No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

JACOB WEBSTER, et al.
Petitioners,

v.

STATE OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. For facial challenges to a state prosecution on Second Amendment grounds, must a criminal defendant prove that no set of circumstances exist under which the charging statute would be valid, or may the defendant rely on the overbreadth principle of *United States v. Stevens*, 559 U.S. 460, 473 (2010) and establish only that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep"?

2. When this Court decided *New York State Rifle & Pistol Assn., Inc. v. Bruen*, __ U.S. __ [142 S.Ct. 2111] (2022) holding that when a government regulation infringes on an individual's Second Amendment right to bear arms, the regulation is presumptively unconstitutional unless and until the government justifies the regulation with analogous historical precedent, did it intend for that analysis to apply to criminal defendants charged with unlawful firearm possession?

3. Is California's "may issue" firearm licensing scheme unconstitutional in light of this Court's ruling in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, __ U.S. __ [142 S.Ct. 2111] (2022)?

PARTIES TO THE PROCEEDING IN THIS COURT

JACOB WEBSTER, Petitioner

ISAIAH BATES-CLARK, Petitioner

STATE OF CALIFORNIA, Respondent

PRIOR PROCEEDINGS RELATED TO THIS CASE

People v. Jacob Webster & Isaiah Bates-Clark, No. 22008341/22008362, San Francisco Superior Court. Demurrer denied on October 21, 2022.

Jacob Webster, et al. v. Superior Court of San Francisco, No. A166782, Court of Appeal of the State of California, First Appellate District. Petition for Writ of Prohibition denied on February 23, 2023.

Jacob Webster, et al. v. Superior Court of the City and County of San Francisco, No. S278903, Supreme Court of California. Petition for review denied on April 12, 2023.

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IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners, JACOB WEBSTER and ISAIAH BATES-CLARK, through their counsel of record, Rose Mishaan, respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The judgment of the California Supreme Court denying review is attached hereto as Appendix A.

STATEMENT OF JURISDICTION

The California Supreme Court entered its decision denying review on April 12, 2023. The jurisdiction of this Court is invoked under 28 U.S.C., section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment to the United States Constitution provides that, "the right of the people to keep and bear Arms, shall not be infringed." This case involves the proper application of this Court's decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, __ U.S. __ [142 S.Ct. 2111] (2022) interpreting the Second Amendment to prosecutions for firearm possession in California's criminal courts.

STATEMENT OF THE CASE

Petitioners are each charged in the Superior Court of California, County of San Francisco, with one count of Carrying a Concealed Firearm on his Person (Cal. Pen. Code, § 25400, subd. (a)(2); Counts I, IV) and one count of Carrying a Loaded

Firearm (Cal. Pen. Code, § 25850, subd. (a); Counts II, III.)[1] Petitioner Webster is facing additional charges of Possession of an Assault Weapon (Cal. Pen. Code, § 30605, subd. (a), Counts V, VI.)

Petitioners filed demurrers to the charges of Penal Code section 25400, subdivision (a)(2), and 25850, subdivision (a), on the grounds that the prosecution was unconstitutional. In denying their demurrers, the trial court agreed with petitioners that the "good cause" requirement of Penal Code sections 26150 and 26155, California's gun control statutes, is "clearly unconstitutional." However, the trial court also found that the "good cause" requirement was severable, rendering the remaining licensing scheme in Penal Code section 26150, et seq, constitutional. The trial court found other provisions of the law—such as the "may issue" and "good moral character" provisions—to be constitutional on their face, though possibly "constitutionally suspect" in their application. Pet., Exh. H, p. 68, attached hereto as Appendix B.[2]

In denying the demurrers, the trial court identified the standard for a facial challenge as requiring the challenger to "establish that no set of circumstances exists under with the Act would be valid." Pet., Exh. H, p. 62. Next, the court found that a facial challenge to the charged statutes was not appropriately subject to demurrer. The court noted that the Supreme Court did not provide guidance as to how a trial court "is to conduct the exegesis of historical firearm regulations" to

[1] All references to the Penal Code are to the California Penal Code unless otherwise stated.
[2] References to "Pet." are to petitioners' Petition for Writ of Prohibition filed in the California Court of Appeal, First Appellate District.

determine whether the policies and practices at issue are constitutional. Pet., Exh. H, p. 69. The court therefore declined to resolve that procedural question and held only that such an analysis "does not seem to be an exercise appropriate for demurrer." Pet., Exh. H, p. 70.

Petitioners filed a Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief with the Court of Appeal, First Appellate District, on December 21, 2023. On January 11, 2023, the court requested additional briefing on the issues raised. Respondent filed a preliminary opposition on January 31, 2023, and petitioners filed their reply on February 14, 2023.

On February 23, 2023, the Court of Appeal issued an order denying the petition. Petitioners then petitioned the California Supreme Court for review of that denial. That petition was denied on April 12, 2023. Appendix A.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

In their demurrers, petitioners challenged the felony complaint on the basis that the Second Amendment prohibited prosecution for firearm possession under the analysis articulated in *Bruen*, unless and until the prosecution justified the regulation of firearm possession by reference to historical precedent. Petitioners further contended that the charges against them were unconstitutional, as they prohibited firearm possession outside of California's licensing scheme in Penal Code section 26150, et seq, and that such licensing scheme impermissibly infringed on their Second Amendment right to bear arms.

In their Petition for Writ of Prohibition to the California Court of Appeal, First Appeal District, petitioners contended that the trial court improperly denied their demurrers in violation of their Second Amendment rights. Petitioners raised the issue of their Second Amendment rights again in their Petition for Review to the California Supreme Court.

REASONS FOR GRANTING THE PETITION

Rule 10 of the Rules of the Supreme Court identifies the following as a compelling reason why this Court may choose to review a decision of a state court of last resort on certiorari: "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

In denying petitioners' petition for review, the California Supreme Court let stand the Superior Court's ruling that there was no constitutional violation in allowing the firearm possession charges against petitioners to proceed. The ruling conflicts with the decisions of this Court in several ways. First, the trial court identified the standard for a facial challenge as requiring the challenger to "establish that no set of circumstances exists under with the Act would be valid." Pet., Exh. H, p. 62. This contravenes this Court's decisions in *United States v. Stevens*, 559 U.S. 460, 473 (2010) and *Bruen*, 142 S.Ct. at 2156. Second, the trial court's finding that a demurrer was not the proper venue to require the prosecution to justify the regulation it is seeking to enforce contradicts this Court's decision in

Bruen. Lastly, the trial court's finding that California's gun licensing scheme remains constitutional with the single modification of excising the "good cause" requirement, contradicts this Court's decision in *Bruen*.

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER FACIAL CONSTITUTIONAL CHALLENGES BASED ON THE SECOND AMENDMENT SHOULD BE ANALYZED UNDER THE SAME PRINCIPLES AS FIRST AMENDMENT CHALLENGES.

Here, the trial court identified the standard for a facial challenge to a statute as requiring the challenger to "establish that no set of circumstances exists under which the Act would be valid." Pet., Exh. H, p. 62, quoting *United States v. Salerno*, 481 U.S. 739, 745 (1971). The court then denied the demurrer having found that, "[t]here are circumstances in which, even according to *Bruen*, what remains of the licensing requirement in California could be enforced constitutionally. Pet., Exh. G, pp. 53-54.

The trial court's reasoning is erroneous for two reasons. First, where important constitutional rights are concerned, a defendant may raise a facial challenge to the constitutionality of a law by demonstrating that the law is overbroad where "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens,* 559 U.S. at 473. While traditionally this second type of challenge has been applied in the First Amendment context, this Court made clear in *Bruen* that infringements on rights protected by the Second Amendment should be evaluated under the same body of law as infringements on rights under the First. *Stevens,* 559 U.S. at 473; *Bruen,*

142 S.Ct. at 2129, 2156. Therefore, petitioners need not have established that there were no circumstances under which California's gun possession laws could be applied, but rather that the laws risked criminalizing a substantial amount of constitutionally-protected conduct in addition to legitimately criminalizing unprotected conduct.

Second, the issue raised by petitioners is not whether California may regulate firearm possession under any circumstance, but rather whether the current licensing scheme allows for an impermissible level of discretion in granting or denying permits to publicly carry firearms. If a court answers that question in the affirmative—as *Bruen* mandates that it must—then *any* application of the licensing scheme is unconstitutional.

II. THIS COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT THE CONSTITUTIONAL ANALYSIS ARTICULATED IN *BRUEN* IS APPLICABLE TO CRIMINAL PROSECUTIONS FOR UNLAWFUL FIREARM POSSESSION.

This Court's holding in *Bruen* was unequivocal:

> [W]e hold that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.

Bruen, 142 S.Ct. at 2126. "Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls

outside the Second Amendment's "unqualified command." *Id.*, at 2126, *citing Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, fn. 10 (1961). Therefore, it is the *government* that bears the burden of proving the constitutionality of its action. *Bruen*, at 2130, 2135 ["... the burden falls on respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation."].

Penal Code sections 25850 and 25400 bar the possession of firearms in public and are therefore *presumptively* unconstitutional. The trial court here nonetheless held that "determining what is the 'Nation's historical tradition' does not seem to be an exercise appropriate for demurrer." However, this plainly violates this Court's holding that "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation," in order to establish that the law it seeks to enforce is constitutional. This is particularly important given that, as the trial court noted, "California's concealed carry regime includes a *general prohibition* combined with list of various exceptions that permit individuals to carry a weapon under particular circumstances." Pet., Exh. H, p. 63, *emphasis added*. The prosecution failed to meet that burden here. Direction is needed to clarify the scope of the prosecution's obligation to justify firearm restrictions, and the proper procedures for trial courts to conduct that analysis.

III. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE CONSTITUTIONALITY OF CALIFORNIA'S GUN CONTROL LAWS, INCLUDING THE PROHIBITIONS ON PUBLIC CARRY ARTICULATED IN PENAL CODE SECTIONS 25400 AND 25850.

The trial court erroneously held that the unconstitutional "good cause" provisions of California's licensing scheme could be severed from the statutes, leaving the remaining provisions intact. Pet., Exh. H, pp. 65-67. However, in determining New York's statutory gun control scheme to be unconstitutional, this Court did not merely sever the offending sections. Rather, the majority opinion held that the state's licensing scheme in its entirety was unconstitutional: "Because the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, we conclude that *the State's licensing regime violates the Constitution.*" *Bruen,* 142 S.Ct. at 2122, *emphasis added.* California, like New York, is one of six states the Court specifically referred to that conditions a license to carry on "some additional special need." *Bruen,* 142 S.Ct. at 2122.

Even assuming that the trial court was correct in finding that the "good cause" provision could be properly severed and excised, it does not render the remaining statutory provisions constitutional. Even without the "good cause" provision, subjective criteria and discretionary language pervade California's licensing statutes. Penal Code section 26150, subdivision (a), states that upon application for a concealed carry permit, "the sheriff of a county *may issue* a license that person . . ." *Emphasis added.* In *Bruen*'s majority opinion, this Court specifically contrasted "may issue" licensing schemes like California's with "shall issue" schemes present in 43 states. *Bruen,* 142 S.Ct. at 2123-2124. The latter *mandate* that authorities provide concealed-carry licenses whenever an applicant satisfies the statutory criteria. California's law also requires an applicant to prove

"good moral character," as determined by the county sheriff. Cal. Pen. Code, § 26150, subd. (a)(1). Indeed, the trial court here acknowledged that these provisions may be "constitutionally suspect" in their applications. Pet., Exh. H, p. 68. The court nonetheless denied the demurrers. This Court's guidance is needed to determine the full scope of *Bruen*'s effect on California's gun control statutes.

CONCLUSION

This Court noted as early as 1816 the importance of the consistent application of constitutional interpretation across jurisdictions. See *Martin v. Hunter's Lessee* 14 U.S. 304, 348 (1816). Without a unifying interpretation, "the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable . . ." *Id.* This Court also proclaimed:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their priviliges, before the same forum.

Id., at 348-349.

Otherwise, "the defendant may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights." *Id.*, at 349.

Our nation's trial courts are operating without guidance as to how to apply this watershed moment in Second Amendment jurisprudence to state gun control schemes. Across the country, and in California in particular, defendants, including petitioners, are operating without assurance that their Constitutional rights will be protected by local courts. It is incumbent upon this Court to provide the necessary guidance to both ensure equal and consistent application of the law and protect the constitutional rights of defendants. Therefore, this Court should grant certiorari to review the California Supreme Court's decision to uphold the denial of petitioners' demurrers, or grant such other relief as justice requires.

Dated: July 10, 2023

Respectfully submitted,

ROSE MISHAAN
Counsel of Record for Petitioners

MARSANNE WEESE
Counsel of Record for Petitioners

APPENDIX A

Court of Appeal, First Appellate District, Division Four - No. A166782

S278903

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JACOB WEBSTER et al., Petitioners,

v.

SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, Respondent;

THE PEOPLE, Real Party in Interest.

The petition for review is denied.

GUERRERO

Chief Justice

APPENDIX B

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

HONORABLE BRIAN FERRALL, JUDGE PRESIDING

DEPARTMENT 11

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THE PEOPLE OF THE STATE OF CALIFORNIA,
PLAINTIFF,

VS.

ISAIAH BATES-CLARK AND JACOB WEBSTER,
DEFENDANT.

COURT NO. CRI-22008362
COURT NO. CRI-22008341

REPORTER'S TRANSCRIPT OF PROCEEDINGS

OCTOBER 21, 2022

A P P E A R A N C E S:

FOR THE PEOPLE: HON. BROOKE JENKINS, DISTRICT ATTORNEY
350 RHODE ISLAND STREET
NORTH BUILDING, SUITE 400N
SAN FRANCISCO, CA 94103
BY: JONAH ROSS
ASST. DISTRICT ATTORNEY

CERTIFIED TRANSCRIPT

FOR THE DEFENDANT ISAIAH BATES-CLARK: BY: MICHAEL WHELAN, JR., ESQ.
1000 BRANNAN STREET, SUITE 400
SAN FRANCISCO, CA 94103

FOR THE DEFENDANT JACOB WEBSTER: BY: DAVID HARRISON, ESQ.
877 BRYANT STREET, SUITE 300
SAN FRANCISCO, CA 94103

REPORTED BY:
JOANN M. PRIOR, CSR 9129 OFFICIAL COURT REPORTER

OCTOBER 21, 2022

P R O C E E D I N G S

THE COURT: Let's go on the record on lines 2 and 3, Bates-Clark and Webster.

Let's get appearances, please.

MR. ROSS: Jonah Ross for the People.

MR. HARRISON: David Harrison for Mr. Webster. He's present.

MR. WHELAN: Michael Whelan, W-h-e-l-a-n, on behalf of Mr. Bates-Clark, who is present out of custody.

THE COURT: All right. Good morning, everyone.

There is a couple of things to talk about. There is -- I guess there is first the People's motion to amend and then -- and maybe -- well, I think it is first. And then there is also the demur that we talked about before. All right?

So the -- on the motion to amend, I think one of the reasons, if I remember correctly, and, please correct me if I'm getting this confused with another case, but I think one of the reasons we postponed this was that Mr. Ross had indicated that he was going to amend the complaint and add a couple of charges.

I think it was the defense view that you argued, admittedly, I think sort of off-the-cuff, but you didn't think that was going to change the outcome, but you wanted to look into it.

I don't think I received any briefing since then, but if I did and missed it, let me know.

MR. HARRISON: No, there was no briefing. The reason was, Your Honor, that I looked at the Bruen case. It makes a

distinction between various classes of firearms, so my opinion was that our argument would apply equally to the amended counts. And I don't know procedurally, since the amendment hasn't been filed yet, it would be up to the Court whether we wanted to simply agree to have it filed today and have our demur reply to that -- those new counts as well.

But if the court doesn't want to do that, we can simply have a ruling on the demur and then we can file a new demur, which, if necessary, would address the new counts, but I think it would probably be the same argument.

THE COURT: Okay.

Well, why don't we -- why don't we resolve the demur on the existing counts and then in light of that you can decide what to -- all of you decide what to do as to the new counts.

MR. ROSS: May I clarify? The amendment has not been filed, but I certainly did file the motion.

THE COURT: You did. Absolutely. And that's been -- that's been filed since October 4th, so it's ripe for hearing today. It's properly noticed for today, and I don't think there is any opposition to the amendment other than the Bruen argument. That's my understanding.

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

THE COURT: So it is not like there is an issue about those charges being added.

I do think, and I'll just say at the outset, the -- I don't think the arguments are identical. I think -- but you'll hear more on that right now.

So I'm prepared to rule on the demur. I don't know if you

all have seen the order that I issued in another case that is, I think, factually indistinguishable for purposes of the demur. Have you seen my order in Machuca?

MR. HARRISON: No.

THE COURT: Okay. That's understandable. I know there is no reason you would.

So in that case, which was case number 22006756, I overruled the demur and I'm going to do that today for these cases as well. And I'm not going to issue a new order on this case, but the logic applies identically. And you can get a copy of that order, if you wish.

I will summarize the logic of my order, though, for the sake of the defendants and counsel who was not a party to that.

I say "factually indistinguishable" because, to me, the most important thing is that -- or the things are that the complaint is alleging the same violations, 25400(a)(2) and 25850. And there is a similar lack of any detailed allegations that may otherwise be pertinent to the analysis, as is usual. There is nothing unusual about the complaints.

And the offense -- the alleged offense occurred after June 24, 2022, which is pertinent because that's not only after the Bruen decision, but more importantly, after the California AG issued his order or legal alert instructing law enforcement, sheriff's offices, and police departments to not enforce the good cause order or requirement for obtaining a license.

Now, my -- so the summary of my logic of my order in that other case that applies here is that the good-cause requirement of -- let me make sure I get the statute correct here. The good

cause requirement of Penal Code 26150 and 26151 or 155, sorry, is clearly unconstitutional.

The People don't really contest that and the California AG doesn't contest that. The issue is severability. I analyzed severability of that good cause requirement in the Machuca case and I do find that the good cause requirement is severable. So the issue is what are the consequences of that.

To me, in a case in which the offense occurred after the legal alert and the good cause requirement is severable, we're then left with at least potentially a factual issue that can't be resolved on demur as to what requirements actually did apply to these gentlemen when the offense occurred.

And on a demur I basically -- I don't think a demur is the proper way to resolve those issues. So factual issues such as did the defendants try to get a license, whether they did or not may or may not be dispositive. I'm not saying that. But I don't even know what county they reside in, what licensing requirements attached in that county, how those were enforced, if they were enforced.

None of those is resolvable on the face of the complaint and so for that reason I view the demur in this case as I did in Machuca is purely a facial challenge to the statute because anything other than a facial challenge can't be resolved on demur.

And facially I can't say that there are no circumstances under which the statutes could be enforced in a constitutional way. There are circumstances in which, even according to Bruen, what remains of the licensing requirement in California could be

enforced constitutionally.

And my order in Machuca states -- elaborates and points out the cite in Bruen that states why I feel that way.

So, in conclusion, I think a demur is not the right vehicle for this or at least it's impossible for me to resolve it on demur, so I'm overruling it.

With that, on this motion I'm going to grant the People's motion to amend to add a Count 5, violation of Penal Code 30605(a) for the possession of the Kel-Tec PMR firearm. This is as to Mr. Webster only, to be clear. So this is only as to line 3. And Count 6, a violation of 306059(a), possession of the Arrow Precision M4 carbine firearm.

Mr. Ross, you'll file an amended complaint?

MR. ROSS: It's there in court, Your Honor.

THE COURT: Okay. I don't have it, but do you have it?

THE CLERK: I do.

THE COURT: Okay. I've looked at your amended complaint that's consistent with your motion, so those can be filed.

And then -- so in light of all of that how do you want to proceed?

MR. HARRISON: So Mr. Webster will be demurring to the amended complaint and so we won't be entering a plea today. We, Mr. Whelan and I, will be filing writs with regard to the Court's order today. And I don't know what Mr. Whelan wants to do in terms of time, but we expect that the writs will be resolved in the appellate department. I don't know how long that's going to take. So that's our position.

THE COURT: Okay. We still need to set a new date here.

Are you -- so you don't want to arraign on the amended complaint, Mr. Harrison. You are going to continue arraignment?

MR. HARRISON: No. I am demurring to the amended complaint since the court seems to feel that the -- that the issues may be different, and I respect the court's opinion and I would take a fresh look at that and file a new demur on the basis of that and we can do a briefing schedule on that. So I'm not entering a plea today, correct.

THE COURT: Okay. When do you want to set that for hearing?

MR. HARRISON: I'd like to set it for sometime in early December. It will take a couple of weeks to file my new demur and give Mr. Ross an opportunity to respond.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: We set a schedule for the demur on the amended counts as follows: Mr. Harrison will file his demur on November 7th, opposition will be due November 21st, reply November 28th with a hearing on December 2nd.

And, also, just to clarify the basis for my order, I will file in the docket here the order that I issued in Machuca case incorporating the reasoning from that decision into my overruling the demur in this case.

MR. HARRISON: Thank you.

Mr. Ross, yes, if you would e-mail it to defense counsel, we'd appreciate that.

MR. ROSS: Will do.

MR. HARRISON: Thank you, Your Honor.
THE CLERK: For Mr. Whelan's case are we also setting that?
THE COURT: Should that be on to set on the 2nd?
MR. WHELAN: Yes.
THE COURT: Okay. Thank you.
(PROCEEDINGS WERE CONCLUDED.)
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STATE OF CALIFORNIA)
) SS.
CITY AND COUNTY OF SAN FRANCISCO)

REPORTER'S CERTIFICATE

I, JOANN M. PRIOR, AN OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT STATEMENT OF THE TESTIMONY AND PROCEEDINGS HAD IN THE WITHIN-ENTITLED MATTER AND THAT THE SAME IS A FULL, TRUE AND CORRECT TRANSCRIPTION OF THE SHORTHAND NOTES AS TAKEN BY ME IN SAID MATTER.

DATED: AT SAN FRANCISCO, CALIFORNIA, THIS 7TH DAY OF DECEMBER, 2022.

JOANN M. PRIOR, CSR 9129

Endorsed

FILED
Superior Court of California
County of San Francisco

OCT 10 2022

CLERK OF THE COURT
BY: _____ Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. ADRIAN MACHUCA, Defendant.	Case Nos. 22006756 **ORDER OVERRULING DEMURRER** October 10, 2022 Dept. 11

I. INTRODUCTION

Defendant Adrian Machuca demurs to all counts of the criminal complaint filed against him "pursuant to Penal Code section 1004, the common law and the 2nd Amendment of the U.S. Constitution." For the reasons stated herein, the Court overrules the demurrer.

II. FACTUAL AND PROCEDURAL BACKGROUND

On July 13, 2022, Defendant was charged in a criminal complaint alleging violations of Penal Code sections 25400(a)(2) ("Concealed firearm on person – not registered owner") and 25850(a) ("Carrying loaded firearm – not registered owner").[1] The offense was alleged to have occurred on July 8. As to the section 25400(a)(2) charge, it is further alleged under Penal Code section

[1] All code citations are to the California Penal Code unless otherwise noted.

25400(c)(6)(A) and (B), that the firearm and unexpended ammunition were in the immediate possession of the defendant and that he was not the registered owner in the California Department of Justice records. As to the section 25850(a) charge, it is further alleged under Penal Code section 25850(c)(6), that Defendant was not the registered owner of the firearm in the California Department of Justice records.

Defendant was arraigned on July 13 and pled not guilty. Counsel reserved the right to demur after entering a plea.

On August 24, 2022, Defendant filed this motion. The People filed an opposition to the demurrer on September 8, and on September 22 Defendant filed a reply. A hearing was held on September 29, 2022, after which the Court took the matter under submission.

III. ***NEW YORK RIFLE V. BRUEN.***

On June 23, 2022, the United States Supreme Court issued its opinion in *New York Rifle & Pistol Ass'n v. Bruen* (2022) 142 S.Ct. 2111. It would be no exaggeration to say that *Bruen* represented a seismic shift in Second Amendment jurisprudence when it held that a New York State firearm licensing scheme that had been in place for over a century was unconstitutional. *(Id.)* The decision reached far beyond New York, however, for the Supreme Court advised that the two-step analytical structure followed only fourteen years earlier, in *District of Columbia v. Heller* (2008) 554 U.S. 570, was "one step too many." (*Id.* at p. 2127.) "[W]hen the Second Amendment's plain text covers an individual's conduct," Courts are not to undertake any form of balancing of governmental interests when assessing the constitutionality of a regulation of that conduct. (*Bruen* 142 S.Ct. at 2126.) While the *Bruen* majority relied on *Heller's* observation that the Second Amendment ""is the very product of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense," (*id.* at p. 2131 (quoting *Heller*)), *Bruen* rejected a long history of jurisprudence, including *Heller,* that considered countervailing government interests to Second Amendment rights.

This Court, of course, must follow the holdings of the U.S. Supreme Court with respect to federal Constitutional law. *(See* U.S. Const., art. VI, cl.2 [supremacy clause]; *People v. Fletcher*

(1996) 13 Cal.4th 451, 469, n. 6.) Although *Bruen* declared a New York statute—not a California statute—unconstitutional, Defendant argues that California has a firearm licensing scheme that is effectively indistinguishable from New York's, and similarly in violation of the Second Amendment. This Court must attempt to discern the scope of the holding and distinguish that holding from *dicta,* which may be persuasive but not binding.[2]

That exercise is particularly important here where concurring opinions (and a dissent) reveal a range of views about what is or is not protected by the Second Amendment, even from the justices in the majority. At the center of the *Bruen* holding was a New York State law that was found unconstitutional because it required a showing of "proper cause" to obtain a license to carry a firearm in a concealed manner. *(Bruen* 142 S.Ct. at p. 2123.) Beyond this explicit holding, it is not clear what else was "actually decided" by *Bruen* or how the Court would rule on other firearm license requirements. For example, one member of the majority wrote a concurrence to clarify that the holding did not affect "anything that we said in *Heller* or *McDonald v. Chicago*, 561 U.S. 742, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), about restrictions that may be imposed on the possession or carrying of guns." (*Id.* at p. 2157 (Alito, J, concurring).) Another two members of the majority concurred to observe, among other limitations, that "the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States." (*Id.* at p. 2162 (Kavanaugh, J, concurring).)

IV. ANALYSIS

A. Standard for demurrer based on constitutional challenge to charged offense.

This motion is styled as "demurrer/motion to dismiss" but no authority is cited for the dismissal other than Penal Code section 1004, the demurrer statute. A demurrer is proper where "the facts stated [in a criminal complaint] do not constitute a public offense." (Section 1004(4).) A demurrer must be in writing and specify the grounds. (Section 1005.) It is proper to invoke section

[2] "Mere observations by an appellate court are dicta and not precedent, unless a statement of law was "necessary to the decision, and therefore binding precedent [ ]." (*Areso v. CarMax, Inc.* (2011) 195 Cal.App.4th 996, 1006 (citations omitted).) "An appellate decision is not authority for everything said in the court's opinion but only for the points actually involved and actually decided." (*Id.* (internal quotations omitted).)

1004(4) to challenge the constitutionality of a charged offense. (*People v Superior Court (Caswell)* (1988) 46 Cal.3d 381.) A demurrer can only challenge a defect that appears on the face of the complaint. (*People v. Muniz* (1970) 4 Cal.App.3d 562, 568, fn 3.) "[A]ny factual issue must be resolved in accordance with the allegations of the complaint" at the time of a demurrer. (*Mandel v. Municipal Court for Oakland-Piedmont Judicial Dist* (1969) 276 Cal.App.2d 649, 656.) And because a defendant "could not, on a demurrer to the accusatory pleading, offer evidence that as applied to their individual circumstances the [statute] was invalid," a constitutional challenge at this stage can only be a facial challenge. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1091-92.) Since a defendant may demur to a felony complaint at arraignment, it is proper for a magistrate to hear and dispose of a demurrer prior to preliminary hearing. (*In re Geer* (1980) 108 Cal.App.3d 1002, 1007.)

Presumably in recognition of the limited nature of the review available at the demurrer stage, Defendant confirmed at oral argument that its challenge was purely a facial challenge. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." (*U.S. v. Salerno* (1987) 481 U.S. 739, 745.)

B. **California's Conceal Carry and Loaded Firearm Laws and Regulations.**

Penal Code section 25400(a)(2) provides that a person is guilty of the offense of carrying a concealed firearm if they "Carr[y] concealed upon the person any pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code section 25850(a) provides that a person is guilty of the offense of carrying a loaded firearm "when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory."

These charging statutes cannot be read on their own, however; rather, they must be read together with sections 25655, 26010, 26150 and 26155.[3] Section 25655 provides that section 25400 does not apply to a person "who is authorized to carry that weapon in a concealed manner pursuant

[3] To do so would plainly run afoul of the Second Amendment, as interpreted by *Heller* and *Bruen*, since they prohibit the concealed carry of a loaded firearm without exception.

to Chapter 4 (commencing with Section 26150)" and section 26010 provides that section 25850 does not apply to a person who has a license under section 26150 or 26155.[4] In other words, California's concealed carry regime includes a general prohibition combined with a list of various exceptions that permit individuals to carry a weapon under particular circumstances.[5] One of those exceptions—critical in light of *Bruen*—is for persons who obtain a firearm license. Therefore, the constitutionality of California's licensing scheme is essential to preserve the constitutionality of sections 25400 and 25850.

Bruen did not call into question all firearm licensing schemes; indeed, it explicitly cited approvingly many schemes throughout the country. *Bruen* made clear, however, that a state's licensing scheme may be so discretionary, restrictive or onerous that is does not comport with the Second Amendment. If California's licensing scheme in section 26150 violates the Second Amendment, then sections 25400 or 25850 may also well be unconstitutional.

Section 26150 provides as follows:

> (a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person, the sheriff of a county may issue a license to that person upon proof of all of the following:
> (1) The applicant is of good moral character.
> (2) Good cause exists for issuance of the license.
> (3) The applicant is a resident of the county or a city within the county, or the applicant's principal place of employment or business is in the county or a city within the county and the applicant spends a substantial period of time in that place of employment or business.
> (4) The applicant has completed a course of training as described in Section 26165.
>
> (b) The sheriff may issue a license under subdivision (a) in either of the following formats:
> (1) A license to carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person.
> (2) Where the population of the county is less than 200,000 persons according to the most recent federal decennial census, a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.
>
> (c) (1) Nothing in this chapter shall preclude the sheriff of the county from entering into an agreement with the chief or other head of a municipal police department of a city to process all applications for licenses, renewals of licenses, or amendments to licenses pursuant to this chapter, in lieu of the sheriff.

[4] Section 26155 provides the same authorization for police chiefs as 26150 provides for sheriffs, therefore for convenience this Order uses "section 26150" to refer to both provisions.
[5] Other exceptions are listed at sections 25505 – 25595.

(2) This subdivision shall only apply to applicants who reside within the city in which the chief or other head of the municipal police department has agreed to process applications for licenses, renewals of licenses, and amendments to licenses, pursuant to this chapter.

In response to the opinion in *Bruen*, the California Attorney General issued a "Legal Alert" on June 24, 2022, stating: "Although California law was not directly at issue in the *Bruen* decision, the decision makes clear that 'good cause' requirements such as those in California Penal Code sections 26150(a)(2) and 26155(a)(2) are inconsistent with the Second and Fourteenth Amendments."[6] (Cal. AG Legal Alert, June 24, 2022 at p. 1.) The Alert goes on to conclude that the "good cause" requirements of sections 26150 and 26155 are "unconstitutional and unenforceable" and instructs "issuing authorities should no longer require proof of good cause for the issuance of a public-carry license." (*Id.* at p. 2.)

C. **Standing**

The People argue that the Defendant lacks standing to challenge the constitutionality of these statutes because it is not apparent on the face of the pleading that Defendant attempted to obtain a concealed carry license. But this argument misses the nature of the challenge Defendant raises. Since Defendant raises purely a facial challenge to the statutes with which Defendant is charged, this demurrer does not raise any question about whether Defendant was denied a license and, if so, why. Defendant plainly has suffered a legal injury by the attempted enforcement of the statute in question just from having been arrested and ordered to appear in Court to defend against the charges.

In the First Amendment context both the California and United States Supreme Courts have held that where a regulation on speech or protest violates the Constitution, and a defendant is prosecuted under such a regulation, the defendant may challenge it without attempting to comply with the regulation. (*People. v. Fogelson* (1978) 21 Cal.3d 158, 162-63 & n.3 (and cases cited therein).) The People offer one case in response, *United States v. Decastro* (2d Cir. 2012) 682 F.3d 160. That case involved both a direct constitutional challenge to a federal criminal firearm statute, and a challenge that the combination of the federal statute and the New York State licensing scheme

[6] https://oag.ca.gov/system/files/media/legal-alert-oag-2022-02.pdf. While the parties dispute the legal significance of this Alert, both parties cited and relied on it in their briefs so the Court views any objection to the consideration of this Alert as waived.

placed an unconstitutional burden on his Second Amendment rights.[7] The Second Circuit's decision finding no standing only applied to the latter combination argument. But unlike this case, the defendant in *Decastro* could not have avoided the charges by obtaining a license because the charged federal offense was for the transportation of firearms into New York from another state. Notably, the court in *Decastro did* evaluate the facial constitutional challenge to the federal statute with which he was charged without even questioning the standing of the defendant to argue that the asserted criminal statute was unconstitutional. (*See Decastro* 682 F.3d at pp. 168-169.)

In other contexts—including in the civil context of *Bruen* itself—persons who do not apply for a permit generally lack standing to challenge the constitutionality of that permitting scheme. But this is not a civil case. This case is closer to those discussed in *Fogelson* and the First Amendment cases discussed therein. Here, Defendant's right to carry a firearm depended on his obtaining a license but, he argues, the only available licensing scheme has an unconstitutional requirement of showing "good cause" to carry a firearm. The law does not require a party charged with a criminal offense to first attempt to obtain a license for that conduct before they can challenge the charge as unconstitutional. (*Burton v. Municipal Court of Los Angeles* (1968) 68 Cal.2d 684, 688; *Steffel v. Thompson* (1974) 415 U.S. 452, 459.)

D. **Are sections 25400 and 25850 constitutional after *Bruen*?**

There is no serious dispute that, in light of *Bruen*, section 26150 is unconstitutional as written. The People, in opposition to this motion, do not attempt to defend the licensing requirements, nor do they attempt to defend 25400 or 25850 as somehow separate from the licensing scheme. Given the Attorney General's unequivocal statements, the People would be hard-pressed to argue otherwise. Instead, the People argue that the "good cause" requirement of the California firearm licensing scheme can be severed from the remainder, and once that requirement is severed and not enforced, the remainder passes constitutional muster. The Court addresses these arguments in turn.

1. **Severability of "good cause" provision.**

[7] The latter argument contended that obtaining a license in New York was so burdensome that the defendant should be permitted to acquire firearms in other states and bring them in to New York, notwithstanding the federal law prohibiting that transportation.

Whether a constitutionally infirm provision of a statute can be severed to preserve the remainder of the statute requires the Court first to consider whether there is a clause in the legislation either providing for, or prohibiting, severance, and then to evaluate whether the language is "grammatically, functionally, and volitionally separable." *California Redev't Ass'n v. Matosantos* (2011) 53 Cal.4th 231, 271. The *Matosantos* court further elaborated:

> Grammatical separability, also known as mechanical separability, depends on whether the invalid parts "can be removed as a whole without affecting the wording" or coherence of what remains. . . . Functional separability depends on whether "the remainder of the statute ' "is complete in itself' " . . . [and] Volitional separability depends on whether the remainder " 'would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute.' "

(*Id.* (citations omitted).)

Here, there is no severability clause associated with section 26150, so severance is neither presumed nor is it prohibited.

The "good cause" requirement of section 26150 is grammatically severable since subsection (a)(2) can simply be excised and the statute still makes sense grammatically. The "good cause" requirement is also functionally severable since that subsection can be excised and the licensing scheme is still functional and logical. Indeed the *Bruen* court recognized many states' licensing schemes that include requirements such as background checks and mandatory gun safety courses, without a "proper cause" requirement. (*See, e.g., Bruen* 142 S.Ct. at p. 2138, n.9.) The existence of licensing schemes that are similar to how section 26150 would operate if "good cause" were excised is compelling evidence that "good cause" is functionally severable from the remainder of the statute.

Volitional severability is more difficult to evaluate. Without any severance clause either in favor or against severance, there is no direct evidence of what the California Legislature would or would not adopt. But by drawing reasonable inferences from the text of the statute the Court can conclude that, if faced with a prohibition against the "good cause" requirement, the Legislature would choose to implement all the other requirements rather than have no licensing requirements whatsoever. The other requirements of section 26150 plainly serve reasonable and permissible goals, namely: that persons carrying firearms are responsible and law abiding (subsection (a)(1));

that they are resident of the county where the license issues so that local law enforcement is responsible for the licensee's compliance (subsection (a)(3)); and, that they understand the responsibilities of safe gun use and storage (subsection (a)(4)). Each one of these goals is reasonable on its own and in conjunction with one another. Most importantly, each one serves a purpose even without the "good cause" requirement of subsection (a)(2). Accordingly, there is no reason the Legislature would abandon the goals of subsections (a)(1), (3) and (4) just because the restriction of "good cause" in subsection (a)(2) was found to be unconstitutional. Therefore, the Court finds subsection (a)(2) to be severable, and so the remainder of the licensing scheme in section 26150 is not tainted by the unconstitutional "good cause" requirement in subsection (a)(2).

2. **Other challenged provisions of sections 26150 and 26155.**

Defendant also argues that even without the "good cause" requirement, section 26150 violates the Second Amendment because it (1) contains a "good moral character" requirement, and (2) allows that a law enforcement agency "may issue" the license rather than compels the issuance of the license to anyone who qualifies.

To assess these arguments, the Court starts with any relevant guidance from *Bruen* and other U.S. Supreme Court authority. Neither *Bruen* nor any other Supreme Court decision cited to this Court decided the constitutionality of any and all "may issue" licensing schemes. But it is noteworthy that *Bruen* explicitly discusses such licensing schemes and does not treat them as all alike. Three states with "may issue" licensing schemes—Connecticut, Delaware and Rhode Island—are condoned because those "may issue" states "operate like a 'shall issue' jurisdiction." (*Bruen* 142 S.Ct. at p. 2123, n.1.) As to a requirement of "good moral character," the Supreme Court recognized that similarly-phrased provisions in other states do not run afoul of the Second Amendment. For example, the Court cited with seeming approval Connecticut's "suitable person" requirement because it only precluded permits to "those lacking the essential character of temperament necessary to be entrusted with a weapon." (*Id.*) The *Bruen* court also appeared to condone regimes that require applicants to "undergo a background check or pass a firearm safety course." (*Id.* at p. 2138, n.9.) And the concurrence elaborates on the firearm restrictions that are

not called into question by the majority. *(See, e.g.,* 142 S.Ct. at p. 2157 ("Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. Nor does it decide anything about the kinds of weapons that people may possess.") (Alito, J, concurring).) In sum, the majority in *Bruen* appears only to criticize—and find unconstitutional—provisions that condition the right to personally carry a firearm on demonstrating some special need beyond a basic desire for self-defense. The *Bruen* majority clearly *did not* find unconstitutional reasonable licensing requirements designed to ensure that only "law abiding, responsible citizens" can carry firearms. (*Bruen* at p. 2138, n.9.)

Turning to the "may issue" and "good moral character" provisions of section 26150, there is nothing to suggest that those are facially unconstitutional provisions. On the contrary, as intimated in *Bruen* itself, regulations phrased in this manner could be interpreted or applied in a range of ways. For example, a jurisdiction could require assurances that the applicant has no criminal history to satisfy "good moral character," or various other permutations of reasonable requirements that correspond with the ideal of granting permits only to the "law abiding, responsible citizen." The phrase "may issue" may be interpreted—either by a court or by an implementing law enforcement agency—as a grant of *authority* to issue the license, but not a grant of unfettered *discretion* to deny a license. This interpretation is bolstered by the fact that both licensing sections (26150 and 26155) include an option that the sheriff and head of police agree that only one of the two agencies will process *all* applications for firearm licenses where the agencies' jurisdiction overlaps. (Sections 26150(c), 26155(c).) This flexibility would not be possible if each agency were forced ("shall issue") to grant licenses to any qualifying person.

While it is possible that both the "good moral character" requirement and the "may issue" provision could be constitutionally suspect in their application, that hypothetical question is not before the Court on this facial constitutional challenge. Because Defendant has failed to show "that no set of circumstances exists under which the" licensing scheme could be constitutional, his facial challenge must fail. (*Salerno* 481 U.S. at 745.)

Moreover, any challenge to those provisions "as applied" faces other significant hurdles. First is standing. Because the Defendant never attempted to obtain a license, he may not be able to complain about the particular application of a county's "good moral character" requirement in his jurisdiction and circumstances.

Second, because there are a host of ways in which the "may issue" and "good moral character" provisions could be implemented there are many fact questions underlying any constitutional analysis. Those fact questions cannot be answered on demurrer. For example, the pleadings do not allege where Defendant resides. Without that fact, the parties cannot even identify the relevant local law enforcement licensing policy, which is essential just to begin the debate about its constitutionality.[8] It may also be that a counties' licensing issuance practice differs from its written policy in ways that may preserve or doom its constitutionality. These factual questions cannot be answered at this stage, and so for this additional reason the Court overrules the demurrer.

Finally, even if those factual questions could be answered now, the Court may still need to conduct the historical review of firearm restrictions to determine whether those policies and practices are analogous to the "Nation's historical tradition of firearm regulation." (*Bruen* 142 S.Ct. at p. 2130.) The Supreme Court did not provide any guidance as to how, procedurally, a trial court is to conduct the exegesis of historical firearm regulations that it performed in *Bruen.* The Court observed that courts proceed by "party presentation" and that courts are "entitled to decide a case based on the historical record compiled by the parties." (*Bruen* 142 S.Ct. at p. 2130, n.6.) But the permission granted in note 6 does not resolve the practical question about compiling that historical record or resolving disputes of fact about what history to credit and what to discount. (*See also Bruen* 142 S.Ct. at p. 2177 ("Do lower courts have the research resources necessary to conduct exhaustive historical analyses in every Second Amendment case? What historical regulations and decisions qualify as representative analogues to modern laws? How will judges determine which historians have the better view of close historical questions?") (Breyer, J, dissenting).) This Court will not attempt to resolve those procedural questions here, except to say that determining what is

[8] Sheriffs and municipal police chiefs are required to "publish and make available a written policy summarizing the provisions" of sections 26150(a) and 26155(a). (Section 26160.)

the "Nation's historical tradition" does not seem to be an exercise appropriate for demurrer. The exercise would entail consideration of a vast quantity of material outside the pleadings and applicable law. It may raise disputes of fact as to whether a particular historical document accurately reflected an enforced law, and how it was actually enforced. (*Compare Bruen* and *Peruta v. County of San Diego* (2016) 824 F.3d 919, 929-939 (pre- *Bruen* survey of historical traditions of concealed carry limitations dating from the reign of Edward I in 1299).) It is inconsistent with the procedures of a demurrer to attempt to amass such a factual record at this stage and to resolve factual disputes about the relevant historical sources and evidence.

For these reasons, once subsection (a)(2) is severed from section 26150, the remainder of section 26150 is not facially unconstitutional. Accordingly, the demurrer is overruled.

IT IS SO ORDERED.

Dated: October 10, 2022

Brian L. Ferrall
JUDGE OF THE SUPERIOR COURT