SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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JASON WOLFORD, ET AL.,)

Petitioners,)

v.) No. 24-1046

ANNE E. LOPEZ, ATTORNEY GENERAL)

OF HAWAII,)

Respondent.)

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APPEARANCES:

ALAN A. BECK, ESQUIRE, San Diego, California; on behalf of the Petitioners.

SARAH M. HARRIS, Principal Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States as amicus curiae, supporting the Petitioners.

NEAL K. KATYAL, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:10 a.m.)

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

Mr. Beck.

ORAL ARGUMENT OF ALAN A. BECK

ON BEHALF OF THE PETITIONERS

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

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

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

national tradition of allowing people to carry onto private property open to the public unless the owner objects. Hawaii's threshold position that this Court should adopt a state-by-state community standard lacks -- port in this Court's precedent, and Hawaii's argument the laws of the Kingdom of Hawaii should -- termine Petitioners' Second Amendment rights is completely without merit.

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

I welcome this Court's questions.

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

MR. BECK: We're not arguing that this

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

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

JUSTICE THOMAS: 96 --

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

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

MR. BECK: Yeah -- yes, Justice.

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

MR. BECK: A -- a portion of it, yes, Justice.

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

MR. BECK: That -- it's -- it includes

parks and beaches, yes, Justice.

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

MR. BECK: That is correct, Justice.

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

MR. BECK: Yes, Justice.

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

MR. BECK: The -- the Second Amendment --

JUSTICE SOTOMAYOR: My question is very simple. Is there a constitutional right to enter private property with a gun without an owner's express or implicit consent?

MR. BECK: The --

JUSTICE SOTOMAYOR: The answer has to be simply no. You can't own -- enter an owner's property without their consent, correct, express or implicit?

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

JUSTICE SOTOMAYOR: All right. So, if we start from there, then I start from the simple proposition, you want to say that there's a custom that permits you to go on private property without the owner's express consent, correct?

MR. BECK: Yes, Your Honor.

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

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

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

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

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

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

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

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

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

MR. BECK: There was, Your Honor, of

carrying on private property that's open to the public. Every case that you're -- every law that you're citing to deals with prohibitions on enclosed lands, and enclosed lands, there was a -- those laws deal with -- the enclosed lands were closed to the public. You couldn't --

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

MR. BECK: By definition, if I -- I --

JUSTICE SOTOMAYOR: That's a closed land.

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

JUSTICE BARRETT: Counsel, do you agree, picking up on that, that Hawaii could pass a law that prohibited the carry without the express consent of the owner on lands that were closed to the public, on private

residences?

MR. BECK: I do not, Your Honor.

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

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

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

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

of the property in Hawaii?

MR. BECK: Yes, Justice. Everyone -- every private property owner has the right to affirmatively put up a sign -- otherwise not give permission for people to enter a property with a firearm.

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

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

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

And so, fine, there are many states

and perhaps even most states that say we're going to imply that a property owner who opens his property to the public is giving consent for people to carry a gun.

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

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

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

JUSTICE JACKSON: But that doesn't mean it implicates. I -- what I'm -- what I'm suggesting is that it might affect, right, and -- and the United States was here just last

term talking -- or sitting, talking about how you could have rights and regulations that affect someone's interests, but they actually don't implicate their constitutional rights.

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

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

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

MR. BECK: No --

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

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

JUSTICE JACKSON: Right.

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

JUSTICE JACKSON: But -- but -- but -- but you do agree that there is no right to carry on private property without someone's -- without the owner's consent, right?

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

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

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

JUSTICE JACKSON: You do not concede?

MR. BECK: I do not. You -- you still would be dealing with carry. If someone gives me an invitation, a general invitation, to enter into their home and there's a historical presumption that you're allowed to carry a firearm with you, then, if the government

passed a law that says -- that flips that historical presumption to something --

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

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

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

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

JUSTICE JACKSON: You disagree. All right.

MR. BECK: Yes, Your Honor.

JUSTICE JACKSON: Thank you.

JUSTICE BARRETT: Counsel, do you agree that the state as property owner could exclude someone, not -- not this implied consent law, but let's say that the state as property owner -- put aside the fact that the sensitive places here include state-owned property. Assume that that's not so.

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

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

JUSTICE BARRETT: Okay. Why?

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

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

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

JUSTICE BARRETT: So it's all a matter

of sensitive places?

MR. BECK: Yes, Your Honor.

JUSTICE GORSUCH: Counsel, you make an argument that Hawaii effectively destroys the right to bear arms. You discussed that a little bit with Justice Thomas and with Justice Sotomayor. And I'm wondering where you fit -- think that -- that that analysis fits into the two-step Bruen framework the Court announced?

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

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

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

JUSTICE SOTOMAYOR: By -- by Bruen?
MR. BECK: Yes, Your Honor.
JUSTICE SOTOMAYOR: So there's no interest bearing. So, if, in fact -- if Hawaii has a right to regulate a custom as opposed to a constitutional right to bear an arm on private property, then -- then tough luck, correct?
MR. BECK: I -- we have established in our briefing, Your Honor, that --
JUSTICE SOTOMAYOR: I -- counsel, there's no means-ends, so, if they over-regulate or under-regulate, that's irrelevant. Is there a right to carry a gun?
MR. BECK: As -- as we know from Rahimi, there's a general principle that dictates that you have a general right to carry. When a -- the government violates that's rights, then, because it violates that principle, then the Second --
JUSTICE SOTOMAYOR: But that -- that's the interesting part. There certainly was a principle of the states regulating hunting on private enclosed property. There was a history of, in at least New York in 1763, just before

the founding, that prohibited trespassing and hunting on other people's lands because trampling on the land was destroying it.

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

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

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

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

JUSTICE SOTOMAYOR: If means and ends is not a part of our equation, I don't

understand what pertinence that has.

MR. BECK: Because, in order to do the Bruen analysis, we look to see whether a law is implicated by the Second Amendment right. Then we look to see what the historical tradition was in this country.

JUSTICE SOTOMAYOR: But that seems --

CHIEF JUSTICE ROBERTS: Counsel? I'm --

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

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

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

JUSTICE SOTOMAYOR: But we didn't have --

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

JUSTICE SOTOMAYOR: Go ahead.

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

MR. BECK: Yeah. Yes, Your Honor.

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

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

MR. BECK: Yes, Your Honor. The --

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

MR. BECK: Yes, absolutely, Your Honor.

CHIEF JUSTICE ROBERTS: Okay. Is it a different analysis or the same analysis when you're talking about a dwelling along the side of the --

MR. BECK: That -- that's a --

CHIEF JUSTICE ROBERTS: -- of -- of a

road?

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

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

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

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

MR. BECK: Yes, Your Honor.

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

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

CHIEF JUSTICE ROBERTS: Thank you.

Justice Thomas?

Justice Alito?

JUSTICE ALITO: Under Hawaii law, are there any other objects besides guns that a person may not possess when that person enters

private property that is open to the public?

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

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

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

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

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

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

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

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

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

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

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

JUSTICE SOTOMAYOR: Not in Hawaii.

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

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

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

JUSTICE SOTOMAYOR: I -- I --

MR. BECK: It is the custom --

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

MR. BECK: Bruen was very clear here

that we're dealing with our national tradition, Your Honor. It is not local custom that controls in this area of law.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: Mr. Beck, the various statutes that Hawaii has cited as going to the Bruen step two question, you say they're not close enough, and I guess I want to know why.

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

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

MR. BECK: The state has not cited to a single case that is relevantly similar to the

one at issue here.

We've got basically two sets of laws. One were the antipoaching laws that dealt with private property that was not open to the public, one, and part of that also is there were exemptions for people to be able to carry firearms onto those lands that -- for purposes of self-defense. So land that's not open to the public where you still have a self-defense right isn't relevantly similar to the -- to the law at issue here.

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

JUSTICE KAGAN: Yeah. So, I mean, go back to the first thing, the idea that these are antipoaching laws. I mean, okay, Hawaii's is not an antipoaching law. But I suppose I'm sort of stuck on the fact that that doesn't

seem to me to be the relevant similarity.

In Rahimi, we said, you know, you can go up a -- a level of generality. You don't have to have a historical twin. There can be differences. In Rahimi, the essential similarity that we thought controlled was just that the guns were being used to protect against people who would be violent with their guns. And, you know, that's a pretty general principle.

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

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

MR. BECK: Yes, Your Honor, but one dealt with private property that was not open to the public, whereas this law is dealing with private property that's open to the public. And, in addition to that, the antipoaching laws also gave you a right to be able to carry a firearm for self-defense.

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

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

at the freedmen.

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

MR. BECK: I do not, Your Honor.

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

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

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

Justice Barrett?

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

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

JUSTICE BARRETT: The United States Government, yeah.

MR. BECK: Yeah -- yeah -- yes. Yes, Your Honor.

JUSTICE BARRETT: Okay.
(Laughter.)
JUSTICE BARRETT: The -- the government that's on your same side.
MR. BECK: Yes, I understand.
(Laughter.)
MR. BECK: I agree with every --
JUSTICE BARRETT: I'm not asking you to throw your case away.
(Laughter.)
MR. BECK: I fully endorse the United States' brief, Your Honor.
JUSTICE BARRETT: Okay. And then I just have one clarifying question.
When Justice Kagan was pressing you on the analogies between the antipoaching laws and Hawaii's law, one of the things that you used to distinguish it was that the antipoaching laws applied to private property and these apply to property that's open to the public albeit private.
MR. BECK: Yes.
JUSTICE BARRETT: But I thought you had initially told me that Hawaii couldn't do this with respect to property that was like a

dwelling, a private residence either, that was not open to the public.

MR. BECK: Well, what I'm saying is that that -- that was simply -- that's a different historical analysis. And if they were to muster enough historical analysis to justify the law, that might be true. I just don't think that they have developed enough history on this record to be able to justify that law, Your Honor.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

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

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

The reason we presume they can go

in is because property law implies that a gas station owner who has private gas station and opens it to the public has consented for people to come in.

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

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

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

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

MR. BECK: Because --

JUSTICE JACKSON: -- the reason why this was all here in -- in -- is because you had an implied license. I thought the historical tradition required you to have a license because you don't have a right to go onto private property, and the tradition was we're going to imply that you have a license

under these circumstances.

MR. BECK: The base is this lawsuit is that we're only discussing private property where you have a right to enter onto that is open to the public, and we're saying that once that property is open to the public, we have a right to carry a firearm onto it --

JUSTICE JACKSON: Okay.

MR. BECK: -- unless the government --

JUSTICE JACKSON: Okay. I -- I think I understand.

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

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

MR. BECK: There's nothing wrong with the Bruen test, Your Honor. Just on a fundamental level, the black codes can't be

used because they dealt to discriminate against a small --

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

And so, to the extent that the test today is tying us to historical circumstances, it would seem to me that all of history should be on the table.

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

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

JUSTICE JACKSON: To -- to people other than the people in this small segment that you're talking about, who were a part of

society, but I guess you're saying that for the purpose of this test, we're not going to consider what happened to them?

MR. BECK: No. I'm saying is that the -- the black codes dealt with a very -- it -- it wasn't a law of general applicability. It was designed to discriminate against -- it was a racist law designed to discriminate against African Americans, whereas, here, the law at issue here is a law that applies to everyone.

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. BECK: Thank you, Chief Justice.

CHIEF JUSTICE ROBERTS: Ms. Harris.

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

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

Bruen held that states can't refuse to license public carry. Hawaii can't gut

Bruen by presumptively banning everyone licensed to carry from doing so at retail establishments or other private property open to the public absent the owner's express consent. That novel law offends our history and tradition.

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

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

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

I welcome the Court's questions.

JUSTICE THOMAS: What's your best

support for what appears to be your argument that a pretextual regulation is per se unconstitutional?

MS. HARRIS: I would start historically with Blackstone and the meaning of the word "infringed" in the text of the Second Amendment. If you look to Blackstone, which is one of the main sources underpinning what the preexisting Second Amendment right meant, the canonical example of a law that burdened impermissibly the right -- right to bear arms was the English game laws, which, under the pretext of trying to preserve game, were designed to prevent commoners from hunting.

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

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

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

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

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

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

JUSTICE KAVANAUGH: Why do we need --

JUSTICE KAGAN: Most --

JUSTICE KAVANAUGH: -- to make it --

ope, go ahead.

JUSTICE KAGAN: Mostly, in our constitutional law, I mean, there are exceptions here and there, but mostly, in our constitutional law, we've steered clear from trying to evaluate motive, purpose, directly. You know, we -- we -- we create rules that maybe are meant to ferret out bad motive, but we kind of think it's -- it's a bad road to go down if we're going to ask about every state's -- whether the state has acted pretextually in doing one thing or another.

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

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

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

JUSTICE KAGAN: So that's -- that's --

that's -- that seems fair. But then it seems as though that's classic means-ends scrutiny. You know, look at over-inclusion, look at under-inclusion. Is the state really regulating what its interests would suggest ought to be regulated?

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

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

And the Second Amendment of all places, in terms of history and tradition, is where this test would apply because, again, the original meaning of the word "infringed" in 1791 -- and I would point you to the Daniel Slate article on this, "infringed," what -- included the Blackstonian concept that if you are regulating for a pretextual purpose that is belied by the design of the law, that is a

classic means of infringement and was what --

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

JUSTICE KAGAN: No, go ahead.

JUSTICE KAVANAUGH: Why are we making it complicated? The text of the Second Amendment covers arms. Part 3 of Heller says that means what it -- Heller says it means what it says, says what it means. Part 3 of Heller says there's certain exceptions to that or contours on that which are rooted, but they have to be rooted in history.

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

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

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

JUSTICE KAVANAUGH: It's pretty simple, right? Your position is there are

no -- there are no sufficient analogs. Usually, when -- as Heller says in Part 3, when you're looking for a historical tradition that justifies an exception to the textually expressed right, it's got to be a deeply rooted tradition broadly consistent over time and broad among a lot of states. And you don't have anything like that here. So it's just kind of, from your perspective, you know, pretty simple.

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

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

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

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

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

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

JUSTICE GORSUCH: Ms. Sarah --

MS. HARRIS: The reason --

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

And, of course, we don't allow governments to redefine property rights in

other contexts that would infringe other constitutional rights. I'm thinking here of the Takings Clause in Tyler versus Hennepin County, but I'd like you to respond to that argument.

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

JUSTICE JACKSON: But, Ms. Harris, can we just be a little bit more specific about the Second Amendment right that you say is being

infringed here? This is -- the -- the point that I guess I'm still stuck on is whether or not, in a world in which we all concede -- and I think the United States is on board with this -- that the Second Amendment yields to the property interests of a private property owner such that the private property owner gets to consent as to whether or not you can carry a gun on his property, when we're in that world, what Second Amendment right is being infringed when the property owner says no or when the state says the property owner's -- consent has to be expressed?

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

JUSTICE JACKSON: No, I am backing away because the Bruen framework only applies where the Second Amendment is implicated. And what I'm suggesting is that the Second Amendment right is not being implicated when

the regulation is about the property owner's consent, the form of it. Can it be implicit or must it be express in a world in which we've said that consent already takes precedent over the Second Amendment right?

MS. HARRIS: So what we're answering here is what is the scope of the right to publicly carry under the Second Amendment. And I don't think states can get out of constitutional scrutiny by -- by -- by trivializing what they're doing if they're getting --

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

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

JUSTICE JACKSON: But you're only

presumptively allowed because the presumption goes to the consent, not to your right.

MS. HARRIS: I understand --

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

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

Just think about in -- I think, in the First Amendment context, you would say no big deal, you are now going from a world where candidates can go door to door and -- for a campaign speech, but now you have to have a big

sign in your yard that says political speech welcome for someone to go in. Or, in the Second Amendment context, Hawaii's same reasoning would lead to a rule that it's fine to ban tenants from owning guns in self-defense unless the landlord in the contract expressly consents to doing so.

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

CHIEF JUSTICE ROBERTS: Thank you.

MS. HARRIS: -- public carry.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

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

MS. HARRIS: Absolutely. Those poaching laws, as the Sigmon article and other sources and the -- the text of the laws themselves exemplify, show the opposite of the

tradition Hawaii is trying to show. They show that for property closed to the public, the people have taken steps to enclose for improvements, to protect the fields from being trampled by hunters, for that special category, there was -- were laws that said you have to affirm -- get affirmative consent, sort of like Justice Barrett's questions about you do need affirmative consent to go into dwellings.

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

The idea that Hawaii's law is a relevant analog would just abstract -- just take away the -- take the level of generality just -- justify the opposite of the tradition. It would have been profoundly disturbing to the founding generation to hear that in order to travel to inns or taverns or anywhere else

people commonly carried arms that they had to, like, get the affirmative consent of each sort of tavern and hope that they weren't trespassing if they were traveling and -- and their carriage had to stop somewhere.

JUSTICE ALITO: And in order to determine whether an analog is adequate for Bruen purposes, is it possible to disregard -- how do you choose the level of -- of generality? What is the principle that tells you what is the -- the relevant level of generality?

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

So I think that's relevant. And to disregard the clear text of these statutes,

which are focused both on property -- that distinction between property closed to the public and open to the public and the specific question of hunting, would allow you to abstract out everything. It's the same thing the Court rejected in Bruen, that just because some places, for instance, might be sensitive places, every place could be a sensitive place on the same reasoning at too high of a level of generality.

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

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

JUSTICE ALITO: And -- other lawful purposes?

MS. HARRIS: Yes.

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

MS. HARRIS: I don't think Heller excludes it, and I don't think the Court has to decide is it self-defense and other things. But it would be, again, sort of strange to

think that you cannot use arms for any other purposes when the founding generation used -- considered arms important not just for self-defense but, for instance, for having -- for making sure that people were proficient in arms to be able to defend the country. So I don't think that there is sort of necessary -- but I don't think the case presents that problem.

JUSTICE ALITO: Do -- do you think it's possible to ignore the purpose of the Second Amendment in determining a level of generality that's appropriate?

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

JUSTICE ALITO: All right. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: There's been a number of church shootings recently. Does the

state or the federal government, does it bar from saying you can go into a church without a gun -- with a gun without the owner's permission, the church's permission?

MS. HARRIS: So --

JUSTICE SOTOMAYOR: Is that illegal?

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

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

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

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

JUSTICE SOTOMAYOR: Just as here, where most property owners for 200 years didn't carry weapons in this state without an owner's

consent. That's the presumption of the Hawaiian people.

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

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

MS. HARRIS: So, to be clear, what I mean by that is you can't use local customs to say you -- that each state gets its own Second Amendment. The Court has rejected that very type of analysis in the Takings Clause, for instance, in Hennepin County, in Cedar Point, where the Court said, even if California has a kind of unusual way of defining easements or Minnesota has a strange way of defining

property interests, that doesn't mean that that sort of individual thing --

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

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

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

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

MS. HARRIS: The presumption is that you're trespassing. It treats -- just for one class of people, it turns essentially property open to the public like a gas station into the equivalent of someone's house, where you're

committing a crime under Hawaii law if you actually go onto it without consent.

JUSTICE SOTOMAYOR: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: Can you imagine, Ms. Harris, any modern analogs of these antipoaching laws? I mean, I guess what I'm asking you to do is to say is there -- are there any modern laws that sort of use this kind of authority over, you know, consent and licensing and so forth but that don't have to do with hunting that would be permissible because they're very much like these antipoaching laws?

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

What are the relevant permissions, what's the default for property closed to the public, setting aside hunting? And I -- I think that's consistent with the way these laws

work. I mean, Justice Sotomayor mentioned the 1763 New York law, and that's talking about enclosed property like orchards or gardens or other stuff and saying, if you carry arms on that land, that's a trespass.

But it's also saying you can't trespass generally in these places. So I think it's getting to the idea of, if you have particular property that's closed to the public, you might not want people with arms on it. That is what these sort of founding-era laws say.

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

JUSTICE KAGAN: So, if I can -- your objection to the use of these old laws really is just that the Hawaii law applies to all -- although it's private property, it applies to property that is entirely open to the public for -- you know, for all other purposes and

with respect to all other activities.

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

MS. HARRIS: I think it would present different questions. And, yes, that is our main objection. And the reason is Hawaii is trying to use laws that actually show the opposite tradition, which is laws closed to the public, you might need affirmative consent in order to be able to hunt on them.

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

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

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Gorsuch?

JUSTICE GORSUCH: There's been the suggestion that this is just flipping a presumption about the implied license and that that's just a matter of property law and not the Second Amendment, but how do we think about that given that it flips the presumption on the longstanding implied license only with respect to firearms, not knives, not solicitation, not politicking, not anything else?

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

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

When a state is saying you're presumptively banned, you're committing a crime

unless you get consent, that is a much bigger deal than just sort of tweaking the edges of property law, and in no other context has the Court said no big deal, the Constitution doesn't apply, this doesn't even implicate the relevant constitutional inquiry.

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

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

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

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

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

And if you run in of gas and you're trying to find a gas station, you can't get gas unless you know you're in your car, you have -- you have your gun in your purse, and you're not actually committing a crime by stepping on the gas station property.

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

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

MS. HARRIS: It is 2026 and it is somewhat astonishing that black codes, which are unconstitutional, are being offered as evidence of what our tradition of

constitutionally permissible firearm regulation looks like.

Those laws are dead ringers only in the sense that this law too is an unconstitutional pretext. The black codes were offered, as you mentioned, by states before their readmission to the union. It is not an indictment of the Bruen framework to say that unconstitutional laws do not count in illuminating a valid tradition.

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

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice

Kavanaugh?

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

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

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

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

Do you agree with that?

MS. HARRIS: We agree with that. And we -- I think, as -- as elaborated by Bruen, there is -- I think the question is how do you define "relevant sensitive places" at the correct level of generality so that not every place is a sensitive place and so that you are

looking to the right historical analogs.

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

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

Let's imagine that Hawaii, rather than just flipping this default categorically, instead is experiencing, say, a rash of gas

station robberies and, you know, doesn't want to make the argument that gas stations are sensitive places. That would be a -- a tough one. So instead flips the presumption, like the antipoaching laws, just with respect to gas stations. Is that okay?

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

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

JUSTICE BARRETT: How do you know that's the relevant distinction? I mean, it

could just be that, well, that is an incidental of the problem. I mean, that just happens to be where the problem of poaching arose, which was on enclosed lands because those are the people who were trying to protect themselves from poachers. But, I mean, there might have been poaching on open lands too, and -- and then the legislature might have responded differently.

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

MS. HARRIS: And I think the answer is that is under -- you look to the broader articles and I think history of what was going on with the antipoaching laws. It's not that, you know, poaching on or hunting on open -- lands open to the -- the public wasn't a problem. It was actually -- at the founding, it was a hugely politically salient and highly debated issue, so important it was in state constitutions, that this was a sort of elemental distinction to the founding

generation that's carried in our property law, that property open to the public is not -- you're not trespassing if you're hunting on that land. On property closed to the public, you want to protect the improvements and so you are allowed to restrict it with -- by -- by changing the rules so that you have to affirmatively consent.

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

JUSTICE BARRETT: Okay. But, Ms. Harris, then that -- that -- that raises this question for me. In Footnote 1 of your brief, you say "this case does not concern property closed to the public," so "the Court

need not address state laws that prohibit carrying a firearm into a private residence without the owner's affirmative consent."

But both and you Mr. Beck are drawing this distinction in antipoaching laws between -- property that is open to the public and property that is closed to the public. So I guess I don't understand how, if you win this case -- and we do the history and tradition analysis and you win, how is the Court supposed to distinguish that analog in the way that you're proposing we do without deciding this question you tell us we shouldn't be deciding?

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

I don't think that is a complete answer. And the reason we're saying it's just not presented, is it's not the question presented, you -- to whether property closed to

the public, what the range of permissions is. For instance, if I invite someone to my house, what is -- what is the -- what is the tradition with respect to the --

JUSTICE BARRETT: So maybe the state could flip the presumption in the way Hawaii has done here but just with respect to private residences? Mr. Beck said no to that.

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

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

Who is an ordinary American? And

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

MS. HARRIS: I don't think we're trying to suggest any difference between ourselves and Heller in our position here. I think we're -- we're, frankly, using it as a shorthand.

JUSTICE BARRETT: Okay. Thanks.

CHIEF JUSTICE ROBERTS: Justice Jackson?

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

The fact that the black codes were at some later point determined themselves to be unconstitutional doesn't seem to me to be relevant to the assessment that Bruen is asking

us to make. So can you say more about that?

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

JUSTICE JACKSON: Okay. Let me stop you there. They were not deemed unconstitutional at the time that they were enacted. They were part of the history and tradition of the country. And when we have a test now that's asking us to look at what people were doing back then, I don't understand why they should be excluded.

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

JUSTICE JACKSON: That was later.

MS. HARRIS: -- found unconstitutional.

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

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

JUSTICE JACKSON: So the history doesn't matter?

MS. HARRIS: No.

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

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

outliers --

JUSTICE JACKSON: All right. Mr. --

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

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

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

Do we have a Second Amendment problem in that situation?

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

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

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

JUSTICE JACKSON: And their purpose is to dissuade. I -- that was part of the hypothetical.

MS. HARRIS: I understand.

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

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

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

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

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

JUSTICE JACKSON: Thank you.

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Katyal.

ORAL ARGUMENT OF NEAL K. KATYAL

ON BEHALF OF THE RESPONDENT

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

This case is about two fundamental rights, the right to bear arms and the property right to exclude. And there's lots of agreement among how -- among the parties about how those rights interact. Everyone agrees there's a right to carry on private property if the owner wants guns on his property. That was elicited by Justice Sotomayor to my friends. And everyone also agrees there's also no such right if the owner doesn't want guns.

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

The Constitution protects the right to keep and bear arms. It doesn't create implied consent to bring those arms onto another's property. At bottom, that is Petitioners' theory, and yet they have zero support for

this, zero support from the founding or for the next 200 years, no treatise, no commentator, no court.

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

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

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

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

The Constitution permits this type of

democratic flexibility and states functioning as laboratories. Before rigidly constitutionalizing one type of property default rule, this Court should insist on at least some evidence that the Second Amendment so requires it.

I welcome the Court's questions.

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

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

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

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

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

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

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

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

constitutional.

Here, we're just following the long --

JUSTICE KAGAN: So suppose --

CHIEF JUSTICE ROBERTS: Well --

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

MR. KATYAL: Yeah.

JUSTICE KAGAN: Would that be constitutionally problematic or not?

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

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

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

JUSTICE KAGAN: -- on any subject.

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

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

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

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

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

JUSTICE ALITO: If --

JUSTICE BARRETT: Well, counsel --

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

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

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

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

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

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

But our fundamental point to you is,

yes, this is -- this is a law that goes -- which traces back to the founding with other laws like New Jersey in 1721 -- in 1771, laws that basically said, look, when you're bringing guns onto property, even property open to the public, that states are free to flip the default rules.

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

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

Hawaii, given its obvious origins and its -- its admission to -- to the United States fairly recently, has a totally different, in

some areas, tradition and practice. The law of property in particular in Hawaii, I mean, for the longest time, I don't know, maybe it's still the case, is that you don't own property, you get it on long-term lease as if you were, you know, a -- a -- a bank in a skyscraper in New York. That was the common method.

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

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

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

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

So just to take a simple example --

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

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

MR. KATYAL: Mm-hmm.

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

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

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

The assumption is that there is a First Amendment right. Yes, you can -- you can withdraw it. And, again, I'm just trying to figure out exactly what the difference is

between the First Amendment and the Second Amendment.

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. KATYAL: And --

JUSTICE BARRETT: Well, Mr. Katyal, I don't understand why you're resisting the First Amendment -- well, I do understand why you're resisting it, but let's say there's no content discrimination. It's just a ban on leafletting and it's a ban because people don't like solicitation, so they just don't want people

passing out pamphlets. It's not aimed at Jehovah's Witnesses or anything like that, like some of our old cases. Why would that fail rational basis review?

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

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

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

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

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

JUSTICE JACKSON: Mm-hmm.

JUSTICE BARRETT: -- one more

question. So let me take it out of the First Amendment for you. I mean, let -- let's pretend that public accommodation laws don't exist. Because the Fourteenth Amendment doesn't apply to private action, only state action, let's say that a state, in the absence of public accommodation laws, decides to flip the default and say, unless the owner affirmatively consents, black people cannot enter your home.

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

JUSTICE BARRETT: Why?

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

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

MR. KATYAL: Absolutely.

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

MR. KATYAL: Yeah.

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

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

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

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

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

MR. KATYAL: -- of that consent.

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

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

JUSTICE BARRETT: Okay.

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

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

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

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

MR. KATYAL: Yes.

JUSTICE ALITO: All right. Now could Hawaii enact a statute that says that if you are wearing the attire, attire expressing

approval of a particular political candidate, you can't come in unless you get express consent from the owner of the restaurant?

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

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

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

And I think the key point here is the Court -- if you accept my friend's invitation, you for the first time would be saying there is some sort of right here which no commentators

recognize, no treatises recognize, no court has ever recognized. Compare this to Bruen in which you had St. George Tucker, you had many state decisions in the 18th and 19th centuries that said laws like the New York one were unconstitutional.

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

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

MR. KATYAL: Yeah. So --

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

MR. KATYAL: So I think Hawaii has -- like all state legislatures, has the right to

put a default rule in that says -- that tracks the expectations of its people, and --

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

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

JUSTICE GORSUCH: So you --

MR. KATYAL: -- because Hawaii here --

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

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

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

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

JUSTICE GORSUCH: Oh, I know I don't have to go that far, but you just said you

would go that far.

MR. KATYAL: I personally would --

JUSTICE GORSUCH: Yeah. Okay.

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

(Laughter.)

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

JUSTICE GORSUCH: No, I appreciate your candor about the extent of where your argument leads. And so it seems to me that, you know, you could have a state law that doesn't just flip the presumption and require express oral consent but requires express written consent, maybe a -- a sign, maybe an irrebuttable presumption of flipping -- I appreciate your candor on that.

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

And you rely very heavily on an 1865

black code law in Louisiana. You say it's a dead ringer and a reason alone to affirm the judgment.

MR. KATYAL: Yeah.

JUSTICE GORSUCH: And I really -- I -- I really want to understand how that could be.

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

JUSTICE GORSUCH: I know it does.

MR. KATYAL: And -- and --

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

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

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

MR. KATYAL: Okay.

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

MR. KATYAL: Right.

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

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

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

JUSTICE GORSUCH: You're not answering the question.

MR. KATYAL: I --

JUSTICE GORSUCH: The question is it's an outlier, and -- and you just called it a shameful outlier. And I -- I agree with that.

And Bruen was supposed to look at the

mainstream of our tradition and history, not outlying statutes that were unconstitutional the moment they were passed and, yes, when Louisiana was admitted to the union.

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

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

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

And, most importantly, even the opponents of the black codes recognized, as the

Sickles general order says, that you have no right to carry a firearm onto someone's property absent their consent.

JUSTICE KAVANAUGH: We said in Ramos --

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

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

MR. KATYAL: So, Justice Alito, we quite agree with you that parts of the black codes were motivated by and had exactly that

operation. Our point to you is this consent requirement did not operate that way.

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

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

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

And we flatly rejected that historical

example for the exact reason that Justice Alito and Justice Gorsuch have been mentioning. Those were rooted in racial prejudice designed to prevent black jurors from having their votes counted on juries in the wake of a decision like Strauder in 1880.

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

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

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

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

whatsoever.

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

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

JUSTICE KAVANAUGH: And on those --

MR. KATYAL: Part 1 is --

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

And then, in Heller and in Bruen, the Court has elaborated on, of course, there's -- as there are with all rights, as Heller said, some exceptions, but those exceptions, to be recognized, must be historically rooted, deep tradition, a broad tradition, widely recognized, commonly recognized, not isolated examples, particularly not ones from the black

codes. But even apart from that, not isolated examples.

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

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

JUSTICE KAVANAUGH: Mm-hmm.

MR. KATYAL: And so the question is whether or not there is some sort of right at the framing, whether the right to keep and bear arms was understood, the right to assume an owner's consent to bring arms.

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

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

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

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

If you just jump to Bruen step two and say, oh, this law deals with guns, therefore, the burden flips to the government, then, yeah, you're going to have a really difficult time

defending laws every state is like the ones that deal with gun consent on private homes and the like.

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

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

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

JUSTICE BARRETT: But that's the second step when you're looking at the history. I mean, I could see history being relevant at

the first step if you're talking about what is the meaning of arms, for example.

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

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

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

MR. KATYAL: Oh --

JUSTICE KAVANAUGH: I -- I mean, I thought that's what the cases say. If it deals with arms, and this is what Heller Part 3 says, then the government comes in and shows there's a historical tradition. And to get ahead of all this, Heller actually went through and specified a number of kinds of regulations that

would be permissible because they are so broadly and deeply rooted.

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

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

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

JUSTICE JACKSON: Mr. Katyal --

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

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

MR. KATYAL: Correct.

JUSTICE JACKSON: The Second Amendment

right, is it really being implicated here?

MR. KATYAL: Correct.

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

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

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

You get to go up to the First Amendment -- the person's door because there is a custom and tradition of implying the person's

consent --

MR. KATYAL: Yes.

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

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

MR. KATYAL: That --

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

Am I right about that?

MR. KATYAL: That's exactly right. And the one thing I would add is that what I

think is doing the work in my friend's argument is some sort of insinuation that Hawaii has singled out and is hostile to guns or the Second Amendment and the like.

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

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

MR. KATYAL: Yes.

JUSTICE JACKSON: There is no -- to the extent we're talking about is this about consent, and I think we are because you don't have a right to go on without consent, then is the Second Amendment doing work with respect to allowing you to say I have a constitutional right to assume that I'm allowed to be here? And you're saying they have no case, no

history, no nothing that establishes that principle.

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

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

CHIEF JUSTICE ROBERTS: Thank --

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

JUSTICE THOMAS: If you're going to cite the Louisiana black codes of 1865, don't you also have to cite the subsequent adoption of the Fourteenth Amendment that was in part

generated because of laws like that?

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

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

I mean, these statutes were around. You would have thought someone, if this was an infringement on the right to keep and bear arms, would have had a court case, a

commentator, anything like what you had in Bruen. You've got none of that.

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

MR. KATYAL: So --

JUSTICE THOMAS: That's simply my point.

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

CHIEF JUSTICE ROBERTS: Justice Alito?

Justice Sotomayor?

JUSTICE SOTOMAYOR: Three-part question. In one or two sentences, could you answer -- finish answering the California point that Justice Gorsuch raised?

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

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

MR. KATYAL: Yeah.

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

So it seems to me that you can't call all of these laws out -- this many outlaws -- outliers. And so the custom and tradition that existed was you -- the license you had and

whether you presumed or didn't presume permission could be flipped, correct?

MR. KATYAL: Yeah. Correct. So --

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

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

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

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

But there is a much more fundamental

problem and it has infected this case from the start. If you read page 1 of his brief, it says quote -- it says "96.4 percent of [the] publicly accessible land" in Hawaii is impacted by this law -- by -- by this law. The map he's got isn't even about Hawaii. It's about one county in Hawaii and not even the most populous county in Hawaii and it's a map he drew himself.

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

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

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

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

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

We certainly think the larger, much larger, number here is enough to count as an analog because these laws actually did the same thing as what the Hawaii law does. It said for -- respect to property that is open to the public, like plantations, like premises, like

enclosed land, Professor Hartog says that includes seed stores, other retail establishments, akin to the kinds of things that my friend is challenging here, there is historical precedent for all of that. We think that's certainly enough to make this constitutional.

CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

MR. KATYAL: So two things. One, factually, we just fundamentally disagree that this burdens firearms. As Justice Alito was saying earlier, if people in Hawaii don't want

to have the guns anyway, they're always going to be able to, even under their rule, say, you know, have signs that say no guns allowed. So, either way, you could have that burden.

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

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

And when you ask yourself what in the text informed by history this Hawaii law violates, the answer is precious zero. No commentator, no treatise, no court, no one's

ever said you have an -- a right to imply consent of the private property owner. And rather, the fundamental tradition, which Justice Sotomayor was saying earlier, that Justice Scalia recognized in the Jardines opinion is that there's a fundamental right to exclude, and that right to exclude has always meant, at the time of taverns and the like, you can exclude people for violating the terms on which they come in even if your tavern's open to the public.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: Near as I can tell, the movement to flip the burden in -- with respect to firearms began in the states in 2020. Is -- is that right?

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

for the first time.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

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

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

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

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

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

Justice Jackson?

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

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

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

MR. KATYAL: That's exactly right.

JUSTICE JACKSON: I mean, it wasn't like they were necessarily trying to keep people from carrying the guns. They were giving property owners the right to exclude by making sure that they were asked: Do you want this gun in your store?

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

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

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Beck.

REBUTTAL ARGUMENT OF ALAN A. BECK
ON BEHALF OF THE PETITIONERS

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

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

The State of New York adopted that law

first, and the governor of New York said the express reason they were doing that was to undermine the Bruen opinion.

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

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

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