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1       IN THE SUPREME COURT OF THE UNITED STATES  
2       - - - - -  
3       JASON WOLFORD, ET AL.,                                 )  
4                                 Petitioners,                         )  
5                                 v.                                 ) No. 24-1046  
6       ANNE E. LOPEZ, ATTORNEY GENERAL                     )  
7       OF HAWAII,                                                 )  
8                                 Respondent.                         )  
9       - - - - -

10  
11                                 Washington, D.C.  
12                                 Tuesday, January 20, 2026  
13

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

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3 behalf of the Petitioners.

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6 United States as amicus curiae, supporting the  
7 Petitioners.

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9 of the Respondent.

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

2 (10:10 a.m.)

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

6 Mr. Beck.

7 ORAL ARGUMENT OF ALAN A. BECK

8 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

21           I welcome this Court's questions.

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

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

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

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

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

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

15 MR. BECK: Yes, Justice.

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

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

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

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

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

4 MR. BECK: That is correct, Justice.

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

8 MR. BECK: Yes, Justice.

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

14 MR. BECK: The Second Amendment --

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

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

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

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

5             MR. BECK: Yes, Your Honor.

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

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

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

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

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

1 suit originated.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15            MR. BECK: No --

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

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

21            JUSTICE JACKSON: Right.

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

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

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

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

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

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

17 JUSTICE JACKSON: You do not concede?

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

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

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

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

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

21 JUSTICE JACKSON: You disagree. All  
22 right.

23 MR. BECK: Yes, Your Honor.

24 JUSTICE JACKSON: Thank you.

25 JUSTICE BARRETT: Counsel, do you

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

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

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

13           JUSTICE BARRETT: Okay. Why?

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

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

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

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

24           MR. BECK: Yes, Your Honor.

25           JUSTICE GORSUCH: Counsel, you make an

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

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

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

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

23 JUSTICE SOTOMAYOR: By -- by Bruen?

24 MR. BECK: Yes, Your Honor.

25 JUSTICE SOTOMAYOR: So there's no

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

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

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

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

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

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

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

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

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

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

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

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

4             JUSTICE SOTOMAYOR: But that seems --

5             CHIEF JUSTICE ROBERTS: Counsel?

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

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

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

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

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

23            JUSTICE SOTOMAYOR: Go ahead.

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

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

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

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

10 MR. BECK: Yes, Your Honor.

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

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

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

19 MR. BECK: That's a --

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

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

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

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

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

10 MR. BECK: Yes, Your Honor.

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

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

15 CHIEF JUSTICE ROBERTS: Thank you.

16 Justice Thomas?

17 Justice Alito?

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

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

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

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

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

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

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

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

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

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

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

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

8 JUSTICE SOTOMAYOR: Not in Hawaii.

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

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

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

15 JUSTICE SOTOMAYOR: I -- I --

16 MR. BECK: It is the custom --

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

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

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: Mr. Beck, the various

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8             JUSTICE KAGAN: Thank you.

9             CHIEF JUSTICE ROBERTS: Justice  
10    Gorsuch?

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

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

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

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

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

11 CHIEF JUSTICE ROBERTS: Justice  
12 Kavanaugh?

13 Justice Barrett?

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

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

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

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

20 JUSTICE BARRETT: Okay.

21 (Laughter.)

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

24 MR. BECK: Yes, I understand.

25 (Laughter.)

1 MR. BECK: I agree with every --

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

4 (Laughter.)

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

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

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

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

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

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

4 CHIEF JUSTICE ROBERTS: Justice  
5 Jackson?

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

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

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

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

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

1 state law governing that, right?

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

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

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

11 MR. BECK: Because --

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

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

1 JUSTICE JACKSON: Okay.

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

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

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

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

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

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

25 And so, to the extent that the test

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

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

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

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

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

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

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

8             JUSTICE JACKSON: Thank you.

9             CHIEF JUSTICE ROBERTS: Thank you,  
10    counsel.

11            MR. BECK: Thank you, Chief Justice.

12            CHIEF JUSTICE ROBERTS: Ms. Harris.

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

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

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

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

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

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

18           I welcome the Court's questions.

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

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

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

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

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

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

1 analog.

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

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

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

17 JUSTICE KAVANAUGH: Why do we need --

18 JUSTICE KAGAN: Most --

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

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

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

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

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

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

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

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

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

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

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

23           JUSTICE KAGAN: No, go ahead.

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

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

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

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

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

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

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

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

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

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

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

1       there.

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

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

11              JUSTICE GORSUCH: Ms. Sarah --

12              MS. HARRIS: The reason --

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

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

25              MS. HARRIS: That is exactly correct.

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

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

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

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

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

25 MS. HARRIS: So what we're answering

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

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

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

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

22 MS. HARRIS: I understand --

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

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

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

1 consents to doing so.

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

6 CHIEF JUSTICE ROBERTS: Thank you.

7 MS. HARRIS: -- public carry.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Justice Thomas, anything further?

11 Justice Alito?

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

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

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

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

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

25           JUSTICE ALITO: And in order to

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

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

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

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

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

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

11 JUSTICE ALITO: And other lawful  
12 purposes?

13 MS. HARRIS: Yes.

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

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

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

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

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

15 JUSTICE ALITO: All right. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Sotomayor?

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

24 MS. HARRIS: So --

25 JUSTICE SOTOMAYOR: Is that illegal?

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

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

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

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

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

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

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

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

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

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

25 MS. HARRIS: Respectfully, this is

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

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

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

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

22 JUSTICE SOTOMAYOR: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

25 But it's also saying you can't

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

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

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

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

25           MS. HARRIS: I think it would present

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

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

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

18 JUSTICE KAGAN: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Gorsuch?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18            JUSTICE GORSUCH: Thank you.

19            CHIEF JUSTICE ROBERTS: Justice  
20    Kavanaugh?

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

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

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

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

13           Do you agree with that?

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

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

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

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

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Barrett?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 residences? Mr. Beck said no to that.

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

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

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

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

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

4 JUSTICE BARRETT: Okay. Thanks.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Jackson?

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

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

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

25 JUSTICE JACKSON: Okay. Let me stop

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

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

11            JUSTICE JACKSON: That was later.

12            MS. HARRIS: -- found  
13    unconstitutional.

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

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

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

24            MS. HARRIS: No.

25            JUSTICE JACKSON: We shouldn't care

1 about the history then?

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

20 JUSTICE JACKSON: All right. Mr. --

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

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

25 I -- I'm trying to understand whether

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

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

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

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

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

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

4 MS. HARRIS: I understand.

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

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

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

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

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

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

11 JUSTICE JACKSON: Thank you.

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

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 Mr. Katyal.

17 ORAL ARGUMENT OF NEAL K. KATYAL

18 ON BEHALF OF THE RESPONDENT

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

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

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

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

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

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

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

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

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

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

24           I welcome the Court's questions.

25           JUSTICE THOMAS: Are there any other

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

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

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

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

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

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

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

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

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

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

20            JUSTICE KAGAN: So suppose --

21            CHIEF JUSTICE ROBERTS: Well --

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

1 first.

2 MR. KATYAL: Yeah.

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

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

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

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

17 JUSTICE KAGAN: -- on any subject.

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

25 This Court, in Free Speech Coalition

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

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

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

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

1 required.

2 JUSTICE BARRETT: Well, counsel --

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

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

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

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

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

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

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

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

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

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

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

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

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

1 States.

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

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

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

17 So just to take a simple example --

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

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

24 MR. KATYAL: Mm-hmm.

25 CHIEF JUSTICE ROBERTS: Well, we know

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

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

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

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

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

25            To the extent that they just ban it

1 entirely, it would flunk rational basis review.

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

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 MR. KATYAL: And --

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

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

25 JUSTICE BARRETT: Yeah. People find

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

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

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

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

15            JUSTICE JACKSON: Mm-hmm.

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

1 enter your home.

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

5 JUSTICE BARRETT: Why?

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

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

13 MR. KATYAL: Absolutely.

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

17 MR. KATYAL: Yeah.

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

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

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

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

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

10          MR. KATYAL: -- of that consent.

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

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

21          JUSTICE BARRETT: Okay.

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

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

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

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

13 MR. KATYAL: Yes.

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

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

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

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

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

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

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

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

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

12            MR. KATYAL: Yeah. So --

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

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

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

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

1 on it --

2 JUSTICE GORSUCH: So you --

3 MR. KATYAL: -- because Hawaii

4 here --

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

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

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

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

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

18 MR. KATYAL: I personally would --

19 JUSTICE GORSUCH: Yeah. Okay.

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

22 (Laughter.)

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

25 JUSTICE GORSUCH: No, I appreciate

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

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

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

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

1     general --

2             JUSTICE GORSUCH: I know it does.

3             MR. KATYAL: And --

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

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

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

11            MR. KATYAL: Okay.

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

14            MR. KATYAL: Right.

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

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

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

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

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

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

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

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

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

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

16           JUSTICE KAVANAUGH: We said in  
17 Ramos --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 JUSTICE KAVANAUGH: And on those --

23 MR. KATYAL: Part 1 is --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 sorts of laws that --

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

4 MR. KATYAL: Oh --

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

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

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

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

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

3 JUSTICE JACKSON: Mr. Katyal --

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

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

10 MR. KATYAL: Correct.

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

13 MR. KATYAL: Correct.

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

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

1     that doesn't just freely exist.

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

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

12            MR. KATYAL: Yes.

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

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

24            MR. KATYAL: That --

25            JUSTICE JACKSON: Similarly, the

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

8 Am I right about that?

9 MR. KATYAL: That's exactly right.

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

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

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

1 Amendment right to assume implicit consent.

2 MR. KATYAL: Yes.

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank --

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

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

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice Thomas?

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

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

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

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

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

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

20 MR. KATYAL: So --

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

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

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

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

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

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

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

19 MR. KATYAL: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17           CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

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

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

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

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

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

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

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

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

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

20           JUSTICE KAGAN: Thank you.

21           CHIEF JUSTICE ROBERTS: Justice  
22 Gorsuch?

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

1       2020. Is that right?

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

10              JUSTICE GORSUCH: Thank you.

11              CHIEF JUSTICE ROBERTS: Justice  
12       Kavanaugh?

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

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

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

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

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

5 JUSTICE KAVANAUGH: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett?

8 Justice Jackson?

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

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

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

24 MR. KATYAL: That's exactly right.

25 JUSTICE JACKSON: I mean, it wasn't

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

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

17            JUSTICE JACKSON: Thank you.

18            CHIEF JUSTICE ROBERTS: Thank you,  
19    counsel.

20            Rebuttal, Mr. Beck.

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

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

1 property open to the public.

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

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

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

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

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 The case is submitted.

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

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        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