MR. KATYAL: I quite agree with much

1 of what you're saying. I think what's the
2 difference is that the Second Amendment, it's
3 not a second-class right. It just has --
4 doesn't have the same components of viewpoint
5 discrimination or antidiscrimination for the
6 Fourteenth Amendment. And it's just not in the
7 Second Amendment.

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

18 JUSTICE ALITO: Justice Sotomayor
19 cited a poll about what the people of Hawaii
20 think about the possession of guns. I'm not
21 aware of the poll, but let's assume it's
22 correct. Let's assume that 78 percent or
23 whatever the figure was in the poll that she
24 cited really don't like guns.

25 So what then is the big deal about

1 this statute? Why does it matter if store
2 owners and owners of private property that
3 is -- that are generally open to the public
4 don't like guns, why is it a big deal to say
5 they want people carrying guns to stay out,
6 just put up a sign?

7 MR. KATYAL: Yeah, so --

8 JUSTICE ALITO: Why does Hawaii have
9 to have this law?

10 MR. KATYAL: So I think Hawaii has --
11 like all state legislatures, has the right to
12 put a default rule in that says -- that tracks
13 the expectations of its people, and --

14 JUSTICE GORSUCH: But, if that's true,
15 then what's wrong with California's law, which
16 flipped the default rule and said it can only
17 be overcome with a sign?

18 MR. KATYAL: Right. So I do think
19 California's law would probably be
20 constitutional, but our argument doesn't depend
21 on it --

22 JUSTICE GORSUCH: So you --

23 MR. KATYAL: -- because Hawaii
24 here --

25 JUSTICE GORSUCH: -- you disagree with

1 the Ninth Circuit's decision on that score?

2 MR. KATYAL: I do, but I think that
3 here --

4 JUSTICE GORSUCH: And so a result
5 here, you -- you'd admit, would logically
6 entail permitting California's law or ones like
7 it to pass?

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

10 JUSTICE GORSUCH: Oh, I know I don't
11 have to go that far, but you just said you
12 would go that far.

13 MR. KATYAL: I personally would --

14 JUSTICE GORSUCH: Yeah. Okay.

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

17 (Laughter.)

18 MR. KATYAL: So -- and the -- and
19 the -- and the reason for that --

20 JUSTICE GORSUCH: No, I appreciate
21 your candor about the extent of where your
22 argument leads. And so it seems to me that,
23 you know, you could have a state law that
24 doesn't just flip the presumption and require
25 express oral consent but requires express

1 written consent, maybe a sign, maybe an
2 irrebuttable presumption of flipping -- I
3 appreciate your candor on that.

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

11 And you rely very heavily on an 1865
12 black code law in Louisiana. You say it's a
13 dead ringer and a reason alone to affirm the
14 judgment. And I really -- I -- I really want
15 to understand how that could be.

16 MR. KATYAL: So let me take those in
17 turn. So, first, with respect to the
18 California law, I think it's really important
19 to understand here the Hawaii law has a much
20 broader definition of consent, a much more
21 general --

22 JUSTICE GORSUCH: I know it does.
23 That wasn't the question. Why don't you answer
24 the question posed.

25 MR. KATYAL: About the California law

1 or the --

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

4 MR. KATYAL: Okay.

5 JUSTICE GORSUCH: -- should inform
6 this Court's decision-making.

7 MR. KATYAL: Right.

8 JUSTICE GORSUCH: It's quite an
9 astonishing claim to me.

10 MR. KATYAL: So -- so the black codes
11 are undoubtedly a shameful part of our history,
12 but that doesn't at all mean that this
13 particular law is irrelevant to Second
14 Amendment analysis for two reasons.

15 First, the Solicitor General says
16 correctly, as she did just now, that Louisiana
17 wasn't a state in 1865. The relevant point is
18 what happened in 1868, when Louisiana was
19 admitted to be a state. The Act of June 22nd,
20 1868, admitted Louisiana as a state. That was
21 the radical Reconstruction Congress. It
22 examined the Louisiana laws, including this
23 specific statute, and Louisiana was admitted
24 into the union by the Reconstruction Congress.
25 There were many laws that the Louisiana --

1 JUSTICE GORSUCH: You're not answering
2 the question. The question is it's an outlier,
3 and -- and you just called it a shameful
4 outlier. And I -- I agree with that.

5 And Bruen was supposed to look at the
6 mainstream of our tradition and history, not
7 outlying statutes that were unconstitutional
8 the moment they were passed and, yes, when
9 Louisiana was admitted to the union.

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

12 JUSTICE GORSUCH: I understand a lot
13 of people like to cite the black codes who
14 promote gun restrictions, who would --
15 otherwise, they would be garlic in front of a
16 vampire in front of them. But, here, they --
17 they like them, they embrace them. And I'm
18 really interested in why.

19 MR. KATYAL: So, Justice Gorsuch, when
20 I said the black codes were a shameful period,
21 there are parts of the black codes like this
22 particular statute which were race-neutral,
23 which the Congress of the United States, the --
24 the same Congress that ratified the Fourteenth
25 Amendment, implicitly blessed by admitting

1 Louisiana back in. It didn't treat that with
2 the same -- with respect to other laws from
3 other states, but it did here.

4 And, most importantly, even the
5 opponents of the black codes recognized, as the
6 Sickles general order says, that you have no
7 right to carry a firearm onto someone's
8 property absent their consent.

9 JUSTICE KAVANAUGH: We said in
10 Ramos --

11 JUSTICE ALITO: Mr. Katyal, wasn't the
12 purpose of the laws in the post- -- in the
13 post-Reconstruction south that disarmed black
14 people precisely to prevent them from doing
15 what the Second Amendment is designed to
16 protect, which is to defend yourself against
17 attacks? They didn't want the -- they wanted
18 to disarm the black population in order to help
19 the Klan terrorize them and other -- and law
20 enforcement officers in that period in that
21 region, they wanted to put them at the mercy of
22 racist law enforcement officers.

23 So is it not the height of irony to
24 cite a law that was enacted for exactly the
25 purpose of preventing someone from exercising

1 the Second Amendment right to cite this as an
2 example of what the Second Amendment protects?

3 MR. KATYAL: So, Justice Alito, we
4 quite agree with you that parts of the black
5 codes were motivated by and had exactly that
6 operation. Our point to you is this consent
7 requirement did not operate that way.

8 Indeed, if anything, it protected
9 black churches and black-owned businesses and
10 the like by insisting on this consent rule.
11 And that is why the radical Reconstruction
12 Congress admitted Louisiana back in. They said
13 no to various laws, but they never did that
14 with respect to this. And this law stayed on
15 the books for a long time.

16 More generally, of course, we've
17 obviously for good reason taken all this time
18 on Louisiana, but remember our argument, if we
19 were to get to the historical analogues and the
20 like, we don't think you even need to, but if
21 you got there, you wouldn't just look to
22 Louisiana in 1865. You'd start with New Jersey
23 in 1771.

24 JUSTICE KAVANAUGH: Well, on -- on
25 Louisiana, in -- in Ramos on the jury trial

1 right, the question of whether he had a right
2 to unanimous jury, there were Louisiana and
3 Oregon precedents going way back that allowed
4 non-unanimous juries.

5 And we flatly rejected that historical
6 example for the exact reason that Justice Alito
7 and Justice Gorsuch have been mentioning.
8 Those were rooted in racial prejudice designed
9 to prevent black jurors from having their votes
10 counted on juries in the wake of a -- a
11 decision like Strauder of 1880.

12 And we just said no, that's -- that's
13 inadmissible to account for that as somehow
14 justifying an exception to the constitutional
15 right. It seems like the same kind of thing
16 here.

17 What is different?

18 MR. KATYAL: Well, Justice Kavanaugh,
19 we, just disagree with the idea that that
20 applies to this particular law from Louisiana
21 in 1865. But regardless, our tradition goes
22 way back before that.

23 New Jersey in 1771, 1721 Pennsylvania,
24 the law said, quote, "you cannot carry any gun
25 or hunt on the improved or enclosed lands of

1 any plantation."

2 The 1763 New York law which my -- the
3 solicitor general only read part of says that
4 it was unlawful to carry, shoot, or discharge
5 any musket or other firearm whatsoever into any
6 orchard, garden or other enclosed land
7 whatsoever.

8 And there's other statute after
9 statute. There's no allegation by anyone that
10 those were motivated by any sort of racist
11 concerns or the like. And what they've said
12 is, oh, no, that was just limited to poaching.
13 That's just wrong.

14 There's two parts, for example, to the
15 New Jersey law. Part 2 is about poaching --

16 JUSTICE KAVANAUGH: On those --

17 MR. KATYAL: -- and part 1 --

18 JUSTICE KAVANAUGH: -- laws, a couple
19 of them that you cite, it seems to me you're
20 approaching the whole analysis upside down from
21 how the Court's cases have approached it. The
22 Court's cases have started with the text, which
23 declares an individual right.

24 And then in Heller and in Bruen, the
25 Court has elaborated on, of course, as there

1 are with all rights, as Heller said, some
2 exceptions, but those exceptions to be
3 recognized must be historically rooted, deep
4 tradition, a broad tradition, widely
5 recognized, commonly recognized, not isolated
6 examples, particularly not ones from the black
7 codes. But even apart from that, not isolated
8 examples.

9 And I just don't see the kind of broad
10 tradition of the regulation here that you see
11 with the other things specified in Heller, for
12 example.

13 MR. KATYAL: Right. So I agree with
14 some of what you're saying. So I completely
15 agree the relevant test under Bruen is text and
16 then the next words you used were "as informed
17 by history."

18 And so the question is whether or not
19 there is some sort of right, at the framing,
20 whether the right to keep and bear arms was
21 understood, the right to assume an owner's
22 consent to bring arms.

23 That's where we think this case --
24 their case falls apart because for the first
25 time you'd be saying, if you accept their

1 invitation, in the absence of any affirmative
2 evidence whatsoever, a commentator, a court,
3 anything, that said that -- that there was a
4 right to imply consent, there's just nothing.
5 There is precious zero on that.

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

13 And he ultimately said yeah, because
14 the burden-shifting, you wouldn't be able to
15 defend the law under the burden-shifting of
16 step 2 of Bruen in which you have to have
17 demonstrated historical analogues and the like.

18 That gets everything undone entirely.
19 I mean this Court has a general rule, Justice
20 Alito wrote about it in Kennedy versus
21 Louisiana, which is when you are coming in to
22 challenge a state law, you bear a heavy
23 presumption that your challenge is invalid,
24 that there's a presumption of good faith and
25 presumption of regularity on the part of the

1 legislature.

2 If you just jump to Bruen step 2 and
3 say, oh, this law deals with guns, therefore,
4 the burden flips to the government, then yeah,
5 you're going to have a really difficult time
6 defending laws every state is like the ones
7 that deal with gun consent on private homes and
8 the like.

9 JUSTICE BARRETT: Well, which is why
10 you don't want to get to step 2 because it's a
11 lot harder for you at step 2. But I think what
12 Justice Kavanaugh is asking, I have the same
13 question, is how can you avoid step 2? Because
14 the text encompasses it.

15 And that leads you to step 2 where you
16 have all the difficulties you were just saying.

17 MR. KATYAL: Because if you read Bruen
18 as only about the text, okay, I agree with you,
19 you could say well, maybe it's the right to
20 keep and bear arms as implicated by these
21 implied default rules, but it is the text as
22 informed by history.

23 And when you ask yourself text as
24 informed by history, where has anyone ever said
25 there's a right to presume consent of the owner

1 in the absence of an explicit statement, it
2 just doesn't exist.

3 JUSTICE BARRETT: That's the second
4 step. When you're looking at the history. I
5 mean I could see history being relevant at the
6 first step if you're talking about what is the
7 meaning of arms, for example.

8 But when you're talking about things
9 that kind of go to what is the core of the
10 right or is it included and you're talking
11 about history and tradition, I guess I don't
12 see how it is the first step.

13 MR. KATYAL: Well, I think it -- it's
14 got to be. Otherwise I think you run into the
15 problem that you've now flipped the burden for
16 every firearms regulation. As long as it deals
17 with guns then -- then the state has to come in
18 or the federal government has to come in with
19 an affirmative thing. And we have all sorts of
20 laws that --

21 JUSTICE KAVANAUGH: That's exactly
22 what the cases say.

23 MR. KATYAL: Well, I --

24 JUSTICE KAVANAUGH: I -- I mean, I
25 thought that's what the cases say. If it deals

1 with arms, and this is what Heller part 3 says,
2 then the government comes in and shows there's
3 a historical tradition. And to get ahead of
4 all this, Heller actually went through and
5 specified a number of kinds of regulations that
6 would be permissible because they are so
7 broadly and deeply rooted.

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

10 MR. KATYAL: Because then it would
11 really, as the every town brief says, threaten
12 gun regulation more generally in ways this
13 Court has so far not reached because you have
14 all sorts of times, in which like take 920 --
15 the 922 statute, 11 different categories of
16 things that are singled out as gun regulation.

17 If every single time the state had to
18 defend the burden on each of those things and
19 say you've got to find, you know, historical
20 analogues, that really does undo, I think, the
21 much more limited nature of the inquiry that --

22 JUSTICE JACKSON: Mr. Katyal --

23 MR. KATYAL: -- Bruen recognizes --

24 JUSTICE JACKSON: -- I thought your
25 answer to Justice Barrett and Justice Kavanaugh

1 is that really step 1 is trying to help us to
2 understand what the scope of the right is.

3 MR. KATYAL: Correct.

4 JUSTICE JACKSON: The Second Amendment
5 right. Is it really being implicated here?

6 MR. KATYAL: Correct.

7 JUSTICE JACKSON: And so that when you
8 have a situation like this one in which there
9 is broad consensus, everybody agrees that there
10 is some limit to the Second Amendment right,
11 and you read a case that said that limit was
12 geography in the sense that you don't have a
13 Second Amendment right to bring your gun on to
14 someone else's private property, they have to
15 consent for you to be able to do that.

16 We have already limited the scope of
17 the Second Amendment right for purposes of this
18 discussion because we're talking about a right
19 that doesn't just freely exist.

20 So in the Chief Justice's leafletting
21 example, it's -- it's similar. Like I don't
22 see the Second Amendment operating differently
23 than, say, the First Amendment because, in the
24 leafletting example, the reason why you get to
25 go up to the person's door is not because you

1 have a First Amendment right to do that.

2 You get to go up to the -- the
3 person's door because there is a custom and
4 tradition of implying the person's consent --

5 MR. KATYAL: Yes.

6 JUSTICE JACKSON: -- for you to do
7 that in that situation, that -- that -- that
8 all the states, everybody says when you come
9 for the purpose of passing a leaflet, we are
10 going to assume, we are going to imply that the
11 owner is allowing you to do that.

12 He doesn't have to put up a sign that
13 says please come. We're going -- but it's --
14 it's operating around property rights, not that
15 your First Amendment right is what is getting
16 you on to his property.

17 MR. KATYAL: That --

18 JUSTICE JACKSON: Similarly, the
19 Second Amendment right is not getting you on to
20 someone's property in this way, if it is a
21 private property, even the property open to the
22 public. It's the implicit consent that many
23 states have allowed that is what is doing the
24 work of allowing you to carry your gun in that
25 gas station.

1 Am I right about that?

2 MR. KATYAL: That's exactly right.

3 And the one thing I would add is that what I
4 think is doing the work in my friend's argument
5 is some sort of insinuation that Hawaii has
6 singled out and is hostile to guns or the
7 Second Amendment and the like.

8 And I point you to two reasons why
9 that's wrong. Number 1, Hawaii has these very
10 same laws about implied consent and changing
11 the default rules for other things besides
12 guns. So 445115 has it for cards and banners
13 and placards, akin to the example that you're
14 mentioning before. 339-4 is about litter and
15 bringing it on. 291C is about vehicles and the
16 like.

17 JUSTICE JACKSON: And what you're
18 saying, I think, is that there is no Second
19 Amendment right to assume implicit consent.

20 MR. KATYAL: Yes.

21 JUSTICE JACKSON: There is no -- to
22 the extent we're talking about is this about
23 consent, and I think we are, because you don't
24 have a right to go on without consent, then is
25 the Second Amendment doing work with respect to

1 allowing you to say I have a constitutional
2 right to assume that I'm allowed to be here?
3 And you're saying they have no case, no
4 history, no nothing that establishes that
5 principle.

6 MR. KATYAL: That's exactly right.
7 And the other thing I'd point to about this
8 motivation attack by my friend on the other
9 side is that, you know, the -- you know,
10 Hawaii, the legislature, took Bruen seriously.
11 This statute's all about making sure the right
12 of Bruen is vindicated.

13 And just last year, for example,
14 Hawaii issued 2207 concealed permit -- permits
15 for firearms.

16 CHIEF JUSTICE ROBERTS: Thank --

17 MR. KATYAL: You know, they only
18 denied 119 applications, and the majority of
19 those were denied because people didn't fill
20 out the application in full or they got it out
21 of time.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas?

25 JUSTICE THOMAS: If you're going to

1 cite the Louisiana black codes of 1865, don't
2 you also have to cite the subsequent adoption
3 of the Fourteenth Amendment that was in part
4 generated because of laws like that?

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

16 And so, yes, we do think it is
17 relevant history. We don't think our argument
18 depends on it because there's statute after
19 statute from the founding on. And the idea
20 that those -- that the number of statutes we've
21 provided isn't enough, I think, is -- is very
22 hard to reconcile when you have zero tradition,
23 zero evidence on the other side saying these
24 statutes were problematic.

25 I mean, these statutes were around.

1 You would have thought someone, if this was an
2 infringement on the right to keep and bear
3 arms, would have had a court case, a
4 commentator, anything like what you had in
5 Bruen. You've got none of that.

6 JUSTICE THOMAS: Well, actually, there
7 was quite -- as I said in my McDonald opinion,
8 quite a bit of discussion of these sorts of
9 laws and the consideration of some that they
10 thought that the privilege -- or Immunities
11 Clause in the Fourteenth Amendment preempted
12 these.

13 MR. KATYAL: So --

14 JUSTICE THOMAS: That's simply my
15 point.

16 MR. KATYAL: So, Justice Thomas, I
17 agree with you about what you said there, but I
18 don't think it applied to this specific
19 question, which is private property default
20 rules. I think what -- the evidence you were
21 talking about there dealt with other aspects of
22 state regulation over firearms.

23 CHIEF JUSTICE ROBERTS: Justice Alito?
24 Justice Sotomayor?

25 JUSTICE SOTOMAYOR: A three-part

1 question. In one or two sentences, could you
2 answer -- finish answering the California point
3 that Justice Gorsuch raised?

4 Number two, finish your list on where
5 else the State of Hawaii has flipped the
6 presumption. You -- you got up to littering,
7 and then you were cut off.

8 And then, number three, I have never
9 quite understood the Court's recent
10 jurisprudence on outliers don't count. I don't
11 know how much outliers mean.

12 MR. KATYAL: Yeah.

13 JUSTICE SOTOMAYOR: Meaning, at the
14 founding, there were 13 states. I don't know
15 how many territories at the time because I
16 don't remember off the top of my head. But
17 there were at least four states that had
18 flipped the presumption: New Jersey, New York,
19 Maryland, then -- and Pennsylvania. And then
20 later there was Massachusetts in 1790 at least
21 for a group of islands. And then you don't
22 have just the black codes; you have Oregon and
23 Florida flipping the presumption a little later
24 on.

25 So it seems to me that you can't call

1 all of these laws out -- this many outlaws --
2 outliers. And so the custom and tradition that
3 existed was you -- the license you had and
4 whether you presumed or didn't presume
5 permission could be flipped, correct?

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

7 JUSTICE SOTOMAYOR: So why don't you
8 answer the other two questions.

9 MR. KATYAL: Yeah. So, on the
10 California thing, the -- the one thing I would
11 just add to the -- my prior discussion with
12 Justice Gorsuch is just I think the overall
13 understanding -- overall history of what the
14 Hawaii legislature did here was relevant.

15 They weren't trying to attack a
16 second-class right or something like that.
17 They were rather trying to take Bruen seriously
18 by opening up what counts as consent, unlike
19 California, deviating even from the old
20 historical laws like New Jersey in 1771, which
21 required written consent.

22 And I think what did the work in my
23 friend's argument in his opening statement was
24 this idea that 96.4 percent of Hawaii is now
25 encompassed. You pointed out that dealt with

1 sensitive places.

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

12 So I'd just caution the Court into
13 saying -- because, if you read these briefs, it
14 does sound like, oh, the government of Hawaii
15 is out to get guns or something like that.
16 Nothing could be farther from the truth.
17 They've taken Bruen seriously, as the permit
18 statistics I read to you say.

19 With respect to Hawaii singling out
20 firearms, there's statute after statute. I was
21 reading 291-112, which is that you can't use a
22 vehicle for habitation on private property
23 "without the authorization of the owner."
24 There's also 633-16, that you can't remove
25 shopping carts without the written consent of

1 the owner. There's statute after statute like
2 this.

3 And the amicus briefs from the
4 property law professors goes through and says
5 this is true not just in Hawaii but in state
6 after state. They flip default rules all the
7 time.

8 Your last question was about outliers.
9 And I think, here, our most important point is
10 we don't think that there's some sort of
11 mechanistic formula for how many states is
12 enough or anything like that. We do think it's
13 relevant that there are a number of states at
14 the founding that do have this.

15 This Court on the sensitive places
16 part of Bruen said legislative assemblies may
17 be a -- a sensitive place. There was only one
18 state in the founding that had that. That was
19 Maryland, and it passed two separate laws five
20 years apart during the colonial era. That was
21 enough to count as an analogue.

22 We certainly think the larger, much
23 larger, number here is enough to count as an
24 analogue because these laws actually did the
25 same thing as what the Hawaii law does. It

1 said for -- with respect to property that is
2 open to the public, like plantations, like
3 premises, like enclosed land, Professor Hertog
4 says that includes seed stores, other retail
5 establishments, akin to the kinds of things
6 that my friend is challenging here, there is
7 historical precedent for all of that. We think
8 that's certainly enough to make this
9 constitutional.

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAGAN: So just on your last
12 point, Mr. Katyal, I -- I took Ms. Harris to be
13 saying with respect to your analogues at Bruen
14 step two that her principal point was, look,
15 it's not about, like, is it about poaching, but
16 the difference between those laws and this law
17 is that those laws were about lands that were
18 closed to the public. And that was her
19 principal point that -- that made that, like,
20 just a different category.

21 MR. KATYAL: Right. And it just blows
22 off the word "improved" in the statutes. It's
23 not just about unfenced -- it's not just about
24 fenced land but improved land. For improved
25 land, the statutes did change the default rule

1 and say you couldn't imply the consent of the
2 owner.

3 And as Professor Hertog said, that
4 applied to stores. It applied to plantations.
5 Indeed, that's the definition of plantations.
6 And it applied to premises, which is another
7 word used in some of these statutes.

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

11 JUSTICE KAGAN: Okay. And on -- on
12 this -- your step one inquiry, which I -- I
13 find interesting and difficult, I mean, I think
14 somebody could say: Look, what these
15 consent-flipping, default-flipping rules do,
16 they do burden the carrying of firearms and --
17 and that's what they are, and to incorporate
18 the burden into one's understanding of the
19 scope of the right is a kind of category
20 mistake, that the burden is supposed to be at
21 step two, and these are burdens on the carrying
22 of firearms.

23 MR. KATYAL: So two things. One,
24 factually, we just fundamentally disagree that
25 this burdens firearms. As Justice Alito was

1 saying earlier, if people in Hawaii don't want
2 to have the guns anyway, they're always going
3 to be able, even under their rule, say, you
4 know, have signs that say no guns allowed. So,
5 either way, you could have that burden.

6 The second thing is, legally, this
7 Court has made clear as day at page 22 of Bruen
8 you can't ask that burden test. Here's the
9 language. You said, "Heller and McDonald
10 expressly rejected the application of any
11 judge-empowering, interest-balancing inquiry
12 that asks whether the statute burdens a
13 protected interest in a way."

14 And so, you know, that which my friend
15 is definitely trying to say, that this burdens
16 the right, that is not a Second Amendment
17 violation. That's going down the road of undue
18 burdens that this Court has criticized in a
19 separate number of contexts in saying that's a
20 smoke screen for policy judges' preferences.
21 Rather, the inquiry at Bruen step one has
22 always been text is informed by history.

23 And when you ask yourself what in the
24 text informed by history this Hawaii law
25 violates, the answer is precious zero. No

1 commentator, no treatise, no court, no one's
2 ever said you have a right to imply consent of
3 the private property owner. And rather, the
4 fundamental tradition, which Justice Sotomayor
5 was saying earlier, that Justice Scalia
6 recognized in the Jardines opinion is there is
7 a fundamental right to exclude. And that right
8 to exclude has always meant, at the time of
9 taverns and the like, you can exclude people
10 for violating the terms on which they come in,
11 even if your tavern is open to the public.

12 JUSTICE KAGAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 JUSTICE GORSUCH: As near as I can
16 tell, the movement to flip the burden in --
17 with respect to firearms began in the states in
18 2020. Is that right?

19 MR. KATYAL: The burden to flip the
20 firearms with respect -- with laws like this, I
21 think that was after Bruen. I think that was
22 when this Court's decision in Bruen happened.
23 And then laws like -- the states like Hawaii in
24 which there was no tradition at all of carrying
25 had to deal with this question for the first

1 time.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 JUSTICE KAVANAUGH: How many states
6 have laws like Hawaii's with respect to
7 firearms on property?

8 MR. KATYAL: So I think five states
9 have enacted those laws, just in the few short
10 years since the Bruen decision.

11 I think other states, there's one, a
12 brief for you from D.C. saying some other
13 states are considering it.

14 Our point is the Constitution permits
15 both types of rules. It doesn't -- there's --
16 it's not constitutionally compelled that you
17 have to use the Hawaii rule. States function
18 as laboratories. They can do either -- they
19 can pick either default rule. Neither is an
20 infringement on the Second Amendment right to
21 keep and bear arms.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 Justice Jackson?

1 JUSTICE JACKSON: And it's not an
2 indictment, necessarily, that this arose after
3 Bruen. It was in response to Bruen, because
4 Bruen gave rise to the need for clarity about
5 property owners.

6 Once Bruen said you can carry the
7 gun outside of your home and there was an
8 alternative, you know, well-established
9 principle that private property owners can
10 exclude people, I think the states were trying
11 to make sure that property owners had the
12 opportunity to do that.

13 And that only became necessary once
14 Bruen allowed people to carry their guns
15 anywhere, right?

16 MR. KATYAL: That's exactly right.

17 JUSTICE JACKSON: It wasn't like they
18 were necessarily trying to keep people from
19 carrying the guns. They were giving property
20 owners the right to exclude by making sure that
21 they were asked: Do you want this gun in your
22 store?

23 MR. KATYAL: Exactly. And I was
24 saying to Justice Gorsuch, with respect to
25 California law, Hawaii took it far more

1 seriously. They said: We want to make sure
2 that you have the opportunity to get
3 on-the-spot oral consent, which is why the
4 gas station hypothetical that the Chief Justice
5 used and the others, it is not an issue under
6 the Hawaii law, because you do have the ability
7 to go and ask for consent even if there's no
8 posted -- no sign one way or the other.

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Rebuttal, Mr. Beck?

13 REBUTTAL ARGUMENT OF ALAN A. BECK

14 ON BEHALF OF THE PETITIONERS

15 MR. BECK: Your Honor, this -- as the
16 NRA's amicus brief makes very clear is, it is
17 a historical tradition of carrying on private
18 property open to the public.

19 This whole legal theory regarding
20 presumptive ban, default rules, started off
21 with a law review article that was published in
22 2020.

23 And the premise of that law review
24 article is putting in a presumptive ban like
25 Hawaii has would lessen people from carrying.

1 The State of New York adopted that law first,
2 and the governor of New York said the express
3 reason they were doing that was to undermine
4 the Bruen opinion.

5 There's no -- there's a clear body of
6 evidence here that this was done to undermine
7 Bruen and to undermine the Second Amendment
8 right; and, thus, this law very clearly
9 implicates the Second Amendment.

10 And the state has simply failed in its
11 burden to justify this law through relatively
12 similar historical analogues. Therefore, this
13 Court should rule in our favor.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 12:01 p.m., the case
17 was submitted.)

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