

APPENDIX A

**SUPREME COURT
FILED**

APR 12 2023

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

Jorge Navarrete Clerk

S278903

Deputy

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

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JACOB WEBSTER, et al,

Petitioners,

v.

SUPERIOR COURT OF
CALIFORNIA, CITY AND COUNTY
OF SAN FRANCISCO,

Respondent;

THE PEOPLE,

Real Party in Interest.

A166782

San Francisco Super. Ct.
Nos. 22008341, 22008362

THE COURT:

The petition for writ of mandate, prohibition, or other appropriate relief
is denied.

Date: 02/23/2023

Brown, Acting P.J. Acting P.J.

(Brown, Acting P.J., Goldman, J., and Whitman, J.*)

* Judge of the Superior Court of California, County of Alameda,
assigned by the Chief Justice pursuant to article VI, section 6 of the
California Constitution.

APPENDIX B

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
3 HONORABLE BRIAN FERRALL, JUDGE PRESIDING
4 DEPARTMENT 11
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7 THE PEOPLE OF THE)
8 STATE OF CALIFORNIA,)
9 PLAINTIFF,)
10 VS.)
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15 REPORTER'S TRANSCRIPT OF PROCEEDINGS

16 OCTOBER 21, 2022

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

19 FOR THE PEOPLE: HON. BROOKE JENKINS, DISTRICT ATTORNEY
20 350 RHODE ISLAND STREET
21 NORTH BUILDING, SUITE 400N
22 SAN FRANCISCO, CA 94103
23 BY: JONAH ROSS
24 ASST. DISTRICT ATTORNEY

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

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

27

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

CERTIFIED
TRANSCRIPT

1 OCTOBER 21, 2022

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

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

5 Let's get appearances, please.

6 MR. ROSS: Jonah Ross for the People.

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

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

11 THE COURT: All right. Good morning, everyone.

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

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

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

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

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

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

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

11 THE COURT: Okay.

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

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

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

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

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

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

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

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

4 MR. HARRISON: No.

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

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

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

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

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

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

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

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

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

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

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

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

1 enforced constitutionally.

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

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

7 With that, on this motion I'm going to grant the People's
8 motion to amend to add a Count 5, violation of Penal Code
9 30605(a) for the possession of the Kel-Tec PMR firearm. This is
10 as to Mr. Webster only, to be clear. So this is only as to
11 line 3. And Count 6, a violation of 306059(a), possession of
12 the Arrow Precision M4 carbine firearm.

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

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

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

16 THE CLERK: I do.

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

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

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

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

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

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

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

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

15 THE COURT: Off the record.

16 (Discussion off the record.)

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

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

25 MR. HARRISON: Thank you.

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

28 MR. ROSS: Will do.

1 MR. HARRISON: Thank you, Your Honor.

2 THE CLERK: For Mr. Whelan's case are we also setting that?

3 THE COURT: Should that be on to set on the 2nd?

4 MR. WHELAN: Yes.

5 THE COURT: Okay. Thank you.

6 (PROCEEDINGS WERE CONCLUDED.)

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1 STATE OF CALIFORNIA)
2) SS.
3 CITY AND COUNTY OF SAN FRANCISCO)
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5 REPORTER'S CERTIFICATE

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

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

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19 JOANN M. PRIOR, CSR 9129
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Endorsed
FILED
Superior Court of California
County of San Francisco

OCT 10 2022

CLERK OF THE COURT
BY: [Signature]
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.

1 25400(c)(6)(A) and (B), that the firearm and unexpended ammunition were in the immediate
2 possession of the defendant and that he was not the registered owner in the California Department
3 of Justice records. As to the section 25850(a) charge, it is further alleged under Penal Code section
4 25850(c)(6), that Defendant was not the registered owner of the firearm in the California
5 Department of Justice records.

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

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

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

12 On June 23, 2022, the United States Supreme Court issued its opinion in *New York Rifle &*
13 *Pistol Ass'n v. Bruen* (2022) 142 S.Ct. 2111. It would be no exaggeration to say that *Bruen*
14 represented a seismic shift in Second Amendment jurisprudence when it held that a New York State
15 firearm licensing scheme that had been in place for over a century was unconstitutional. (*Id.*) The
16 decision reached far beyond New York, however, for the Supreme Court advised that the two-step
17 analytical structure followed only fourteen years earlier, in *District of Columbia v. Heller* (2008)
18 554 U.S. 570, was "one step too many." (*Id.* at p. 2127.) "[W]hen the Second Amendment's plain
19 text covers an individual's conduct," Courts are not to undertake any form of balancing of
20 governmental interests when assessing the constitutionality of a regulation of that conduct. (*Bruen*
21 142 S.Ct. at 2126.) While the *Bruen* majority relied on *Heller's* observation that the Second
22 Amendment "'is the very product of an interest balancing by the people' and it 'surely elevates
23 above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense,"
24 (*id.* at p. 2131 (quoting *Heller*)), *Bruen* rejected a long history of jurisprudence, including *Heller*,
25 that considered countervailing government interests to Second Amendment rights.

26 This Court, of course, must follow the holdings of the U.S. Supreme Court with respect to
27 federal Constitutional law. (See U.S. Const., art. VI, cl.2 [supremacy clause]; *People v. Fletcher*
28

1 (1996) 13 Cal.4th 451, 469, n. 6.) Although *Bruen* declared a New York statute—not a California
2 statute—unconstitutional, Defendant argues that California has a firearm licensing scheme that is
3 effectively indistinguishable from New York’s, and similarly in violation of the Second
4 Amendment. This Court must attempt to discern the scope of the holding and distinguish that
5 holding from *dicta*, which may be persuasive but not binding.²

6 That exercise is particularly important here where concurring opinions (and a dissent) reveal
7 a range of views about what is or is not protected by the Second Amendment, even from the justices
8 in the majority. At the center of the *Bruen* holding was a New York State law that was found
9 unconstitutional because it required a showing of “proper cause” to obtain a license to carry a
10 firearm in a concealed manner. (*Bruen* 142 S.Ct. at p. 2123.) Beyond this explicit holding, it is not
11 clear what else was “actually decided” by *Bruen* or how the Court would rule on other firearm
12 license requirements. For example, one member of the majority wrote a concurrence to clarify that
13 the holding did not affect “anything that we said in *Heller* or *McDonald v. Chicago*, 561 U.S. 742,
14 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), about restrictions that may be imposed on the possession
15 or carrying of guns.” (*Id.* at p. 2157 (Alito, J, concurring).) Another two members of the majority
16 concurred to observe, among other limitations, that “the 6 States including New York potentially
17 affected by today’s decision may continue to require licenses for carrying handguns for self-defense
18 so long as those States employ objective licensing requirements like those used by the 43 shall-issue
19 States.” (*Id.* at p. 2162 (Kavanaugh, J, concurring).)

20 IV. ANALYSIS

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

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

26
27 ² “Mere observations by an appellate court are dicta and not precedent, unless a statement of law was “necessary to
28 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).)

1 1004(4) to challenge the constitutionality of a charged offense. (*People v Superior Court*
2 (*Caswell*) (1988) 46 Cal.3d 381.) A demurrer can only challenge a defect that appears on the face
3 of the complaint. (*People v. Muniz* (1970) 4 Cal.App.3d 562, 568, fn 3.) “[A]ny factual issue must
4 be resolved in accordance with the allegations of the complaint” at the time of a demurrer. (*Mandel*
5 *v. Municipal Court for Oakland-Piedmont Judicial Dist* (1969) 276 Cal.App.2d 649, 656.) And
6 because a defendant “could not, on a demurrer to the accusatory pleading, offer evidence that as
7 applied to their individual circumstances the [statute] was invalid,” a constitutional challenge at this
8 stage can only be a facial challenge. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1091-92.)
9 Since a defendant may demur to a felony complaint at arraignment, it is proper for a magistrate to
10 hear and dispose of a demurrer prior to preliminary hearing. (*In re Geer* (1980) 108 Cal.App.3d
11 1002, 1007.)

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

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

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

24 These charging statutes cannot be read on their own, however; rather, they must be read
25 together with sections 25655, 26010, 26150 and 26155.³ Section 25655 provides that section 25400
26 does not apply to a person “who is authorized to carry that weapon in a concealed manner pursuant

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

1 to Chapter 4 (commencing with Section 26150)” and section 26010 provides that section 25850
2 does not apply to a person who has a license under section 26150 or 26155.⁴ In other words,
3 California’s concealed carry regime includes a general prohibition combined with a list of various
4 exceptions that permit individuals to carry a weapon under particular circumstances.⁵ One of those
5 exceptions—critical in light of *Bruen*—is for persons who obtain a firearm license. Therefore, the
6 constitutionality of California’s licensing scheme is essential to preserve the constitutionality of
7 sections 25400 and 25850.

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

13 Section 26150 provides as follows:

14 (a) When a person applies for a license to carry a pistol, revolver, or other firearm capable of
15 being concealed upon the person, the sheriff of a county may issue a license to that person
upon proof of all of the following:

- 16 (1) The applicant is of good moral character.
17 (2) Good cause exists for issuance of the license.
18 (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
19 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.

20 (b) The sheriff may issue a license under subdivision (a) in either of the following formats:

- 21 (1) A license to carry concealed a pistol, revolver, or other firearm capable of being
concealed upon the person.
22 (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.

23 (c) (1) Nothing in this chapter shall preclude the sheriff of the county from entering into an
24 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
25 chapter, in lieu of the sheriff.

26
27 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.

28 ⁵ Other exceptions are listed at sections 25505 – 25595.

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

4 In response to the opinion in *Bruen*, the California Attorney General issued a “Legal Alert” on June
5 24, 2022, stating: “Although California law was not directly at issue in the *Bruen* decision, the
6 decision makes clear that ‘good cause’ requirements such as those in California Penal Code sections
7 26150(a)(2) and 26155(a)(2) are inconsistent with the Second and Fourteenth Amendments.”⁶ (Cal.
8 AG Legal Alert, June 24, 2022 at p. 1.) The Alert goes on to conclude that the “good cause”
9 requirements of sections 26150 and 26155 are “unconstitutional and unenforceable” and instructs
10 “issuing authorities should no longer require proof of good cause for the issuance of a public-carry
11 license.” (*Id.* at p. 2.)

11 C. Standing

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

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

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27 ⁶ <https://oag.ca.gov/system/files/media/legal-alert-oag-2022-02.pdf>. While the parties dispute the legal significance of
28 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.

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

8 In other contexts—including in the civil context of *Bruen* itself—persons who do not apply
9 for a permit generally lack standing to challenge the constitutionality of that permitting scheme.
10 But this is not a civil case. This case is closer to those discussed in *Fogelson* and the First
11 Amendment cases discussed therein. Here, Defendant's right to carry a firearm depended on his
12 obtaining a license but, he argues, the only available licensing scheme has an unconstitutional
13 requirement of showing "good cause" to carry a firearm. The law does not require a party charged
14 with a criminal offense to first attempt to obtain a license for that conduct before they can challenge
15 the charge as unconstitutional. (*Burton v. Municipal Court of Los Angeles* (1968) 68 Cal.2d 684,
16 688; *Steffel v. Thompson* (1974) 415 U.S. 452, 459.)

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

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

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

26
27 ⁷ The latter argument contended that obtaining a license in New York was so burdensome that the defendant should be
28 permitted to acquire firearms in other states and bring them in to New York, notwithstanding the federal law
prohibiting that transportation.

1 Whether a constitutionally infirm provision of a statute can be severed to preserve the
2 remainder of the statute requires the Court first to consider whether there is a clause in the legislation
3 either providing for, or prohibiting, severance, and then to evaluate whether the language is
4 “grammatically, functionally, and volitionally separable.” *California Redev’t Ass’n v. Matosantos*
5 (2011) 53 Cal.4th 231, 271. The *Matosantos* court further elaborated:

6 Grammatical separability, also known as mechanical separability, depends on whether the
7 invalid parts “can be removed as a whole without affecting the wording” or coherence of what
8 remains. . . . Functional separability depends on whether “the remainder of the statute ‘is
9 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.’ ”

10 (*Id.* (citations omitted).)

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

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

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

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

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

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

15 To assess these arguments, the Court starts with any relevant guidance from *Bruen* and other
16 U.S. Supreme Court authority. Neither *Bruen* nor any other Supreme Court decision cited to this
17 Court decided the constitutionality of any and all "may issue" licensing schemes. But it is
18 noteworthy that *Bruen* explicitly discusses such licensing schemes and does not treat them as all
19 alike. Three states with "may issue" licensing schemes—Connecticut, Delaware and Rhode
20 Island—are condoned because those "may issue" states "operate like a 'shall issue' jurisdiction."
21 (*Bruen* 142 S.Ct. at p. 2123, n.1.) As to a requirement of "good moral character," the Supreme
22 Court recognized that similarly-phrased provisions in other states do not run afoul of the Second
23 Amendment. For example, the Court cited with seeming approval Connecticut's "suitable person"
24 requirement because it only precluded permits to "those lacking the essential character of
25 temperament necessary to be entrusted with a weapon." (*Id.*) The *Bruen* court also appeared to
26 condone regimes that require applicants to "undergo a background check or pass a firearm safety
27 course." (*Id.* at p. 2138, n.9.) And the concurrence elaborates on the firearm restrictions that are
28

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

9 Turning to the “may issue” and “good moral character” provisions of section 26150, there is
10 nothing to suggest that those are facially unconstitutional provisions. On the contrary, as intimated
11 in *Bruen* itself, regulations phrased in this manner could be interpreted or applied in a range of ways.
12 For example, a jurisdiction could require assurances that the applicant has no criminal history to
13 satisfy “good moral character,” or various other permutations of reasonable requirements that
14 correspond with the ideal of granting permits only to the “law abiding, responsible citizen.” The
15 phrase “may issue” may be interpreted—either by a court or by an implementing law enforcement
16 agency—as a grant of *authority* to issue the license, but not a grant of unfettered *discretion* to deny
17 a license. This interpretation is bolstered by the fact that both licensing sections (26150 and 26155)
18 include an option that the sheriff and head of police agree that only one of the two agencies will
19 process *all* applications for firearm licenses where the agencies’ jurisdiction overlaps. (Sections
20 26150(c), 26155(c).) This flexibility would not be possible if each agency were forced (“shall
21 issue”) to grant licenses to any qualifying person.

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

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

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

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

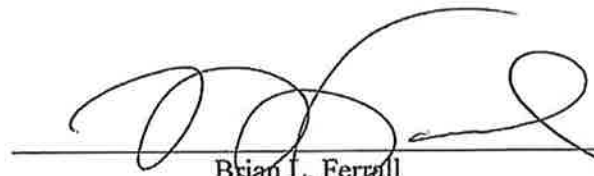
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28 ⁸ Sheriffs and municipal police chiefs are required to “publish and make available a written policy summarizing the provisions” of sections 26150(a) and 26155(a). (Section 26160.)

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

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

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12 IT IS SO ORDERED.

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14 Dated: October 10, 2022

15 
16 Brian L. Ferrall
17 JUDGE OF THE SUPERIOR COURT
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