

No. 26-

In the
Supreme Court of the
United States

OMAR JOHNSON,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari
to the Court of Appeals of the State of New York.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Omar Johnson was prosecuted for possessing a firearm for self-defense purposes without a public-carry license under the very regime that this Court considered in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). Mr. Johnson argued that his unlicensed possession was a direct result of New York’s unconstitutional “proper cause” standard. The New York Court of Appeals rejected his Second Amendment defense on severability grounds, finding that New York’s other licensing requirements could continue to be enforced against Mr. Johnson notwithstanding his undisputed inability to satisfy the “proper cause” standard.

This question presented is:

Whether, or under what circumstances, individuals can be criminally prosecuted for failing to comply with a licensing scheme that contains a facially unconstitutional licensing standard?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Omar Johnson respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals (Pet. App. 5-36) is published at -- N.E.3d --, 2025 WL 3259873. The opinion of the Appellate Division of the New York Supreme court, First Judicial Department (Pet. App. 1-4) is published at 225 A.D.3d 453. The relevant order of the New York Supreme Court (Pet. App. 66-68) is unpublished.

JURISDICTION

The Court of Appeals entered its judgment on November 24, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

As this petition draws into question the constitutionality of state statutes, 28 U.S.C. § 2403(b) may be applicable and the Attorney General of the State of New York has been served with this petition. *See* Sup. Ct. Rule 29(4)(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES,
Amendment II:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

CONSTITUTION OF THE UNITED STATES,
Amendment XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK PENAL LAW

§ 265.20(a)(3)

. . . Sections 265.01, 265.02, [and] 265.03 [of New York Penal Law].
. . shall not apply to . . . Possession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00 of this chapter . . .

NEW YORK PENAL LAW

§ 265.03(3)

A person is guilty of criminal possession of a weapon in the second degree when . . . such person possesses any loaded firearm. Such possession shall not, except as provided in subdivision one or seven of section 265.02 of this article, constitute a violation of this subdivision if such possession takes place in such person's home or place of business. . . Criminal possession of a weapon in the second degree is a class C felony.

FORMER NEW YORK PENAL LAW

§ 400.00(1),(2)(f)

No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true . . . A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to . . . have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof.

STATEMENT OF THE CASE

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court recognized a Second Amendment right to public carry for self-defense purposes. *Id.* at 10. Prior to *Bruen*, New York did not. To obtain a concealed-carry license, New Yorkers had to demonstrate “proper-cause”—defined as a “special need for self-protection distinguishable from that of the general community.” *Id.* at 12-13 (quoting *In re Klenosky*, 428 N.Y.S.2d 256, 257 (1980)). As this Court recognized, New York’s unconstitutional “proper-cause” requirement “broadly prohibit[ed]” the core Second Amendment right to public carry and rendered it “virtually impossible” to exercise. *Id.* at 38; *id.* at 76 (Alito, J., concurring).

This petition raises the question of whether, and in what circumstances, individuals subject to New York’s “proper cause” requirement or other facially invalid licensing standards can be prosecuted for failing to obtain a license to engage in their constitutionally guaranteed right to bear arms.

A. Mr. Johnson Is Prosecuted for Unlicensed Firearm Possession

In July 2022, police officers recovered a loaded pistol inside of Mr. Johnson’s moped, parked outside of his home. He was not alleged to have displayed or used his gun at any time. Mr. Johnson—a delivery driver whose work placed him in potentially dangerous situations—told the police that he kept the gun for self-protection purposes. Mr. Johnson was arrested and charged with second-degree criminal weapon possession, in violation of N.Y. Penal Law § 265.03(3), as well as lesser-related charges.

New York criminalizes only unlicensed possession of handguns. *See People v. Hughes*, 1 N.E.3d 298, 301 (N.Y. 2013); N.Y. Penal Law § 265.20(a)(3) (exempting from New York’s criminal prohibitions on gun possession anyone with a license). At the time of Mr. Johnson’s arrest, New York required anyone seeking a public carry license to demonstrate “proper cause.” N.Y. Penal Law § 400.00(2)(f).

B. New York State Courts Reject Mr. Johnson’s Second Amendment Defense

Mr. Johnson moved to dismiss the charges on Second Amendment grounds. Pet. App. 37-49. He alleged that he was being prosecuted “for no other reason” than his “possess[ing] a firearm without a license . . . under an unconstitutional licensing scheme.” Pet. App. 40. The “proper-cause” requirement was the but-for cause of Mr. Johnson’s prosecution: because it was impossible for Mr. Johnson to satisfy this standard, he had no lawful path to immunity for possessing a firearm for self-defense purposes. Pet. App. 43. Mr. Johnson argued that his prosecution could not pass constitutional muster unless the prosecution could demonstrate that he was disqualified from exercising his Second Amendment rights, and the prosecution could not do so here. Pet. App. 45-46 (citing *Magnus v. United States*, 11 A.3d 237 (D.C. 2011)).

In response, the prosecution did not claim that Mr. Johnson lacked a Second Amendment right to public carry or that his conduct fell outside of Second Amendment protection. Nor did the prosecution cite any lawful basis upon which Mr. Johnson could

have been denied a license.¹ Rather, the prosecution made a pair of broad arguments against the viability of a Second Amendment defense in essentially any case: (1) Mr. Johnson lacked standing to challenge his unlicensed possession prosecution because he did not apply for a license; and (2) all of New York’s gun licensing provisions aside from “proper-cause” remained intact after *Bruen* and could still be enforced against Mr. Johnson. Pet. App. 56-64. The trial court and Appellate Division, First Department adopted these arguments in large measure. *See* Pet. App. 66-68 (trial court decision, finding that Mr. Johnson lacked standing and that all of New York’s other licensing requirements survived *Bruen*); Pet. App. 1-4 (Appellate Division decision, affirming Mr. Johnson’s conviction on his appellate waiver before determining, without further explanation, that Mr. Johnson “lacked standing to challenge New York’s gun licensing scheme . . . and [] failed to establish that his conviction is unconstitutional under *Bruen*”).

On review in the New York Court of Appeals, Mr. Johnson renewed his Second Amendment claim. Mr. Johnson argued, as he did before the trial court, that the case presented a “question . . . of remedy”: because Mr. Johnson could not satisfy “proper cause,” he “lacked any path to immunity for exercising his Second Amendment rights”.

¹ On appeal, the prosecution would later argue that Mr. Johnson was statutorily ineligible for a license due to a prior felony. Because the prosecution had failed to make any argument regarding Mr. Johnson’s particular circumstances at the trial level, this newfound argument was unpreserved under New York State law and was not relevant to the Court of Appeals’ decision below. *See* Pet. App. 147 & n. 6 (Mr. Johnson’s reply in the Court of Appeals, citing New York State cases demonstrating the prosecution’s failure to preserve and abandonment of any claim that Mr. Johnson’s background disentitled him to Second Amendment protection); *see generally* N.Y. Ct. App. Decision: Pet. App. 5-21 (denying Mr. Johnson’s claim without reference to any prior convictions).

Pet. App. 105 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)). Moreover, the prosecution had not established below the validity of New York’s other licensing provisions. Pet. App. 106. Responding to the prosecution’s reliance on severability in the Court of Appeals, Mr. Johnson maintained that such “exclusive focus on [New York’s firearm] provisions not explicitly invalidated by *Bruen* misses the mark,” because “[a] person cannot be prosecuted for violating an unlawful licensing *standard* . . . that renders a constitutional right functionally nonexistent.” Pet. App. 145-46.

The Court of Appeals held that Mr. Johnson had standing to raise a facial challenge to New York’s licensing regime but affirmed his conviction. Pet. App. 13-17. As to the merits, the Court claimed that Mr. Johnson had made “only one” argument before the trial court: that *Bruen* “rendered New York’s entire firearm licensing scheme facially unconstitutional.” Pet. App. 17. The Court determined that New York’s “proper cause” requirement was severable under State law and that the remaining licensing provisions were valid in at least some circumstances. The Court did not assess whether any lawful basis existed to deny Mr. Johnson a license. Pet. App 17-21.

REASONS FOR GRANTING THE WRIT

Bruen made clear that the Second Amendment protects the right to public carry for self-defense purposes. Prior to *Bruen*, New York was among a small group of outlier States that broadly prohibited this right.

As with any other Federal Constitutional error, New Yorkers whose felony, unlicensed possession charges were tainted by the unconstitutional “proper cause”

requirement are entitled to a remedy. The New York Court of Appeals' misplaced application of State "severability" doctrine ensures that none exists. The decision below reflects an unfortunate pattern of denying relief to anyone prosecuted for failing to obtain a license under a patently unconstitutional "may-issue" regime, without regard to whether any valid basis existed to deny a license. Indeed, since *Bruen* came down in 2022, no New York appellate court has invalidated a weapons charge that was tainted by the proper-cause requirement although thousands of New Yorkers were convicted of felony charges under that proper-cause regime and hundreds have sought appellate relief under *Bruen*.

This case provides an excellent opportunity to ensure that "Americans are always free to invoke the Second Amendment as a defense against unconstitutional firearms-licensing schemes." *Wilson v. Hawaii*, 145 S.Ct. 18, 22 (2024) (Thomas, J., and Alito, J.). And it is vital that this Court reject the broad "severability" rule that New York and some other jurisdictions have adopted. That approach asks the wrong constitutional question. And it lacks any foundation in this Court's jurisprudence, under which an individual cannot be prosecuted for violating a facially unconstitutional licensing provision. Only by intervening now can this Court ensure that this pernicious doctrine no longer undermines Second Amendment rights and other core rights guaranteed by the Bill of Rights.

A. “May Issue” States Have Almost Uniformly Failed to Remedy *Bruen* Errors.

Bruen held that New York’s “proper-cause” requirement violates the Second Amendment since it is not supported by any well-established historical tradition. 597 U.S. at 38. *Bruen* did not invalidate “shall-issue” licensing regimes, which require officials to grant public carry licenses upon satisfaction of objective criteria. *Id.* at 38 n. 9; *id.* at 79 (Kavanaugh, J., concurring). This Court identified only seven “may-issue” jurisdictions, New York among them, that granted officials unfettered discretion to deny public carry licenses based upon a perceived lack of suitability. *Id.* at 14-15. Such broad prohibitions on law-abiding citizens’ ability to carry for self-defense purposes are unconstitutional. *Id.* at 38, 71.

Under this Court’s precedents, “[a] defendant can always raise unconstitutionality as a defense ‘where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of constitutional right.’” *Wilson v. Hawaii*, 145 S. Ct. at 20 (Thomas, J., and Alito, J.) (quoting *Smith v. Caboon*, 283 U.S. 553, 562 (1931)); see *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958) (“The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which, on its face, violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance.”). Yet appellate courts in almost all jurisdictions that unconstitutionally restricted public carry rights prior to

Bruen have made it virtually impossible to raise a Second Amendment defense to prosecution for unlicensed possession under those regimes.

Of the seven “may-issue” jurisdictions identified in *Bruen*, only the District of Columbia has permitted litigants to challenge criminal charges by demonstrating that they are entitled to Second Amendment protection, which D.C.’s licensing scheme failed to adequately protect. *See Ward v. United States*, 318 A.3d 520, 533-36 (D.C. Ct. App. 2024) (remanding a conviction, post-*Bruen*, for a hearing on Second Amendment defense to prosecution).

Hawaii, Maryland, and New Jersey hold—in direct opposition to the decisions cited above—that criminal defendants who did not attempt to obtain a license lack standing to raise a Second Amendment challenge to their conviction for unlicensed possession.²

Following the decision below, New York joins California and Massachusetts in upholding weapons convictions on severability grounds.³ The decisions in these “severability states” employ essentially the same, four-step process to deny *Bruen* defenses. The courts: (1) find standing exists to lodge only a facial challenge,

² *State v. Wade*, 301 A.3d 393, 403-04 (N.J. Super. Ct. App. Div. 2023) (explicitly declining to apply this Court’s First Amendment decisions in *Shuttlesworth* and *Staub* to the post-*Bruen*, Second Amendment challenge at issue); *State v. Wilson*, 543 P.3d 440, 444-45 (Haw. 2024); *Bourdeau v. State*, No. 1196, 2023 WL 6567799 at *5 (Md. Ct. App., Oct. 10, 2023). *See also State v. Ortiz*, 317 A.3d 737, 741-45 (R.I. 2024).

³ *People v. Bey*, 328 Cal.Reptr.3d 904, 920 (Cal. Ct. App. 2025); *Commonwealth v. Rodriguez*, 267 N.E.3d 77, 90-92 (Mass. 2025).

characterized as a challenge to every provision in the licensing scheme (2) determine that the “proper cause” or analogous provision is severable; (3) identify a singular provision in the State’s licensing scheme that survives *Bruen*’s historical text, whether applicable in the case at bar or not; and, (4) hold that the continued viability of *some* of the licensing requirements bars the Second Amendment defense. *See* Pet. App. 17-21; *Bey*, 328 Cal. Repr. at 920; *Rodriguez*, 267 N.E.3d at 91 (citing continued viability of exclusions for violent felons, without reference to the defendant’s history, as a basis for denying his Second Amendment defense). Under this theory, as long as *one* provision is constitutional in the licensing scheme, the constitutional defense fails, even if the unconstitutional provision is the but for cause of the conviction since no other provision could have lawfully barred a license.

While grounded in different rationales, “may issue” States’ standing and severability decisions sweep equally broadly. The upshot is that even law-abiding citizens who had lacked any ability to obtain a public carry license can be prosecuted for exercising a fundamental right simply because they did not get a license under an unconstitutional licensing standard.

Of course, *Bruen* concerned a direct challenge to a licensing requirement, and not a criminal prosecution. But that distinction ought to make no difference. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 159 (1969) (reversing a criminal conviction for violating unlawful permit ordinance); *Staub*, 355 U.S. at 325 (same). If the State conditions access to a defense to a criminal charge—here, possession of a license—on

a defendant's satisfying an *unconstitutional* licensing standard, the charge itself is unconstitutional. New York can no more punish unlicensed weapon possession under an unconstitutional licensing standard than it can punish unlicensed marching under a licensing requirement that requires proving to a government official that the speech is for the "public good." *Shuttlesworth*, 394 U.S. at 159. "The constitutional right to bear arms in public for self-defense is not 'a second class right.'" *Bruen*, 597 U.S. at 70 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010)). The "may-issue" States identified in *Bruen*, lamentably, continue to disregard this message. This Court's course correction is warranted.

B. The Question Presented is Extremely Important.

Courts' indiscriminate rejection of Second Amendment defenses on procedural grounds carries significant ramifications. In New York, unlicensed public carry is a Class C, violent felony. New York Penal Law § 265.03. An individual with no prior criminal record faces a mandatory term of incarceration between three-and-a-half and 15 years for merely failing to obtain a license. New York Penal Law §§ 60.05(4), 70.02(3)(b). And prosecuting unlicensed possession has become a cottage industry in New York. According to the most recently published data from the New York Department of Corrections and Community Supervisions, over 4,800 individuals are currently in prison for weapons offenses. NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, *Incarcerated Profile Report – February 2026*, at Tbl. 3A (Feb. 1, 2026).

Fundamental liberty interests dictate that this Court's Second Amendment jurisprudence play a role in the criminal realm.

New York and other States' disfavored treatment of the Second Amendment right is creating odd doctrine that threatens to permeate other fundamental rights as well. Any error of a Federal Constitutional dimension requires reversal of a conviction unless no reasonable possibility exists that it contributed to the conviction. It is the prosecution's burden to establish harmless error beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967). Mr. Johnson alleged in New York's courts that the error identified in *Bruen*—an unconstitutional statutory provision—contributed to his conviction, and the prosecution failed to establish any other basis for his prosecution. There is no logical reason why defendants should secure relief where unconstitutionally admitted evidence potentially impacted a verdict but should be out of luck when an unconstitutional *statute* potentially does the same.

The illogical theory that the legality of any one licensing requirement can save a prosecution under a facially unconstitutional licensing standard also has widespread ramifications. Almost *every* licensing provision in the First or Second Amendment contexts contain *some* valid provisions. For example, the permitting law at issue in *Shuttlesworth* contained some plainly lawful provisions, such as requiring applicants to disclose general information about the planned demonstration. 394 U.S. at 149. Nevertheless, the *Shuttlesworth* defendants secured relief because their convictions for unlicensed speech were tainted by an unconstitutional permit standard.

The decision below would lead to the absurd result that, if New York law barred citizens of a particular national origin, skin color, or gender from obtaining a license, those who fell within those categories could be convicted for unlicensed conduct based on other constitutional licensing requirements that had no relevance to them. A defendant should not have to show that every nook and cranny of the licensing law is invalid to secure relief. *One* unconstitutional provision is enough, at least where it is causally connected to the defendant's lack of a license and thus, the absence of a defense to a criminal charge.

C. The Decision Below is Wrong.

Like other core constitutional rights, the Second Amendment is self-executing. “[B]ecause the constitutional violation occurs as soon as an individual’s right to bear arms is inhibited, States cannot mandate that would-be gun owners go through an unconstitutional licensing process before they may invoke their Second Amendment rights.” *See Wilson*, 145 S.Ct. at 21-22 (Thomas, J., and Alito, J., concurring). The Court of Appeals thus correctly held that Mr. Johnson had standing to raise his Second Amendment defense to his prosecution. Yet New York’s and other States’ “severability” holdings nevertheless continue to choke off relief.

Mr. Johnson consistently alleged, both before the trial court and on appeal, that he was being unconstitutionally prosecuted solely for exercising his Second Amendment rights: or, alternatively stated, that the unconstitutional “proper-cause” requirement was the but-for cause of his unlicensed possession. Pet. App. 43, 72, 105.

The Court of Appeals’ “severability” analysis, Pet. App. 17-21, is irrelevant to deciding the remedy question at the heart of Mr. Johnson’s case. *Bruen* concerned a *facial* challenge to New York’s proper cause standard, which barred public-carry licenses for general self-defense purposes. Whether New York’s other licensing requirements remain enforceable after *Bruen* does nothing to change the fact that Mr. Johnson and anyone else subjected to the “proper cause” requirement lacked any lawful path to exercising their Second Amendment rights. *Id.* at 22 (Gorsuch, J.) (noting “it is surely true” that states can continue to require firearm licenses following *Bruen*, “[b]ut it’s just as true that state licensing regimes can sometimes be so restrictive that they violate the Second Amendment.”).

Thus, severing a facially unconstitutional licensing standard cannot retroactively justify a conviction for failing to comply with it. *Compare Shuttlesworth*, 394 U.S. at 155 (“We may assume that . . . the ordinance, as now authoritatively construed, would pass constitutional muster. It does not follow, however, that the severely narrowing construction put upon the ordinance by the Alabama Supreme Court [] serves to restore constitutional validity to a conviction that occurred [] under the ordinance as it was written.”). Where a State has made it “impossible” to obtain a firearm license, unlicensed possession cannot be penalized “unless the government proves the defendant was disqualified from exercising his Second Amendment rights.” *Magnus v. United States*, 11 A.3d 237, 242-43 (D.C. 2011). Similarly too, where the State conditions access to a defense to a criminal charge on an unconstitutional licensing standard, and

that standard taints the conviction because no other lawful bases justify license denial, the conviction is invalid.

In response to Mr. Johnson’s motion to dismiss, the prosecution did not claim that Mr. Johnson was in any way disqualified from public carry. Additionally, his conduct was plainly protected by the Second Amendment. It was uncontested that he possessed a firearm for self-protection purposes and neither used it nor harbored any intent to use it unlawfully. On this record, therefore, the proper-cause standard tainted the conviction and requires relief.

Even accepting the severability of New York’s “proper cause” requirement, that does not properly end the inquiry. The relevant question here is not merely whether any of New York’s additional licensing requirements survived *Bruen*, but whether any constitutionally valid basis existed to deny Mr. Johnson his right to public carry. By looking to licensing provisions with only theoretical application to *other* defendants before them, California, Massachusetts, and New York have permitted unconstitutional prosecutions to persist.

D. This Case is an Ideal Vehicle for Resolving the Question Presented.

This case is an excellent vehicle to determine whether, or under what circumstances, individuals can be prosecuted for failing to comply with a licensing scheme that contains a facially invalid standard such as “proper cause.”

The question is squarely and cleanly presented. Despite the New York Court of Appeals’ straw-man characterization of Mr. Johnson’s claim as only that *Bruen*

invalidated every single provision of New York’s licensing scheme, Mr. Johnson argued before the New York courts that his indictment was invalid because the discrete *proper-cause* standard ultimately deprived him of a license. He alleged before the trial court that, since the “proper cause” requirement was the “but for” cause of his unlicensed possession, his prosecution was unconstitutional. Pet. App. 43. He reiterated this argument before the Appellate Division and the New York Court of Appeals. *See* Pet. App. 72 (arguing to the Appellate Division that the “proper-cause requirement . . . subjected Mr. Johnson to an unconstitutional restriction on his Second-Amendment rights”); Pet. App. 105 (arguing to the Court of Appeals that a remedy was required because Mr. Johnson had no path to immunity for exercising his rights); Pet. App. 145-46 (addressing the prosecution’s severability arguments in reply to the Court of Appeals). The question presented was therefore raised before the New York courts and is ripe for review here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 23, 2026

APPENDIX

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Oing, J.P., Kapnick, Shulman, Rodriguez, O'Neill Levy, JJ.

1893

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

Ind. No. 73320/22
Case No. 2023-01900

-against-

OMAR JOHNSON,
Defendant-Appellant.

Jenay Nurse Guilford, Center for Appellate Litigation, New York (Abigail Everett of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Emily A. Aldridge of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Albert Lorenzo, J.), rendered March 28, 2023, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to five years' probation, unanimously affirmed.

Based on the totality of the circumstances, including the clear, accurate, and comprehensive communication of the nature and consequences of the appeal waiver by the court and in the written waiver that defendant signed, we find that defendant knowingly, intelligently, and voluntarily waived his right to appeal (*see People v Thomas*, 34 NY3d 545, 560 [2019], *cert denied* 589 US —, 140 S Ct 2634 [2020]).

Defendant's valid waiver of his right to appeal forecloses review of his claim that his weapon possession conviction is unconstitutional under *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]). We decline to follow the Fourth Department's decision in *People v Benjamin*, in which the Court held that the

“defendant’s challenge to the constitutionality of Penal Law § 265.03 in light of [*Bruen*] is not barred by the waiver inasmuch as that challenge relates to ‘a right of constitutional dimension going to “the very heart of the process”’” (216 AD3d 1457 [4th Dept 2023], quoting *People v Lopez*, 6 NY3d 248, 255 [2006]; *but see People v Fisher*, 121 AD3d 1013 [2d Dept 2014], *lv denied* 24 NY3d 1119 [2015]).

The “narrow class of appellate claims” that are “unwaivable as part of a plea bargain” are “grounded in the integrity of our criminal justice system and the reality of fairness in the process,” and “implicate either an infirmity in the waiver itself or a public policy consideration that transcends the individual concerns of a particular defendant to obtain appellate review” (*People v Muniz*, 91 NY2d 570, 574 [1998] [internal quotation marks omitted]). The “process” to which this standard refers is the core process of adjudicating guilt or innocence and imposing punishment. Of course, the issues that meet the standard include the several issues traditionally enumerated in a valid appeal waiver colloquy, each of which is integral to a fair trial process: a constitutional speedy trial claim, a claim that the sentence imposed was illegal, a claim that the defendant is not competent to stand trial, and a claim that either the plea or the appeal waiver was involuntary. Beyond these fundamental issues, determinations that an issue goes to the very heart of the process are rare (*see e.g. People v Pacherille*, 25 NY3d 1021 [2015]), and New York courts have held that myriad claims of constitutional dimension do not qualify for the very limited class of issues that cannot be voluntarily waived (*see e.g. Muniz*, 91 NY2d at 573; *People v Suarez*, 110 AD3d 420 [1st Dept 2013], *lv denied* 22 NY3d 1044 [2013]; *People v Doyle*, 82 AD3d 564 [1st Dept 2011], *lv denied* 17 NY3d 805 [2011]; *People v Rodriguez-Ortiz*, 23 AD3d 204 [1st Dept 2005], *lv denied* 6 NY3d 817 [2006]; *People v Williams*, 204 AD2d 116 [1st Dept 1994], *lv denied* 84 NY2d 835

[1994]).

Notably, the standard for determining whether an issue is waivable on appeal is identical to that employed in determining whether the narrow mode of proceedings exception to the preservation rule applies. In *People v Hanley*, the Court of Appeals described mode of proceedings errors as a “tightly circumscribed class” that excludes “most errors of constitutional dimension” and “encompasses only the most fundamental flaws that implicate jurisdictional matters . . . or rights of a constitutional dimension that go to the very heart of the process” (20 NY3d 601, 604-605 [2013] [internal quotation marks and citation omitted]). Applying this standard, New York courts have long held that a claim that a statute is unconstitutional is subject to the preservation requirement and does not implicate the mode of proceedings exception. Indeed, the Court of Appeals recently specifically so held with regard to claims that a statute is unconstitutional under *Bruen* (see *People v David*, — NY3d —, 2023 NY Slip Op 05970 [2023]).

Defendant’s constitutional challenge to the third-degree weapon possession statute did not go to the heart of the adjudicative process, and plainly does not do so any more than the host of constitutional claims that have been held waivable on appeal. Thus, there is no principled reason to conclude that defendant’s claim cannot be waived.

As an alternative holding, we find that on the present record, defendant lacked standing to challenge New York’s gun licensing scheme because he did not apply for a gun license (see *United States v Decastro*, 682 F3d 160, 164 [2d Cir 2012], *cert denied* 568 US 1092 [2013]) and that he has failed to establish that his conviction is unconstitutional under *Bruen* (see *People v Cherif*, 220 AD3d 543 [1st Dept 2023], *lv denied* 40 NY3d 1079 [2023]; *People v DeLarosa*, 219 AD3d 1230 [1st Dept 2023], *lv*

denied 40 NY3d 1080 [2023]; *People v Adames*, 216 AD3d 519, 520 [1st Dept 2023], *lv denied* 40 NY3d 949 [2023]).

Defendant's valid waiver of his right to appeal also forecloses review of his excessive sentence claim. In any event, we perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 12, 2024



Susanna Molina Rojas
Clerk of the Court

State of New York Court of Appeals

OPINION

This opinion is uncorrected and subject to revision
before publication in the New York Reports.

No. 86
The People &c.,
Respondent,
v.
Omar Johnson,
Appellant.

Benjamin Rutkin-Becker, for appellant.
Emily A. Aldridge, for respondent.
Matthew Keller, for intervenor Hon. Letitia James, New York State Attorney General.

HALLIGAN, J.:

The defendant in this appeal was convicted of attempted criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]). A firearm license would have given the defendant a defense to that charge. He contends that the U.S. Supreme Court's

decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) renders the state’s entire firearm licensing scheme facially unconstitutional and thus his conviction should be reversed.

We hold that although the defendant waived his right to appeal as part of a plea bargain, his facial constitutional challenge nonetheless survives. The defendant was directly affected by his criminal prosecution and conviction, and we conclude that he therefore has standing to challenge the licensing scheme even though he did not apply for a firearm license. But his claim fails on the merits. Before the trial court, the defendant argued only that *Bruen*’s invalidation of the licensing scheme’s “proper cause” requirement rendered the state’s entire licensing scheme unconstitutional. That requirement is severable from the rest of the licensing scheme under New York law, and the defendant has not shown that there is no set of circumstances in which the licensing scheme would be valid. We therefore affirm.

I.

On July 30, 2022, police were called to defendant Omar Johnson’s home in response to a 911 call reporting that he had hit his domestic partner. While investigating the incident, an officer discovered a loaded 9-millimeter pistol in the defendant’s moped parked on the street in front of his home. After ascertaining that the defendant did not have a valid license for the pistol, the officer arrested the defendant, and he was indicted for various counts of criminal weapon possession and possession of ammunition. These events occurred shortly

after the U.S. Supreme Court decided *Bruen* on June 23, 2022, and before the amendments to the state’s firearm licensing scheme went into effect on September 1, 2022.¹

The defendant moved to dismiss the indictment. Rather than attacking any specific provisions of the licensing scheme, he argued broadly that *Bruen* effectively “struck down New York’s public carry licensing system” by invalidating the “proper cause” requirement. The defendant further contended that because the charges against him rested “solely on the basis that he did not obtain a license to carry a firearm,” the indictment could not stand.

Supreme Court denied the motion. The court held that the defendant lacked standing to challenge New York’s gun licensing laws because he had not applied for a license and could not show that it would have been futile for him to do so. The court also rejected his claim on the merits, concluding that *Bruen* had invalidated only the “proper cause” requirement and did not “render the entire licensing statute . . . unconstitutional.”

The defendant subsequently pleaded guilty to attempted criminal possession of a weapon in the second degree and was sentenced to 5 years of probation. As part of his plea agreement, the defendant waived his right to appeal.

On appeal, the defendant renewed his argument that *Bruen* invalidated the state’s entire firearm licensing scheme, notwithstanding his waiver. He argued that a *Bruen* claim cannot be waived because it “relates to a right of constitutional dimension going to the very

¹ Following the Supreme Court’s decision in *Bruen*, the Legislature enacted the Concealed Carry Improvement Act (“CCIA”). Signed into law on July 1, 2022, the CCIA amended various firearms-related provisions of the Penal Law, General Business Law, Executive Law, and Civil Practice Law. Those amendments are not at issue in this appeal.

heart of the process” (quoting *People v Benjamin*, 216 AD3d 1457, 1457 [4th Dept 2023] [internal quotation marks omitted]). He also argued in the alternative that the waiver was not knowing and voluntary. On the merits, he continued to assert that *Bruen*’s invalidation of the proper cause requirement rendered the entire licensing scheme unconstitutional, and also challenged for the first time several other provisions of the then-extant licensing scheme, such as the “good moral character” requirement, the requirement that an applicant be 21 years old, and the prohibition on possession by convicted felons.

The Appellate Division affirmed (225 AD3d 453 [1st Dept 2024]). The Court held that the defendant’s appeal waiver was valid and foreclosed review of his *Bruen* claim. Alternatively, the court held that the defendant lacked standing to challenge the licensing scheme because he had not applied for a license, and that his conviction was not unconstitutional under *Bruen* (*id.* at 455).

A Judge of this Court granted leave to appeal (42 NY3d 939 [2024]).

II.

We must first determine whether the defendant’s facial constitutional challenge survives the waiver of his right to appeal. In *People v Seaberg*, we held that appeal waivers generally are enforceable if they are knowing, intelligent, and voluntary (*see* 74 NY2d 1, 9 [1989]). We also noted that there are exceptions, though: Claims that “transcend the individual concerns of the defendant” and “implicate society’s interest in the integrity of [the] criminal process” cannot be waived on appeal (*id.*).

Seaberg explained why most valid appeal waivers should be upheld. They are typically entered into as part of a plea bargain, which *Seaberg* describes as a “vital part of

our criminal justice system” (*id.* at 7). Generally, there is “no public policy precluding defendants from waiving their rights to appeal as a condition of [a] plea and sentence bargain[,]” and holding a defendant to the terms of such a deal serves the public’s interest in the “final and prompt conclusion of litigation” (*id.* at 8, 10).

In furtherance of these interests, we have enforced waivers of various constitutional rights—a point highlighted by the concurrence (concurring op at 6). Those include the right to appeal Fourth Amendment suppression rulings (*see People v Kemp*, 94 NY2d 831, 833 [1999]), Fifth Amendment suppression rulings (*People v Thomas*, 34 NY3d 545, 553-554 [2019]), and double jeopardy claims (*see People v Allen*, 86 NY2d 599, 603 [1995]). But each of these types of claims presents a challenge to the legality of a specific proceeding concerning a particular defendant, akin to an as-applied constitutional challenge, rather than a broad claim that a statute was facially invalid.

On the other hand, we have held unenforceable waivers that “transcend the individual concerns of the defendant” and “embrace the reality of fairness in the process itself” (*Seaberg*, 74 NY2d at 9; *see also People v Muniz*, 91 NY2d 570, 574 [1998] [waivers implicating “a public policy consideration that transcends the individual concerns of a particular defendant to obtain appellate review” cannot be enforced]). One example we gave in *Seaberg* was a constitutional speedy trial claim (74 NY2d at 9). That claim cannot be waived on appeal because it implicates “a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused”

(*People v Blakley*, 34 NY2d 311, 314 [1974] [internal citation omitted]).² Another example was a challenge to the illegality of a sentence (*Seaberg*, 74 NY2d at 9, citing *People v Francabandera*, 33 NY2d 429, 434 n 2 [1974]), which implicates a court’s authority to sentence a defendant. Since *Seaberg*, we have also held that matters going to “the jurisdiction of the court” may not be waived (*Thomas*, 34 NY3d at 566).

We hold that a facial constitutional challenge such as the one presented here likewise falls into the narrow class of non-waivable appellate claims. Hornbook law underscores the very high bar for this type of challenge: a litigant must contend that “in any degree and in every conceivable application, the law suffers wholesale constitutional impairment” (*Cohen v State*, 94 NY2d 1, 8 [1999] [internal quotation marks omitted]). In the rare circumstances where a facial challenge is successful, “the law is invalid in toto—and therefore incapable of any valid application” (*People v Stuart*, 100 NY2d 412, 421 [2003] [internal quotation marks and citation omitted]), and thus the State will lack authority to prosecute or punish the defendant or anyone else for the conduct at issue. In

² As the concurrence notes, we expressed concern in *Seaberg* and *Blakley* that trial delay may compel an innocent person to plead guilty (*Seaberg*, 74 NY2d at 9; *Blakley*, 34 NY2d at 314-315). But our rationale for declining to enforce an appeal waiver for a speedy trial claim was not confined to protecting an individual defendant against this coercive result. We noted that the speedy trial guarantee also serves distinct societal interests, citing *Barker v Wingo* (407 US 514 [1972]) (see *Blakley*, 34 NY2d at 314). As *Barker* explains, these interests include mitigating court backlogs, as well as reducing opportunities for defendants on bail to commit other crimes and incentives for confined defendants to escape (407 US at 519-520). *Barker* also notes that delay “may work to the accused’s advantage” given that “witnesses may become unavailable or their memories may fade” (*id.* at 521), and thus holding an appeal waiver unenforceable in this context may not actually serve a defendant’s interests.

that key respect, a facial challenge goes squarely to the “fairness in the process itself” (*Seaberg*, 74 NY2d at 9), and transcends an individual defendant’s concerns to implicate “a larger societal interest in its correct resolution” (*People v Callahan*, 80 NY2d 273, 280 [1992]). Accordingly, a waiver that precludes appellate review of a facial constitutional challenge to a criminal statute should not be enforced.

The Appellate Division’s contrary view rested on the erroneous premise that the same standard governs whether an issue is waivable on appeal and whether preservation is required. Noting that this Court had already determined that *Bruen* claims must be preserved, the Appellate Division concluded that they also can be waived on appeal (225 AD3d at 454-55, citing *People v David*, 41 NY3d 90 [2023]). That approach improperly conflates the standards for preservation and waiver. The two inquiries present distinct considerations. Preservation implicates constitutional limitations on this Court’s jurisdiction (*see* NY Const, art VI, § 3; *People v Turriago*, 90 NY2d 77, 80 [1997]). “[C]ritically,” preservation also allows for “the development of a record that would allow for careful and deliberate adjudication on the merits of constitutional challenges presented to us” (*People v Cabrera*, 41 NY3d 35, 50 [2023]). Appeal waivers, by comparison, serve the important interests of prompt resolution, conservation of resources, and finality in litigation (*see generally Seaberg*, 74 NY2d 1). But they do not implicate this Court’s jurisdiction. Nor does adjudicating an appeal despite a waiver impede the development of a record, which is a key distinction between the two doctrines. Because preservation and waiver serve different purposes, our prior determination that *Bruen* claims must be preserved does not resolve whether they can be waived on appeal.

Nor are we persuaded by the People’s suggestion at argument, echoed by the Attorney General, that we might decline to enforce an appeal waiver if there is a “a glaring constitutional issue” (oral argument tr at 25) but otherwise enforce them. That approach would invert the analysis. If the enforceability of an appeal waiver turned on the strength of a constitutional challenge, a court would always have to peek at the merits before deciding whether to proceed, thereby defeating the point of the waiver. Moreover, any discomfort with enforcing an appeal waiver that prevents a defendant from challenging a patently unconstitutional statute proves the point, for it undoubtedly rests on a well-placed concern about prosecuting and punishing someone for violating a law that, by definition, is impermissible in each and every one of its applications.

The concurrence opines that our holding today will increase the burden on courts and litigants (concurring op at 13-14). But as with any claim, a facial constitutional challenge must be preserved in the trial court (*see Cabrera*, 41 NY3d at 42-43). Additionally, our precedent leaves no doubt that such a challenge faces an “extraordinary burden . . . of proving . . . that the challenged provision suffers wholesale constitutional impairment” to prevail (*Owner Operator Ind. Drivers Assn., Inc. v New York State Dept. of Transportation*, 40 NY3d 55, 61 [2023] [internal quotation marks and citation omitted]), and we assume that, consistent with their obligations to the court, attorneys will only bring such claims if they have a nonfrivolous basis for meeting this rigorous standard. Nor is it clear that enforcing appeal waivers would always lighten the workload; a brief review of recent Appellate Division cases reveals numerous instances in which the court upheld an appeal waiver but proceeded anyway to resolve a constitutional claim on the merits (*see*

e.g. People v Liriano, 226 AD3d 520, 521 [1st Dept 2024]; *People v Williams*, 227 AD3d 480, 482 [1st Dept 2024]; *People v Hines*, 237 AD3d 643, 644 [1st Dept 2025]). And permitting appellate review of fully preserved facial constitutional challenges should promote judicial economy by ensuring prompt resolution of viable challenges to criminal prosecutions under a particular statute.

In sum, we conclude that the defendant’s facial constitutional challenge to the state’s firearm licensing scheme is not waivable and therefore survives his appeal waiver. We stress that the class of claims excepted from the general rule enforcing appeal waivers remains narrow. There will be few types of claims that transcend a defendant’s individual interests and implicate a larger societal value to such an extent that they cannot be waived, and appeal waivers otherwise should be enforced. Because we hold that the claim here is not waivable, we need not address the defendant’s alternative contention that his appeal waiver was not knowing and voluntary.

III.

Next, we turn to the defendant’s standing to challenge the facial constitutionality of the state’s firearm licensing scheme. Both the People and the Attorney General argue that the defendant lacks standing to challenge the constitutionality of the licensing scheme because he never applied for a firearm license. We disagree.

Although the briefs before us focus exclusively on federal standing doctrine, we note that federal and state standing doctrines are distinct (*see Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]). “[T]he Federal constitutional requirement of a case or controversy . . . has no analogue in the State Constitution” (*id.*), and although

someone challenging government action must demonstrate an “injury in fact” that falls within the “zone of interests or concerns sought to be promoted or protected by the statutory provision” (*Stevens v New York State Div. of Criminal Justice Services*, 40 NY3d 505, 515 [2023]), we do not appear to have explicitly embraced the federal requirement of traceability (*see Lujan v Defs. of Wildlife*, 504 US 555, 560 [1992]).

Here, the defendant has undoubtedly suffered a cognizable injury. Given his prosecution and conviction for unlicensed gun possession, he has an “actual legal stake in the matter being adjudicated” and has suffered a harm that is “sufficiently concrete and particularized to warrant judicial intervention” (*Stevens*, 40 NY3d at 515 [internal quotation marks omitted]). The defendant’s injury is also within the “zone of interests sought to be promoted or protected by the statutory provision” (*id.* [internal quotation marks omitted]). Although the text of Penal Law § 265.03 (3) does not reference unlicensed possession of a firearm, a defendant may avoid prosecution under that provision by producing a valid firearm license (*see* Penal Law § 265.20 [a] [3]; *David*, 41 NY3d at 96). Thus, as this Court has recognized, “New York’s criminal weapon possession laws prohibit only *unlicensed* possession of handguns” (*People v Hughes*, 22 NY3d 44, 50 [2013]). And here, the only basis for the defendant’s conviction was that he possessed a gun without a license.

Guidance from the U.S. Supreme Court instructing that a defendant need not comply with what he alleges is an unconstitutional licensing scheme to challenge a criminal conviction reinforces our conclusion. For example, in *Staub v City of Baxley* (355 US 313 [1958]), a defendant was prosecuted for soliciting union membership without obtaining a

permit. The Court held that “the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review ... of a judgment of conviction under such an ordinance” (*id.* at 319). Similarly, in *Shuttlesworth v City of Birmingham* (394 US 147 [1969]), the defendant was prosecuted for participating in a civil rights march because he failed to comply with a city ordinance requiring a permit for all public demonstrations. Again, the Court held that a person criminally prosecuted for violating a licensing law need not apply for a license in order to “attack its constitutionality” (*id.* at 151).

The facts here are essentially indistinguishable in all but two respects. First, the defendant asserts a right under the Second Amendment rather than the First Amendment. But the Supreme Court made clear in *Bruen* that the Second Amendment is not a “second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees” (*Bruen*, 597 US at 70, quoting *McDonald v City of Chicago*, 561 US 742, 780 [2010]). Second, a valid firearm license is a defense to a criminal prosecution rather than an element of the offense. But the Legislature’s decision to structure the Penal Law in this manner cannot shield the licensing regime from a facial constitutional challenge. The fact remains that the defendant was prosecuted only because he possessed a gun without a license, and he alleges that the state’s gun licensing scheme is facially unconstitutional. The Attorney General attempts to distinguish *Staub* and *Shuttlesworth* by suggesting that the licensing schemes at issue in those cases were obviously void on their face. But that judgment entails consideration of the merits of a facial constitutional challenge. Because

this would put the proverbial cart before the horse, it provides an inapt ground for parceling out standing.

The People and the Attorney General further argue that *United States v Decastro* (682 F3d 160 [2d Cir 2012]) requires a different result. *Decastro* rested on federal concepts of standing, which do not bind us, as noted. In any event, *Decastro* presented different circumstances. The defendant there was prosecuted for violating a federal law that prohibits transporting a firearm purchased in one state to another, and he argued that New York's gun licensing scheme effectively compelled him to leave the state to purchase a gun and then carry it back across state lines. The Second Circuit held that he lacked standing to challenge the constitutionality of the state's gun licensing scheme because he failed to apply for a license (*id.* at 164).

As the Second Circuit has since explained, *Decastro* had limited reach. The Circuit clarified that *Decastro* was really about "traceability" (*see Antonyuk v James*, 120 F4th 941, 979 n 21 [2d Cir 2024]). That is, there was no way to know whether the New York licensing scheme itself caused the defendant to buy a gun elsewhere and transport it across state lines, and thus the causal chain between his criminal conviction and the licensing scheme was too tenuous. Here, by contrast, the defendant's conviction is directly traceable to the state's licensing scheme. The Circuit also said that *Decastro* "governs only challenges to a licensing rule regarding eligibility" (*id.* at 979). Where a defendant's claim is rooted in "personal ineligibility" to obtain a firearm license, the Court explained, it makes sense to require the defendant to first attempt to obtain a license in order to challenge the eligibility rules (*see id.*). But when a defendant challenges the licensing application

process itself, as in *Antonyuk*, the failure to apply for a license is not a barrier to standing (*see id.* at 979-80). The facts of this case resemble *Antonyuk*, not *Decastro*; the defendant challenges the facial constitutionality of the entire licensing scheme, not an eligibility rule.

We conclude that the defendant has standing to challenge the constitutionality of the state’s firearm licensing scheme, notwithstanding his failure to apply for a license. On this point, we are aligned with sister courts in Massachusetts and California (*see Commonwealth v Rodriguez*, 496 Mass 627, 640, 267 NE3d 77, 90 [2025]; *People v Bey*, 108 Cal App 5th 144, 164, 328 Cal Rptr 3d 904, 919 [2025]; *but see State v Ortiz*, 317 A3d 737, 741-745 [RI 2024] [finding defendant did not have standing to challenge licensing statutes]).

IV.

Turning to the merits of the defendant’s Second Amendment challenge, it is essential to spell out precisely the question before us. That turns, as always, on what arguments were made with “sufficient specificity” in the trial court (*People v Robinson*, 88 NY2d 1001, 1002 [1996]; *see also People v Baumann & Sons Buses, Inc.*, 6 NY3d 404, 408 [2006] [applying same rule to a constitutional challenge]). We are able to discern from the defendant’s motion papers only one claim made with the requisite specificity: that *Bruen*’s invalidation of the “proper cause” requirement rendered New York’s entire firearm licensing scheme facially unconstitutional.

Bruen presented a challenge to one discrete aspect of New York’s firearm licensing scheme: the “proper cause” requirement. The Court’s analysis and holding was confined to that provision and did not address any other aspect of New York’s licensing scheme (*see*

Bruen, 597 US at 16, 31, 39, 60, 67, 70-71). To the contrary, *Bruen* instructed that states are not prohibited from imposing licensing requirements on persons who wish to carry a gun for self-defense. The Court observed that Second Amendment rights are subject to “well-defined restrictions” and expressed approval for the gun licensing regimes of 43 states with “shall-issue” licensing regimes, “which often require applicants to undergo a background check or pass a firearms safety course” (*Bruen*, 597 US at 38 & n 9). Several concurrences made similar points (*see id.* at 79-81 [Kavanaugh, J., concurring] [noting that “the Second Amendment allows a variety of gun regulations” including “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places” (internal quotation marks omitted)]; *id.* at 72 [Alito, J., concurring] [stressing that the Court’s holding “decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun”]).

Whether the “proper cause” requirement infected the rest of the licensing scheme so as to render it unconstitutional in its entirety raises a question of severability. To answer it, we look to legislative intent: “whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether” (*CWM Chem. Servs., L.L.C. v Roth*, 6 NY3d 410, 423 [2006], quoting *People ex rel. Alpha Portland Cement Co. v Knapp*, 230 NY 48, 60 [1920]).

We find the “proper cause” requirement severable. The text and structure of the licensing scheme evince a clear legislative intent to regulate the lawful purchase, possession, and use of firearms. The licensing scheme is detailed and multi-faceted; the “proper cause” provision was just one aspect of a much broader scheme that includes a

variety of distinct requirements. For example, a separate provision sets forth various eligibility criteria to obtain a license, including that the applicant be over 21 years of age, of good moral character, not a convicted felon, and not an unlawful user of a controlled substance (*see* Penal Law § 400.00 [1]). Another provision sets forth the types of licenses that an applicant may obtain (*see* Penal Law § 400.00 [2]). Other provisions set forth the procedures for applying and reviewing gun license applications (*see* Penal Law § 400.00 [2]-[5]). We find it implausible that the Legislature would have intended for all of these other provisions to be invalidated simply because the “proper cause” requirement was deemed unenforceable.

The structure of the licensing scheme points to another reason why the defendant’s facial challenge fails. The party making a facial challenge must establish that a law is unconstitutional in every possible application (*see supra* at 6). It is the “most difficult challenge to mount successfully, because it requires a defendant to establish that no set of circumstances exists under which the [challenged statute] would be valid” (*United States v Rahimi*, 602 US 680, 693 [2024] [internal quotation marks omitted]).

The defendant has failed to show that there is no set of circumstances in which the licensing scheme would be constitutionally valid. To take one example, the statute prohibits gun possession by convicted felons (*see* Penal Law § 400.00 [1]). The defendant makes no argument before us that this provision is unconstitutional. Without opining on that question, we note that the Supreme Court has made clear that “the Second Amendment permits the disarmament of individuals who pose a credible threat to the physical safety of others” (*Rahimi*, 602 US at 693; *see also United States v Duarte*, 137 F4th 743, 761 [9th

Cir 2025] [upholding the federal statute prohibiting firearm possession by convicted felons against a Second Amendment challenge]; *Vincent v Bondi*, 127 F4th 1263, 1265 [10th Cir 2025] [same]; *United States v Hunt*, 123 F4th 697, 708 [4th Cir. 2024], *cert denied* 145 S Ct 2756 [2025] [same]).

With these principles in mind, we are confident that the Legislature would have intended for the rest of the licensing scheme to remain in effect following *Bruen*'s invalidation of the "proper cause" requirement. Indeed, when the Legislature enacted amendments to the licensing scheme following *Bruen*, it maintained many of the same requirements, providing further evidence that the Legislature intended for those provisions to remain in effect. We therefore conclude that the "proper cause" requirement is severable, and its invalidation did not render the entire licensing scheme unconstitutional.³

Finally, we reject the defendant's contention that the People were required to provide evidence that the entire licensing scheme is consistent with the Nation's historical tradition of firearm regulation. Although *Bruen*'s "historical tradition" framework would govern challenges to discrete provisions of any gun regulations (*see e.g. Antonyuk*, 120 F4th at 987), the defendant's broad claim before us—that *Bruen*'s invalidation of the

³ Other state courts have reached a similar conclusion (*see In re D.L.*, 93 Cal App 5th 144, 163, 310 Cal Rptr 3d 562, 579 [2023] [holding that the "good cause" provision of the California's gun licensing scheme, though invalid after *Bruen*, was severable and that the entire licensing scheme therefore was not facially unconstitutional); *Bey*, 108 Cal App 5th at 166, 328 Cal Rptr 3d at 920 [same]; *Rodriguez*, 496 Mass at 642, 267 NE3d at 92 [rejecting a facial challenge to Massachusetts' gun licensing scheme because the prohibition on firearm possession by felons or violent criminals was "consistent with the Second Amendment" and therefore the licensing scheme was constitutional in "at least 'some of its applications' "]).

“proper cause” requirement effectively rendered the entire licensing scheme unconstitutional—does not implicate this inquiry, and the constitutionality of the other provisions of the licensing scheme is not before us.⁴ We hold only that *Bruen* did not render the state’s entire gun licensing scheme unconstitutional because the “proper cause” provision is severable.

Accordingly, the order of the Appellate Division should be affirmed.

⁴ Although the case was decided on different grounds, we note that the Illinois Supreme Court also recently declined to apply the “historical tradition” framework when reviewing a facial challenge to the state’s licensing scheme, reasoning that “*Bruen*’s express endorsement of shall issue licensure obviates the need for this court to apply the historical-tradition component of the *Bruen* analysis to defendant’s facial challenge” (*People v Thompson*, 2025 IL 129965, ¶ 53, — NE3d — [2025]).

CANNATARO, J. (concurring):

Although I agree that the Appellate Division order should be affirmed, I would do so on the ground that defendant's appeal waiver bars appellate review of his claim that

New York’s criminal weapons possession statute facially violates the Second Amendment of the U.S. Constitution.

Until today, this Court had identified only five narrow types of claims that survive an appeal waiver, each implicating either the integrity of the process leading to the waiver or the courts’ power to accept and enforce it. Although facial constitutional challenges have been commonplace in the law for well over a century (*see e.g., Gladson v Minnesota*, 166 US 427, 429 [1897]), we have never previously suggested that public policy precludes defendants from agreeing to waive appellate review of such claims in exchange for a favorable plea deal. To the contrary, we have repeatedly concluded that constitutional arguments were foreclosed by appeal waivers. No public policy or societal interest justifies the majority’s departure from well-established precedent and interference with legally valid and socially beneficial plea bargains.

* * *

In 2022, the mother of defendant’s domestic partner called 911 and reported that defendant had violently attacked her daughter. While investigating the matter, an officer witnessed defendant approach the victim and her mother on the street and threaten, “Both of you are dead. I will kill you.” Adding credence to that threat, police discovered a nine millimeter pistol loaded with seven rounds of ammunition in the moped defendant used for work as a food-delivery driver. The gun was unregistered, and defendant did not have a

gun license. Indeed, defendant's prior felony conviction¹ likely disqualified him from obtaining a license even under the more permissive licensing regime this State enacted following the United States Supreme Court's decision in *New York State Rifle & Pistol Assn., Inc. v Bruen* (597 US 1 [2022]) (*see* Penal Law § 400.00 [1] [c]).

A grand jury indicted defendant for criminal possession of a weapon in the second degree (Penal Law § 265.03 [3]), a class C violent felony carrying a mandatory minimum prison sentence of 3½ years and a potential maximum sentence of 15 years (*see id.* § 70.02 [1] [b], [3] [b]). In advance of trial, defendant moved to dismiss the charges as unconstitutional under *Bruen* and the Second Amendment. When that motion was denied, defendant entered into a plea deal with the prosecution in which he agreed to forgo trial and plead guilty to a lesser charge, namely, attempted criminal possession of a weapon in the second degree (*see* Penal Law §§ 110.00, 265.03 [3]), in exchange for a sentence of probation. As a condition of the deal, the prosecution also required that defendant waive his right to appeal the conviction. Defendant accepted this condition and affirmatively waived his right to appeal, both orally and in writing, following consultation with his attorney and a lengthy colloquy with the court. The court accepted the deal, determining that defendant's plea and appeal waiver were knowingly, intelligently, and voluntarily made, and imposed the bargained-for sentence of probation.

¹ Defendant was previously convicted of armed robbery in Georgia and was sentenced to ten years in prison and ten years of probation for that offense.

Defendant nonetheless took an appeal from his judgment of conviction in which he attempted to revive his *Bruen*-based challenge. The Appellate Division unanimously affirmed, holding as a threshold matter that defendant's voluntary waiver of his right to appeal foreclosed appellate consideration his Second Amendment claim (225 AD3d 453, 453 [1st Dept 2024]). I agree.

This Court has long recognized that plea bargaining is “a vital part of our criminal justice system,” without which “New York’s law enforcement system would collapse” (*People v Seaberg*, 74 NY2d 1, 7 [1989]; accord *People v Thomas*, 34 NY3d 545, 557 [2019]; see generally *People v Selikoff*, 35 NY2d 227, 232-235 [1974], cert denied 419 US 1122 [1975]). “Aside from conserving judicial resources and providing finality in criminal proceedings, the plea bargaining process affords the accused the opportunity to obtain a conviction on reduced charges and more lenient punishment in a truncated process that hopefully starts the offender on the road to possible rehabilitation” (*Thomas*, 34 NY3d at 557 [internal quotation marks, brackets, and citation omitted]; *Seaberg*, 74 NY2d at 7; *Selikoff*, 35 NY2d at 232-235; see also *Santobello v New York*, 404 US 257, 261 [1971]). Although the process “necessarily includes the surrender of many guaranteed rights . . . when there is no constitutional or statutory mandate and no public policy prohibiting it, an accused may waive any right which he or she enjoys” (*Seaberg*, 74 NY2d at 7).

The plea bargain in this case, like so many others, was conditioned on defendant's agreement to waive not only the right to a trial but the right to appeal from his judgment of conviction. This Court endorsed that practice in *Seaberg*, broadly declaring that “no public policy preclud[es] defendants from waiving their rights to appeal as a condition of . . . plea

and sentence bargains” (*id.* at 10). To the contrary, “the public interest concerns underlying plea bargains generally are served by enforcing waivers of the right to appeal” (*id.*). “While important,” the right to appeal “is no more fundamental than the right to a jury trial” and all the concomitant due process protections afforded with it that are necessarily waived as part of any plea deal (*see id.* at 7). Moreover, “the final and prompt conclusion of litigation is an important goal of public policy,” and “the negotiating process serves little purpose if the terms of a carefully orchestrated bargain can subsequently be challenged” on appeal (*id.* at 8, 10 [internal quotation marks omitted]).

In view of these public policy considerations, this Court has stated that only a “narrow class of appellate claims” may be raised in the face of an appeal waiver (*see People v Muniz*, 91 NY2d 570, 574 [1998]). Although we have described this class in varying ways, the only claims we have historically recognized as excepted from the *Seaberg* rule are those implicating (1) the voluntariness of the plea, (2) the defendant’s competency to stand trial, (3) the constitutional right to a speedy trial, (4) the court’s jurisdiction over the case, or (5) the legality of the sentence imposed (*see People v Lopez*, 6 NY3d 248, 255 [2006]; *People v Campbell*, 97 NY2d 532, 535 [2002]; *Seaberg*, 74 NY2d at 9). As we explained in *Seaberg* itself, “[t]hese rights are recognized as a matter of fairness to the accused but they also embrace the reality of fairness *in the process itself* and, therefore, a defendant may not waive them” (*Seaberg*, 74 NY2d at 9 [emphasis added]).

More specifically, voluntariness challenges cannot be waived because they call into question whether a defendant actually understood and agreed to the plea and appeal waiver following a negotiation process free from coercion or deception (*see Thomas*, 34 NY3d at

559). Competency challenges are essentially a subset of voluntariness challenges: they cannot be waived because of the “inherent contradiction in arguing that a defendant may be incompetent, and yet knowingly or intelligently waive his right[s]” (*see People v Armlin*, 37 NY2d 167, 172 [1975]). Similarly, constitutional speedy trial claims are unwaivable because of the “inherently coercive” impact that severe trial delays can have on pleas and appeal waivers (*People v Blakley*, 34 NY2d 311, 313 [1974]). As we explained in *Seaberg*, such delays “may result in the loss of evidence or an accused’s inability to respond to criminal charges, thereby compelling innocent persons to plead guilty out of necessity” (74 NY2d at 9; *see also Blakley*, 34 NY2d at 314-315). Finally, challenges to the court’s jurisdiction or the legality of a sentence cannot be waived because they implicate judicial authority to accept and enforce the terms of even a voluntary plea deal and appeal waiver (*see People v McLaughlin*, 80 NY2d 466, 471 [1992]; *Campbell*, 97 NY2d at 535).

In the 36 years since *Seaberg*, this Court has not expanded the list of unwaivable appellate claims beyond these discrete categories implicating the integrity of the process leading to the plea bargain or the court’s authority to enforce that bargain. Over this period, we have in fact repeatedly held that claims involving constitutional rights can be waived (*see e.g., Thomas*, 34 NY3d at 552-553, 557-558, 564-565 [Fifth Amendment claim regarding the privilege against self-incrimination]; *People v Kemp*, 94 NY2d 831, 832-833 [1999] [Fourth Amendment suppression claim]; *People v Allen*, 86 NY2d 599, 602-603 [1995] [double jeopardy claim]). The Appellate Division has likewise held that an appeal waiver bars review of substantial constitutional issues, including a defendant’s right to retain counsel of his choosing (*People v Doyle*, 82 AD3d 564 [1st Dept 2011], *lv denied*

17 NY3d 805 [2011]) and constitutional challenges to New York’s recidivist sentencing laws (*People v Rodriguez*, 82 AD3d 794 [2d Dept 2011], *lv denied* 17 NY3d 809 [2011]; *People v Rodriguez-Ortiz*, 23 AD3d 204 [1st Dept 2005], *lv denied* 6 NY3d 817 [2006]).

Today’s decision represents a profound and troubling departure from precedent. The majority now holds that appellate review of a facial constitutional challenge can never be waived as part of a plea bargain. Even if the waiver was knowingly, intelligently, and voluntarily made, the trial court had jurisdiction to accept it, the negotiated sentence is legal, and the challenge itself is patently lacking in merit, an appellate court must entertain and resolve it. Apparently, this holding applies not just to Second Amendment challenges, but to any argument that a criminal statute is unconstitutional on its face, irrespective of the particular constitutional right or doctrine raised, or whether it implicates the integrity of the process that led to the waiver.

The majority fails to identify any public policy or societal interest that rationally justifies opening the doors of appellate courts to such a practically innumerable assortment of waived facial constitutional challenges. My colleagues assert only that there is a “very high bar” to succeed on a facial challenge, and that in the rare event a defendant does succeed, the resulting decision will preclude similar prosecutions (*see* majority op at 6). Because of this potential preclusive effect, the majority opines, a facial constitutional challenge “goes squarely to the fairness in the process itself and transcends an individual defendant’s concerns to implicate a larger societal interest in its correct resolution” (*see id.* at 7 [internal quotation marks and citation omitted]).

As legal support, the majority relies heavily on *People v Muniz*, in which we described the “previously identified” *Seaberg* exceptions as encompassing claims that implicate, inter alia, “a public policy consideration that transcends the individual concerns of a particular defendant to obtain appellate review” (*Muniz*, 91 NY2d at 574; see majority op at 5). Even under a plain reading of that language,² however, the relevant question is not whether the consequences of hearing a claim will “transcend” the underlying case—a possibility that exists with all appeals by virtue of our common-law system and stare decisis. Rather, the question is whether there is a *public policy consideration* (as opposed to a mere personal interest) that overrides the compelling societal interests favoring the enforcement of plea bargains.

Seaberg was very specific and narrow in describing the type of public policy considerations that are important enough to meet that standard. As the majority acknowledges, this Court agreed with the defendant in *Seaberg* that constitutional speedy trial claims are illustrative of “matters in which the interests of society transcend the individual concerns of the defendant” (74 NY2d at 9). The majority nonetheless relegates to a dismissive footnote our substantive reasoning that “[s]ociety has a recognized interest in speedy trials because trial delay may result in the loss of evidence or an accused’s inability to respond to criminal charges, thereby compelling innocent persons to plead guilty out of necessity. Because of *this* societal interest, a defendant may not waive such

² It is worth noting that the quoted phrase derives from an argument made by the defendant in *Seaberg*; it is not how this Court traditionally described the classes of unwaivable claims (see *Seaberg*, 74 NY2d at 9).

claims” (74 NY2d at 9 [emphasis added]). As discussed above, our concern was specifically that “the nature of the speedy trial guarantee renders [an appeal waiver] condition inherently coercive in a plea bargaining situation” (*Blakley*, 34 NY2d at 313). The majority also ignores our statement in *Seaberg* that even where a claim may be said to “implicate society’s interest in the integrity of the criminal process,” enforcement of an appeal waiver is warranted if “that interest is protected by the procedural and substantive requirements imposed on the Trial Judge before the defendant may be sentenced” (*Seaberg*, 74 NY2d at 9).

The majority does not identify any public policy consideration or societal interest at play here that is remotely analogous to the public interest against coercive pleas discussed in *Seaberg* and *Blakeley*. The alleged unconstitutionality of New York’s criminal weapons possession statute is not the kind of defect that raises a risk of innocent persons pleading guilty out of necessity. Even if it does, the extensive procedural and substantive requirements imposed on trial judges before appeal waivers are accepted adequately protect defendants from being coerced into waiving appellate review of their *Bruen*-based Second Amendment claims (*see generally Thomas*, 34 NY3d at 558-563). Here, the record shows that defendant’s appeal waiver was the quid pro quo for a “highly beneficial bargain”—a plea to a lesser charge and sentence to only five years of probation, compared to the mandatory prison sentence of between 3½ and 15 years that he would face had he been

convicted after trial³—and the trial court followed proper procedure to ensure that the bargain was fair and voluntary (*see id.* at 564; *see also Allen*, 86 NY2d at 603).

The majority gestures at society’s interests in a fair criminal process and the “correct resolution” of facial constitutional challenges, but never concretely explains how enforcement of defendant’s appeal waiver threatens those interests (*see* majority op at 7 [internal quotation marks omitted]). The enforcement of defendant’s waiver does not prevent defendants facing similar prosecutions from preserving and maintaining their own facial constitutional challenges, whether by deciding not to plead guilty or simply by carving such claims out of their appeal waivers. Nor does the enforcement of appeal waivers lead to the *incorrect* resolution of facial challenges. All it does is reserve the resolution of such claims for future cases, in which the right to appeal was not bargained away as “the quid pro quo to the reduced plea bargain” (*see Thomas*, 34 NY3d at 564). To the extent the majority suggests there is a societal interest in facial challenges being resolved at the earliest possible opportunity, that rationale runs headlong into our statement in *Seaberg* that “there is no affirmative public policy to be served in fostering appeals or prohibiting their waiver” (74 NY2d at 8). Surely, if a criminal statute is unconstitutional in all its applications, there is ample opportunity for courts to take proper action without upsetting the compelling societal interests that underlie plea bargaining or permitting a defendant to “eviscerate the favorable plea bargain he knowingly and voluntarily accepted”

³ It is unclear from the record whether defendant’s prior felony conviction increased his sentencing exposure. If it did, one can imagine that a negotiated sentence of probation would have been even more attractive.

(*Thomas*, 34 NY3d at 565; *see also id.* at 557-558; *Seaberg*, 74 NY2d at 7-8). After all, it only takes one preserved and maintained facial challenge to vindicate the public interest in striking down a facially unconstitutional statute.

Further, while I agree with the majority that the Appellate Division erred in conflating our standards regarding waiver with those concerning preservation (majority op at 7), it is equally erroneous to suggest that precedent addressing our preservation requirement is irrelevant to this discussion. As a constitutional limitation on this Court’s appellate jurisdiction, our preservation requirement embodies *the highest* of public policies regarding the scope of appellate review, and there are obvious conceptual links between our preservation and waiver standards. Just two years ago, we held that *Bruen*-based challenges do not qualify for the “mode of proceedings exception” to our preservation requirement because they do not implicate “the essentially validity of the proceedings conducted below” (*People v Cabrera*, 41 NY3d 35, 43 [2023]). The wall the majority attempts to erect today between our waiver and preservation standards does not hide the cognitive dissonance between that conclusion in *Cabrera* and the majority’s suggestion today that the same types of challenges *do* implicate the integrity of the criminal process for waiver purposes. A more logically consistent conclusion would be that, if a defendant can effectively waive a facial constitutional challenge by never asserting such claim in the first place, it does not offend any compelling societal interest for a defendant to waive the right to appellate review after their claim has been fully litigated and rejected at the trial level (*cf. Seaberg*, 74 NY2d at 7 [one reason the right to appeal is waivable is because, “as

a practical matter, defendants frequently lose their right to appeal, by forfeit, when they fail to exercise it or abscond”]).

The majority also fails to articulate a public policy consideration that meaningfully distinguishes facial constitutional challenges from other types of claims. For instance, claims that a Penal Law statute has been incorrectly interpreted have similarly broad stare decisis effect. If successful, “the State will lack authority to prosecute or punish the defendant or anyone else for the conduct at issue” (majority op at 6). If anything, the public policy considerations that favor the enforcement of appeal waivers are stronger with respect to facial constitutional challenges than other types of claims. Facial challenges have been characterized as “disfavored” because they “often rest on speculation,” “raise the risk of premature interpretation of statutes on the basis of factually barebones records,” and “run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it” nor “formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied” (*Washington State Grange v Washington State Republican Party*, 552 US 442, 450 [2008] [internal quotation marks omitted]). Despite this, facial constitutional challenges are common and can be asserted under many different constitutional provisions—they are not a narrow category like the other exceptions we have recognized (*see* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Calif L Rev 915, 917-918 [Aug. 2011]). Nor are the stare decisis consequences of a successful facial challenge always obvious and straightforward.

Take *Bruen*, for instance. *Bruen* significantly altered Second Amendment jurisprudence, not only by recognizing a fundamental constitutional right to carry a firearm in public for the first time in this Nation’s history, but by creating a “historical tradition” test for Second Amendment claims (*see Bruen*, 597 US at 17). In the wake of *Bruen*, Second Amendment challenges have proliferated across the country. While New York data is not readily available, “[f]ederal trial courts addressed 420 claims in the post-*Bruen* year, roughly equivalent to the number of Second Amendment claims addressed by district courts from 2008 through 2014” (Eric Ruben et al., *One Year Post-Bruen, an Empirical Assessment*, 10 Va L Rev Online 20, 30 [Feb. 2024]). That pace only appears to be increasing (*see* Chip Brownlee, *More Than a Thousand Felons Have Challenged Their Gun Bans Since the Supreme Court’s Bruen Decision*, The Trace [Sept. 12, 2024], available at <https://www.thetrace.org/2024/09/felon-gun-ban-law-bruen-supreme-court> [last accessed Nov. 15, 2025] [between 2022 and 2024, federal judges “issued on average two *Bruen*-related rulings each working day”]). These challenges have been far from uniform: they target sensitive-place restrictions, age requirements, background checks, insurance mandates, safe storage requirements, ownership of firearms by convicted felons, assault-weapons bans, and sentencing enhancements, among other areas (*see* Ruben, 10 Va L Rev Online at 35-40).

Responding to and resolving these challenges imposes substantial burdens on prosecutors, courts, and the Attorney General, who is tasked with defending the constitutionality of state statutes. Although there is, of course, a societal interest in constitutional questions being correctly resolved, that is best accomplished through an

orderly and deliberate process. Plea bargaining and appeal waivers facilitate the orderly presentation of consequential constitutional arguments to appellate courts by ensuring that those courts can focus their attention on the appeals that litigants themselves have deemed most worthy of pressing forward.

In the end, what we are left with following today's decision is the suggestion that an appeal waiver is unenforceable whenever this Court in its subjective policy judgment feels that appellate review of a claim would be beneficial. This unpredictability regarding the enforcement of appeal waivers not only incentivizes unnecessary litigation, it disincentivizes the People from offering as favorable terms in plea negotiations. Indeed, although one of the problems with unintended consequences is that they defy prediction, it is not difficult to imagine that, going forward, prosecutors will offer less favorable plea deals to defendants who assert facial constitutional challenges.

None of this is beneficial to criminal defendants, the appellate review process, or society at large. For over a century, facial constitutional challenges have been correctly and efficiently resolved without the exception the majority recognizes today. There is simply no reason or need for this Court to consider whether defendant had a constitutional right to carry a loaded, unlicensed firearm in his moped, after he knowingly and voluntarily waived the right to appeal that argument in return for a lenient sentence. I would therefore affirm the Appellate Division on the ground that defendant's appeal waiver forecloses appellate review of his claim.

Order affirmed. Opinion by Judge Halligan. Chief Judge Wilson and Judges Rivera and Troutman concur. Judge Cannataro concurs in result in an opinion, in which Judges Garcia and Singas concur.

Decided November 24, 2025

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM – PART 77

THE PEOPLE OF THE STATE OF NEW YORK

-against-

NOTICE OF MOTION TO
DISMISS

OMAR JOHNSON ,

Defendant.

Ind. No. 73320-2022

PLEASE TAKE NOTICE, that upon the annexed affirmation of Julema LaForce, Esq. and the prior proceedings in this case, the undersigned will move this Supreme Court, Criminal Term, Part 77, on the 28th day of November, 2022, at 9:30, or as soon thereafter as Counsel may be heard for an Order dismissing Counts 1- 4 of indictment pursuant to the Second Amendment of the United States Constitution.

DATED: Bronx, New York
November 2, 2022



Julema LaForce, Esq.
THE BRONX DEFENDERS
360 East 161st Street
Bronx, NY 10451
Julemal@bronxdefenders.org

TO: DARCEL D. CLARK
District Attorney
Bronx County
Attn: A.D.A. Joel Wright
Served via email at BXDAMotions@bronxda.nyc.gov

Clerk of the Supreme Court, Criminal Term
Bronx County

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM -- PART 24

THE PEOPLE OF THE STATE OF NEW YORK

-against-

AFFIRMATION

OMAR JOHNSON ,

Ind. No. 73320-2022

Defendant.

Julema LaForce, an attorney duly admitted to practice law in New York State, affirms the following to be true:

1. I am associated with The Bronx Defenders, and am attorney of record for Omar Johnson . I am familiar with the facts of this case and the prior proceedings held in it.
2. This affirmation is made in support of Omar Johnson 's Motion to Dismiss.
3. Unless otherwise indicated, all allegations of fact are based upon inspection of the record in this case, initial investigations of the facts and circumstances surrounding the incident, and discussions with the assigned assistant district attorney, and are made on information and belief.
4. Mr. Johnson was arrested on July 29, 2022, and charged with P. L.§ 265.03(3), Criminal Possession of a Weapon in the Second Degree, P. L.§ 265.01-b(1), Criminal Possession of a Firearm, P. L.§ 265.03(3), Criminal Possession of a Weapon in the Fourth Degree, and Possession of Ammunition.
5. On July 29, 2022, Mr. Johnson was in front of 2529 Grand Avenue on his moped. Mr. Johnson had committed no traffic infraction or crime or any other

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unlawful action. After Mr. Johnson was off his moped, the officers surrounded themselves around Mr. Johnson. Mr. Johnson was not engaged in any criminal activity or furtive movements. He had not been about to, or in the process, of committing any unlawful action. Mr. Johnson was not acting in any suspicious way. He had no possession of any weapon or contraband in plain view. He had not engaged, or were about to engage, in the commission of any crime or violation.

6. A firearm is alleged to be recovered from an area under Mr. Johnson dominion and control. Mr. Johnson did not use the gun, nor is there any evidence he intended to use it in a manner unlawfully against another other than use in self-defense. There is no evidence showing that Mr. Johnson brandished or used a gun menacing. Mr. Johnson does not have a violent felony record. Finally, Mr. Johnson is indigent and couldn't afford to pay gun licensing fees.

7. At the time of Mr. Johnson's charged conduct, P.L. § 265.03(3) made it a class C violent felony to possess a loaded firearm outside of a person's home or place of business unless such person had a license to carry a firearm pursuant to P.L. § 400.00. In order to obtain a license to carry a firearm, a licensing officer had to find "proper cause" to issue such license, and even then, the officer had discretion to deny the license. An individual's generalized interest in self-defense could not establish "proper cause."

8. In *New York State Rifle & Pistol Assn v. Bruen*, issued on June 23, 2022, the United States Supreme Court struck down this licensing scheme as violating the Second Amendment of the United States Constitution. Slip Op. No. 20-843 (June 23, 2022).

9. Mr. Johnson was charged under P.L. § 265.03(3) for no other reason than he allegedly possessed a firearm without a license to carry such firearm under an unconstitutional licensing scheme.

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DATED: Bronx, New York
November 2, 2022

Julema LaForce

Julema LaForce, Esq.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, CRIMINAL TERM -- PART T24

THE PEOPLE OF THE STATE OF NEW YORK

-against-

MEMORANDUM OF LAW

OMAR JOHNSON ,

Ind. No. 73320-2022

Defendant

MEMORANDUM OF LAW

I. The Second Amendment Protects Mr. Johnson Right to Carry a Firearm in Public

Mr. Johnson respectfully requests that this Court dismiss with prejudice all the firearms and ammunition charges, Counts 1 through 3 of the indictment pursuant to C.P.L. §§ 210.20(1)(a), 210.25, and the incorporated Second Amendment. Criminal Procedure Law § 210.20(1)(a) allows the accused to move to dismiss an indictment, or counts of an indictment, when "such indictment or count is defective, within the meaning of section 210.25." "An indictment or a count thereof is defective within the meaning of [C.P.L. § 210.20(1)(a)] when the charged statute is unconstitutional. C.P.L. § 210.25(3). The Supreme Court of the United States has held that the incorporated Second Amendment protects the right of individuals to possess and carry firearms and ammunition. As such, these counts must be dismissed as violations of this right.

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear

Arms, shall not be infringed.” U.S. Const. Amend. II. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment guarantees an “individual right to possess and carry weapons in case of confrontation.” *Id.* at 592. This right of “the people” to keep and bear arms for self-defense belongs to “all members of the political community, not an unspecified subset.” *Id.* at 580; *see also id.* at 581 (announcing a “strong presumption” that the Second Amendment right “belongs to all Americans.”). “[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010).

II. The Indictment Should Be Dismissed Because, but for New York State’s Unconstitutional Gun-Licensing System, Mr. Johnson Would Have Been Able to Legally Possess the Firearm He Is Charged with Possessing

In order to lawfully carry a firearm in public in New York, the government requires citizens to first obtain a license. To grant a license to an applicant, among other criteria, the licensing officer must find that “proper cause exists.” P.L. § 400.00(2)(f). “Proper cause” has been defined in case law as “a special need for self-protection distinguishable from that of the general community.” *See In re Klenosky*, 75 AD2d 793 (1st Dept. 1980). New York law criminalizes possession of a firearm without first obtaining this license. P.L. § 265.03(3); *see also People v. Hughes*, 22 N.Y.3d 44, 50 (2013) (“New York’s criminal weapon possession laws prohibit only *unlicensed* possession of handguns”) (emphasis in original). Recently, in *New York State Rifle & Pistol Assn v. Bruen*, the United States Supreme Court struck down New York’s public carry licensing system, holding that it unconstitutionally interferes with citizens’ Second Amendment rights. Slip Op. No. 20-843 (June 23, 2022). The Court stated that “New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.” *Id.*

at 63. The Court explicitly took issue with the discretionary nature of New York’s licensing scheme, contrasting it to systems in other states that “contain only ‘narrow, objective, and definite standards’ guiding licensing officials, rather than requiring the ‘appraisal of facts, the exercise of judgment, and the formation of an opinion’” as New York’s system does. *Id.* at 30, n. 9 (internal citations omitted).

In this case, Mr. Johnson is facing criminal charges solely on the basis that he did not obtain a license to carry a firearm. Because the licensing system is unconstitutional, this Court must dismiss the indictment.

The Constitution does not require Mr. Johnson to first attempt to obtain a license under the facially unconstitutional licensing scheme, only to be denied. *Smith v. Cahoon*, 283 U.S. 553, 562 (1931); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1939). The Court addressed this issue in analogous circumstances in *Staub v. City of Baxley*, 355 U.S. 313 (1958). In that case, the appellant was convicted of violating a city ordinance that prohibited solicitation of membership for an organization without a permit. *Id.* at 314. The appellant did not apply for the appropriate license prior to soliciting membership from the employees of another company, in direct contravention of the ordinance. *Id.* at 315. However, the ordinance granted the mayor and council of the city “unfettered discretion” in their decision to grant or refuse the required permit, “without semblance of definitive standards or other controlling guides.” *Id.* at 322. The Court struck down the licensing scheme as invalid on its face, as it made enjoyment of First Amendment freedoms “contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgement by the First Amendment[.]” *Id.* At 325. In reaching its decision to reverse the appellant’s conviction, the Court explained that “[t]he decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a

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judgment of conviction under such an ordinance.” *Id.* at 319. “The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.” *Id.*

The Court in *Bruen* held that the rights bestowed by the Second Amendment should be treated no differently than rights protected by any other amendment, including the First Amendment. “The constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’” *Bruen*, No. 20-843 at 62. Therefore, the reasoning in *Staub* applies equally in this case. Just as the appellant in *Staub* could engage in the exercise of their right of free expression despite having made no attempt to secure a permit under the facially invalid statute, so too was Mr. Johnson permitted to freely exercise his right to carry a firearm in the face of an unconstitutional licensing law without first attempting to secure a license.

The D.C. Court of Appeals has specifically addressed the issue of a defendant’s failure to seek a license in the context of firearm possession. In *Heller*, the Supreme Court held that the Second Amendment guarantees “an individual right to possess and carry weapons in case of confrontation,” invalidating Washington, D.C.’s near total ban on handgun possession. 554 U.S. at 592. In the wake of *Heller*, the D.C. Court of Appeals held that defendants could move to dismiss indictments charging them with firearms possession under the unconstitutional statute, even where they never applied for licenses for the firearms under the statute. *See Plummer v. United States*, 983 A.2d 323, 341-42 (D.C. 2009) (citing *Chicago v. Atchinson, Topeka & Santa Fe Ry. Co.*, 357 U.S. 77, 89 (1958)). This was so even where the defendant had pled guilty to unlawful possession prior to the decision in *Heller*. *Magnus v. United States*, 11 A.3d 237 (D.C. 2011).

More specifically, the court in *Magnus* held that, “unless the government proves the

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defendant was disqualified from exercising his Second Amendment rights,” it is “impermissible under the Second Amendment to convict a defendant” for unlicensed possession of a firearm if an unconstitutional licensing scheme made it “impossible” for the defendant to obtain a license. *Id.* at 242-43. Here, the “proper cause” requirement made it “impossible” for Mr. Johnson to obtain a license to carry a firearm because he could not distinguish his interest in self-defense from that of the general community. New York courts have made clear that, to obtain a license to carry a firearm, the applicant must provide evidence “of personal threats, attacks or other extraordinary danger to personal safety.” *Bruen*, No. 20-843 at 3 (citing *In re Martinek*, 294 A.D.2d 221, 222 (2002)). The New York licensing law is “almost engineered” to preclude “most citizens” from exercising a fundamental, enumerated constitutional right. *See Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (addressing Washington D.C.’s nearly identical “good cause” requirement for gun licenses).

Mr. Johnson is also charged with P. L. 265. 01-b(1) , Criminal Possession of a Fireman , P. L. 265. 01(1) and A. C. 10-131(i)(2), Possession of Ammunition. These charges are lesser included offenses of P.L. § 265.03(3) and the only basis for the charges is that Mr. Johnson did not have a license to carry a firearm. Mr. Johnson is facing these charges only because he did not obtain a license under an unconstitutional licensing scheme. They must therefore be dismissed as well.

Because the Supreme Court has found New York’s gun licensing scheme to be unconstitutional, and because the prosecution cannot show that Mr. Johnson was “disqualified from exercising his Second Amendment rights,” this Court must dismiss the indictment *See Magnus*, 11 A.3d 237 at 242-43.

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WHEREFORE, the undersigned requests that the foregoing motions be granted and requests such other and further relief as this Court may deem just and proper.

DATED: Bronx, New York
November 2, 2022



Julema LaForce Esq.
Attorney for Omar Johnson

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX, CRIMINAL DIVISION PART T24

THE PEOPLE OF THE STATE OF NEW YORK

-against-

Affirmation of Service by E-mail

OMAR JOHNSON ,

IND. NO. 73320-2022

Defendant

I, Julema LaForce, an attorney duly admitted to practice law in the State of New York, under penalty of perjury and pursuant to Rule 2106 of the CPLR, hereby affirm that the following statements are true, except those based upon information and belief, which I believe to be true:

1. I am an attorney at The Bronx Defenders. I am over eighteen years of age and am not a party to this action.
2. On November 2, 2022 I served a true copy of Bruen’s Motion to Dismiss upon ADA Wright, the assigned Assistant District Attorney (“ADA”) in this action, by transmitting the same via electronic means to the following e-mail address:
BXDAMotions@bronxda.nyc.gov, which is the email address provided by such ADA for service upon written consent.
3. On November 2, 2022 I served a true copy of the attached Omar Johnson Bruen’s Motion to Dismiss upon New York Attorney General Letitia James by mailing a true copy of the attached papers, enclosed and properly sealed in a postpaid envelope, which I caused to be deposited in an official depository under the exclusive care and custody of the United States Postal Services within the State of New York addressed to Attorney General Letitia James the Attorney General of New York at: Office of the Attorney General, 28

Appendix C

Liberty Street, New York, NY 10005, ATTN: Managing Attorney's Office/Personal
Service.

DATED: November 2, 2022

Bronx, NY

Julema LaForce
Julema

LaForce, Esq.

The Bronx

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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 77

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

**AFFIRMATION IN OPPOSITION
TO DEFENDANT’S MOTION
TO DISMISS**

- against -

OMAR JOHNSON,

Indictment No. Ind-73320-22

Defendant.
-----X

I, **Allison Kline**, an attorney duly admitted to practice before the Courts of this State, affirm the following under penalty of perjury and pursuant to CPLR Rule 2106:

1. I am an Assistant District Attorney in the Office of **DARCEL D. CLARK**, the District Attorney of Bronx County.

2. I have prepared this affirmation on information and belief based on records maintained in this Office that I believe to be true and accurate, and defendant’s papers and Exhibits.

3. The People reserve the right to provide additional documentation as needed or requested by this Court.

4. On August 5, 2022, the defendant was indicted under indictment number Ind-73320-22, defendant is charged with Criminal Possession of a Weapon in the second degree (P.L. § 265.03(3)), and other related charges.

5. On November 2, 2022, the defendant filed the present motion.

6. The case is next scheduled in part 77 for Decision on November 28, 2022.

7. For the reasons set forth in the accompanying memorandum of law, this Court should dismiss defendant’s motion in its entirety.

ARGUMENT

Background: New York’s Gun Licensing Scheme and the *Bruen* Decision

New York’s Gun Licensing Scheme

8. Under New York law, it is illegal to possess an unlicensed firearm. The degree of crime depends on various factors, including whether the firearm is loaded, whether it is possessed outside of one’s home or place of business, and whether the defendant harbors the intent to use the firearm unlawfully.

9. For instance, under Penal Law § 265.01(1), a person who possesses “any firearm” is guilty of Criminal Possession of a Weapon in the Fourth Degree, a class A misdemeanor. If the defendant has previously been convicted of a crime, the charge can be elevated to Criminal Possession of a Weapon in the Third Degree, a class D felony. Penal Law § 265.02(1). Additionally, possession of a loaded firearm outside one’s home or place of business, possession of a loaded firearm by a person previously convicted of a crime, or possession of any firearm with the intent to use it unlawfully against another constitutes a class C felony offense. Penal Law §§265.03(1)(b), (3).

10. A person may avoid criminal liability for possession of a firearm if he or she has a valid gun license issued by a New York licensing authority. Pertinent here, under Penal Law § 265.20(3), a licensed owner of a pistol or a revolver is exempt from prosecution from weapon possession under the above-referenced statutes (as well as other, specified weapon possession statutes). Specifically, under section 265.20(3), the possession of a valid New York gun license is an affirmative defense to the charge – the prosecutor is not required to prove unlicensed possession in order to present a legally sufficient case. *See People v. Washington*, 209 A.D.2d 162, 163 (1st Dept. 1995). Further, New York does not give effect to out-of-state gun licenses, except in certain

limited circumstances such as police officers conducting official business in New York and nonresidents attending certain competitive shooting events. *See* 1997 N.Y. Atty. Gen. Op. 14, 1997 WL 136367 (March 13, 1997).

11. To obtain a gun license in New York, an applicant must submit to an investigation, and the licensing officer must find that “all statements in a proper application for a license are true.” Penal Law § 400.00(1). The applicant must be 21 years of age or older and of good moral character. Penal Law § 400.00(1)(a)-(b). An applicant may be disqualified if, among other things, he or she has a prior conviction for a felony or other serious offense, has an outstanding warrant for a felony or a serious offense, is a fugitive from justice, has a history of mental illness, or has an outstanding order of protection – or if there is any other “good cause” for the denial of the license. *See* Penal Law § 400.00(1)(c)-(n).

12. Further, at the time of the instant offense, to obtain a license permitting the carrying of a concealed firearm outside of one’s home or place of business, an applicant was required to show “proper cause,” *see* Penal Law § 400.00(2)(f) (former), which was defined as “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Matter of Klenosky v. New York City Police Dept.*, 75 A.D.2d 793 (1st Dept. 1980), *aff’d*, 53 N.Y.2d 685 (1981).¹

The Supreme Court’s Second Amendment Decisions: *Heller* and *Bruen*

13. Contrary to defendant’s argument, the Supreme Court has never held that a person has the right to possess an unlicensed firearm. Nor has the Court prohibited states and local

¹ Following the *Bruen* decision, the Legislature eliminated the “proper cause” requirement for obtaining a concealed carry permit. In its place, the Legislature substituted additional requirements, including the completion of a training class, an expanded background check including character references, a review of social media accounts, an in-person interview, and an expanded list of disqualifying prior convictions. *See* L.2022 Ch.371 (enacted July 1, 2022).

governments from requiring that a person obtain a permit in order to carry a handgun in public. Further, the Court has not prohibited states and local governments from making a distinction between the possession of a handgun in the home and in a public place. Instead, as demonstrated below, the Court has held only that (1) a locality may not enact a *complete* ban on the possession of handguns in the home for self-defense and (2) a law-abiding citizen – who has submitted to a full background check – may not be denied a concealed carry permit on the ground that he has failed to demonstrate a greater need than other members of the public to carry a handgun for self-defense.

14. The pertinent decisions can be briefly summarized. In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Supreme Court held that the District of Columbia’s “ban on handgun possession in the home violate[d] the Second Amendment, as [did] its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” In *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), the Court applied this right to possess a firearm to the states.

15. Critically, in *Heller*, the Court made clear that “the right secured by the Second Amendment is not unlimited.” *Heller*, 554 U.S. at 626. The Court observed that the right to keep and bear arms “was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* For instance, the Court declared that “nothing” in the *Heller* decision “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” *Id.* The Court added that the Second Amendment did not prohibit localities from enacting “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27. The Court noted, too, that it “identif[ied] these presumptively lawful

regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n.26; *accord McDonald*, 561 U.S. at 786.

16. The Court’s recent decision in *Bruen* did not disturb those holdings. In *Bruen*, two individual plaintiffs and the New York State Rifle and Pistol Association challenged New York’s “proper cause” requirement for the issuance of a concealed carry permit. The two individual plaintiffs were “law-abiding, adult citizens” of New York State who had applied for “unrestricted” licenses to carry a handgun in public. *See Bruen*, 142 S. Ct. at 2124-25. Both plaintiffs submitted to – and passed – the background checks required at the time and were issued restricted licenses, which allowed them to carry handguns outside the home for certain limited purposes, such as hunting and target shooting. However, because the plaintiffs had not demonstrated a special need to carry a concealed weapon in public for self-defense, the licenses prohibited them from carrying their weapons in areas typically frequented by the general public. *See id.*

17. In *Bruen*, the Supreme Court considered a narrow question: whether New York could require a law-abiding citizen who applied for a concealed carry permit to demonstrate “proper cause” – that is, a “special need” to carry a weapon in public for self-defense. *See Bruen*, 142 S. Ct. at 2123. The Court issued a comparably narrow ruling, holding that the Second Amendment protects the right to carry a weapon in public for self-defense, which may not be conditioned on “demonstrating to government officers some special need.” *Bruen*, 142 S. Ct. at 2156. The Court held, therefore, that “New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.” *Id.*

18. Significantly, the Court did not disturb any other aspect of New York’s gun licensing scheme. In fact, the Court reiterated that the Second Amendment right was subject to “well-

defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms.” *Bruen*, 142 S. Ct. at 2138. Instead, in invalidating New York’s “proper cause” requirement, the Court focused on the level of discretion that this standard conferred on licensing officers. The Court observed that 43 states issued “concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability.” *Id.* at 2123. The Court declared that nothing in its “analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes, under which a general desire for self-defense is sufficient to obtain a [permit].” *Id.* at 2138 n.9 (internal quotation omitted). The Court added that, in contrast to New York’s “proper cause” rule, “these licensing regimes do not require applicants to show an atypical need for armed self-defense.” *Id.* The Court emphasized that the regimes of the 43 other states, “which often require applicants to undergo a background check or pass a firearms safety course,” were proper, as they were “designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens.’” *Id.* (quoting *Heller*, 554 U. S. at 635).

19. Concurring in *Bruen*, Justice Kavanaugh (joined by the Chief Justice) observed that “the Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense.” *Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring). Justice Kavanaugh remarked that the “shall-issue” licensing regimes employed by 43 states passed constitutional muster – and 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 2161-62. Justice Kavanaugh recounted the holding of *Heller* that “the Second Amendment

allows a variety of gun regulations,” including “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 2162 (Kavanaugh, J., concurring) (internal quotation marks omitted).

20. Justice Alito echoed those comments, observing that the Court had not “disturbed anything that we said in *Heller* or *McDonald* ... about restrictions that may be imposed on the possession or carrying of guns.” *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring). Justice Alito added that the *Bruen* “holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun.” *Id.*

21. Thus, the Supreme Court’s opinion in *Bruen* – along with concurring opinions joined by three of the six Justices in the *Bruen* majority – make clear that New York may continue to require that a person obtain a license to purchase or possess a firearm, and it may continue to require that a person obtain a concealed carry permit in order to carry a handgun in public. The only caveat is that, when a person applies for a concealed carry permit, the state may not require the applicant to show a “special need” to carry a firearm for self-defense. In all other respects, the Court left New York’s licensing scheme undisturbed.

Argument: Defendant’s motion to dismiss the weapons charges should be denied.

Defendant lacks standing to raise a Second Amendment claim, because unlike the plaintiffs in *Bruen*, he did not apply for a gun license.

22. Initially, defendant lacks standing to challenge the application of New York’s gun licensing laws to him, because unlike the plaintiffs in *Bruen*, defendant did not attempt to obtain a gun lawfully, nor did he apply for a license. Courts have long held that if a defendant “failed to apply for a gun license in New York, he lacks standing to challenge the licensing laws of the state.”

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United States v. Decastro, 682 F.3d 160, 164 (2d Cir. 2012); accord *People v. Miller*, 2022 WL 2137357, at *1 (Sup. Ct. Bronx Co. Apr. 12, 2022). After all, as a general rule, a person may not challenge the constitutionality of a regulatory scheme without first making a good faith effort to “submit to the challenged policy.” *Decastro*, 682 F.3d at 164; see *Allen v. Wright*, 468 U.S. 737, 746, 755 (1984) (parents lacked standing to challenge the tax-exempt status of allegedly racially discriminatory private schools to which their children had not applied); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972) (plaintiff lacked standing to challenge the allegedly discriminatory membership policy of a club to which he never applied).

23. There is a good reason for this rule. As explained, in *Bruen*, the Supreme Court did not hold that citizens have an unfettered right to carry concealed weapons in public. Nor did the Court invalidate New York’s laws criminalizing the unlicensed possession of firearms. And, the Court made clear that individuals with prior felony convictions or a history of mental illness, among other things, may be denied the right to possess a gun. The Court merely held that a law-abiding citizen applying for a concealed carry permit cannot be required show “proper cause” – that is, an “atypical need for armed self-defense.” *Bruen*, 142 S. Ct. at 2138 n.9.

24. Thus, because the Supreme Court left the large majority of New York’s gun licensing laws intact – including the requirement of a background check and criminal record check – it would be anomalous to permit defendant to challenge those regulations without submitting to a background check. Because defendant did not submit to the licensing process here, he should not be heard to raise a Second Amendment challenge to the weapons charges. *Decastro*, 682 F.3d at 164.

25. The Court’s First Amendment jurisprudence – see, e.g., *Staub v. City of Baxley*, 355 U.S. 313 (1958) – does not alter this conclusion. After all, there are critical differences between

the First and Second Amendment rights. As explained, the right to bear arms can be denied to people whose backgrounds indicate that their possession of a weapon poses a danger to the public. By contrast, individuals need not submit to a background check before exercising their First Amendment right to speak. A person whose freedom of speech is restricted by an unconstitutional licensing regime need not, therefore, submit to a licensing process in order to challenge the constitutionality of the licensing scheme. By contrast, because states have the right to impose rules regarding who may own a firearm, a prospective gun owner must submit to the process – including a full background check – before asserting his Second Amendment rights in court. Indeed, as noted, the plaintiffs in *Bruen* submitted to – and passed – background checks before suing to challenge the denial of their applications for unrestricted carry permits.

26. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), is likewise inapposite. In *Shuttlesworth*, the Court reversed the conviction of a Black minister for leading a peaceful civil rights protest, in 1963 Alabama, without obtaining a permit. The Court ruled that the minister could “ignore” Alabama’s blatantly unconstitutional permitting law – which gave the city “virtually unbridled and absolute power” to prohibit demonstrations – in order to exercise “the right of free expression.” *Id.* 148-51. Obviously, there is a stark difference between leading a peaceful civil rights protest in the segregated south and carrying an illegal, unlicensed firearm on the streets of New York. Alabama’s parade permitting law was – as the Supreme Court recognized in *Shuttlesworth* – being used as a tool of oppression to suppress protected speech. By contrast, as the Supreme Court recognized in *Heller* and reiterated in *Bruen*, gun licensing schemes are permissible in order to permit public safety. While Reverend Shuttlesworth was justified, under the First Amendment, in ignoring Alabama’s unconstitutional “prior restraint” on speech, *see id.*

at 151, defendant was not permitted to ignore the perfectly valid aspects of New York’s licensing scheme that rendered his conduct illegal here.

27. Notably, while the *Bruen* decision cited *Shuttlesworth* in a footnote, it was only for the proposition that gun licensing schemes, to be valid, should not give unbridled discretion to licensing officials and instead should “contain only ‘narrow, objective, and definite standards.’” *Bruen*, 142 S. Ct. 2111, 2138 n.9 (quoting *Shuttlesworth*, 394 U.S. at 151). Indeed, in that same footnote, the Court observed that states may enforce gun licensing schemes that require background checks and firearms safety courses in order to ensure that “those bearing arms in the jurisdiction are, in fact, ‘law-abiding, responsible citizens.’” *Bruen*, 142 S. Ct. at 2138 n.9 (quoting *Heller*, 554 U.S. at 635). Defendant, therefore, should not be heard to argue that the citations to First Amendment cases in *Bruen* indicate that individuals may carry illegal firearms on city streets without making any attempt to obtain a gun license.

28. Not surprisingly, following *Bruen*, at least two New York courts – citing the Second Circuit’s holding in *Decastro* – have held that a defendant who fails to apply for a license lacks standing to raise a Second Amendment claim. *See People v. Dave Brown*, Ind. No. 71673-22 (Sup. Ct. Bronx Co. July 15, 2022) (Fabrizio, J.); *People v. Rodriguez*, 2022 NY Slip Op 22217 (Sup. Ct. N.Y. Co. July 15, 2022). This Court should reach the same conclusion.

29. To be sure, following the Supreme Court’s decision *Heller*, the local District of Columbia courts permitted certain defendants to challenge their gun convictions even if they had not attempted to obtain gun licenses. *See Plummer v. United States*, 983 A.2d 323 (D.C. App. 2009), *as amended on denial of rehearing and rearg.* (May 20, 2010). *Plummer* and its progeny, however, are distinguishable from the case at hand. In *Plummer*, the defendant was convicted of violating the District of Columbia’s *complete* ban on handgun ownership by ordinary citizens,

which was subsequently ruled unconstitutional in *Heller*. *See id.* at 324-26. On appeal, the court ruled that the defendant could raise a Second Amendment challenge to his conviction, even though he had not applied for a gun license. The court explained that the District’s “absolute prohibition” on gun ownership “effectively foreclosed any attempt to exercise his Second Amendment right.” *See id.* at 342.

30. *Plummer* arose in circumstances far different from the case at hand. Critically, *Plummer* concerned a District of Columbia law that imposed an “absolute prohibition” on gun ownership by ordinary citizens. New York, by contrast, does not prohibit ordinary citizens from owning and carrying guns. In fact, New York law permits ordinary citizens to apply for gun licenses if they submit to a background check and satisfy various other requirements – including numerous requirements that were not disturbed by *Bruen*. Here, therefore, unlike the defendant in *Plummer*, defendant was not precluded by New York law from obtaining a gun license. Instead, defendant could have obtained a license if he had submitted to, and passed, a background check. Hence, the Second Circuit’s decision in *Decastro* – and not *Plummer* – controls, and defendant lacks standing to challenge his conviction on Second Amendment grounds.

31. Beyond that, *Plummer* does not support defendant’s claim that the charges against him should be dismissed. In *Plummer*, the court recognized that a person may be “disqualified” from exercising his Second Amendment rights based on factors such as “age, criminal history, mental capacity, and vision.” *Plummer*, 983 A.2d at 342 (quoting *Heller*, 554 U.S. at 635). The court, therefore, remanded the case for a hearing to determine whether the defendant would be disqualified from gun ownership based on the “applicable statutory and regulatory requirements for obtaining a registration certificate and license for his handgun.” *Id.* Thus, even if this Court were to find, under *Plummer*, that defendant has standing to raise a

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Second Amendment claim, he would not be entitled to a dismissal of the charges. Instead, at most, he would be entitled to a hearing, at which the court could examine his background – including a full inquiry into his criminal history and mental health – to determine whether he is qualified to obtain a gun license under the numerous New York licensing provisions that *Bruen* left undisturbed.

32. For instance, New York requires an applicant for a gun license to disclose whether he or she has “ever been arrested, summoned, charged or indicted anywhere for any offense, including DWI (except traffic infractions),” to disclose any mental illness or illegal drug use, and to provide the names of four character references.² *Bruen* did not invalidate any of those requirements. Defendant, however, has not made those disclosures here, nor has he provided the names of references. Therefore, even if defendant had standing to raise a Second Amendment claim, the record is insufficient to determine whether he in fact has the right to possess a gun in New York. *See People v. Kinchen*, 60 N.Y.2d 772, 774 (1983) (record insufficient to permit review of defendant’s right to counsel claim).

33. In short, because defendant failed to apply for a gun license, he lacks standing to raise a Second Amendment claim. Indeed, defendant has not submitted to a full background check and mental health evaluation – standard requirements for a gun license that *Bruen* left undisturbed. Therefore, defendant not only has denied the licensing authority the opportunity to conduct a full investigation of his background, but he has failed to create an adequate record to permit review of his Second Amendment claim. Accordingly, defendant’s motion to dismiss the weapons charges should be denied.

² See <https://troopers.ny.gov/system/files/documents/2020/12/ppb-3.pdf> (last visited July 26, 2022).

The Supreme Court’s decision in *Bruen* invalidated only a single aspect of New York’s gun licensing scheme and left the remainder of New York’s gun laws intact.

34. Beyond that, defendant’s broad constitutional challenge to the weapons charges fails for a more fundamental reason. Contrary to defendant’s assertion, the Supreme Court’s decision in *Bruen* did *not* undermine New York’s gun licensing scheme as a whole. Instead, the only provision of New York law at issue in *Bruen* was the requirement that an applicant for a concealed carry permit demonstrate “proper cause” – that is, a special reason why the applicant needed to carry a gun in public for self-defense. Here, the charges against defendant are based on the fact that he did not obtain a gun license *of any sort* – not because he failed to demonstrate “proper cause” for a concealed carry permit. As discussed, to obtain *any* gun license, defendant would have had to satisfy numerous other conditions that the Supreme Court left undisturbed in *Bruen*. Those conditions remain valid, as they can easily be severed from the “proper cause” requirement that the Supreme Court invalidated.

35. If the federal courts declare only part of a state statute unconstitutional, it is a matter of state law whether the remainder of the statute survives. *See generally City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976) (it is a “state-law question” whether the challenged statute “will be totally invalidated” or whether only the unconstitutional portion “will be struck down”); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000) (whether the unconstitutional portion may be severed from the remainder of the statute “is a matter governed by state law”). In New York, the “basic rule governing severability” turns on “whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether.” *CWM Chem. Servs., L.L.C. v. Roth*, 6 N.Y.3d 410, 423 (2006) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y.

48, 60 (1920) (Cardozo, J.)). That question must be answered “‘pragmatically, by the exercise of good sense and sound judgment.’” *Id.* (quoting *Knapp*, 230 N.Y. at 60).

36. Here, the Legislature surely would have preferred excising the “proper cause” requirement to invalidating New York’s entire gun licensing scheme. After all, the Supreme Court merely invalidated one small part of the scheme – creating an additional, “proper cause” requirement for obtaining a concealed carry permit – and left intact the detailed statutory provisions requiring a license to buy, sell, or possess a gun. *See* Penal Law § 400.00. Obviously, the legislative intent was to forbid the unlicensed sale, purchase, possession, and carrying of firearms. Certainly, then, the Legislature would not have wanted the invalidation of the “proper cause” requirement to cause the remainder of the licensing scheme to fall.

37. Further, the pre-*Bruen* licensing scheme can be enforced without the proper cause requirement. Indeed, as Justice Kavanaugh noted, the concealed carry licensing scheme can instead be reinterpreted as a “shall-issue” statute, allowing a person to obtain a concealed carry permit if he or she satisfies all of the remaining (and valid) conditions for the issuance of a license. In the Legislature’s view, that result would undoubtedly have been preferable to invalidating the entire licensing scheme, which would allow anyone – regardless of their background, history, and character – to carry a firearm in public.

38. Moreover, *Bruen* was a civil case in which the plaintiffs were law-abiding citizens who submitted to background checks and followed lawful processes when purchasing firearms. The *Bruen* plaintiffs did not seek to take the law into their own hands by obtaining guns illegally and carrying those unlicensed firearms on city streets. The *Bruen* decision, therefore, does not implicate New York’s *criminal* laws forbidding possession of unlicensed firearms, as those laws, by definition, do not apply to law-abiding citizens. *See Rodriguez*, 2022 NY Slip Op 22217, *supra*,

at *2-*3 (*Bruen* “did not hold that the State is powerless to criminalize the unlicensed possession of firearms on city streets”); *Brown*, No. 71673/22, *supra* (“*Bruen* cannot be read to require dismissal of this action charging defendant with unlicensed possession of a firearm in a public place”); *People v. Radhiid Monroe*, Ind. No. 232/2021 (Sup. Ct. Bronx Co. July 14, 2022) (rejecting defense claim that, under *Bruen*, “a license was not required to carry a handgun for self-defense outside the home”).

39. Indeed, as the *Rodriguez* court explained, “[d]efendant’s reading of the Second Amendment, unsupported by *Bruen*, would turn New York into the Wild West, placing its citizens at the mercy of criminals wielding unlicensed firearms, concealed from public view, in heavily populated areas.” *Rodriguez*, 2022 NY Slip Op 22217, *supra*, at *3. The court continued, “Defendant misreads *Bruen* as eviscerating the police powers of the State to address criminality, or as applying to anyone other than law-abiding citizens. Failing to seek a license before roaming the streets with a loaded firearm is not abiding by the law, and nothing in the Second Amendment requires that it be tolerated. The Constitution is not a suicide pact.” *Id.*

40. In short, the *Bruen* decision – while making it easier to obtain a concealed carry permit – did not invalidate the remainder of New York’s gun licensing scheme. And certainly, *Bruen* did not, in the blink of the eye, legalize the unlicensed possession of firearms on the streets of New York City. Therefore, defendant’s motion to dismiss the weapons charges should be denied.

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In sum, for all the reasons stated above, this Court should reject defendant's Second Amendment challenge to the weapons counts.

Respectfully submitted,



Allison Kline
Assistant District Attorney
Domestic Violence Bureau
(718) 838 - 7525

Dated: November 18, 2022

cc: Julema LaForce
Attorney for Omar Johnson
The Bronx Defenders
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FILED

NOV 25 2022

SUPREME COURT CLERK'S OFFICE
BRONX COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 77

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

Ind. No. 73320-22-22

-against-

DECISION AND ORDER

OMAR JOHNSON,
Defendant.

-----X
HON. NAITA A. SEMAJ:

Defendant filed the instant motion to dismiss on November 2, 2022, seeking dismissal of the indictment. The People opposed the defendant's motion to dismiss on November 18, 2022. The defendant is charged with Criminal Possession of a Weapon in the Second Degree and other related offenses for incidents allegedly occurring on or about June 17, 2022, in Bronx County. For the reasons set forth below, the defense's motion is denied.

Relying on *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597----, 142 S. Ct. 2111, ---- L.Ed.2d----(2022), the defense argues that all the counts in the indictment should be dismissed as the counts violate the defendant, Mr. Johnson's, Second Amendment right to carry a firearm in public. Specifically, the defense asserts that but for New York state's unconstitutional gun licensing system, the defendant would have been able to possess the firearm that he is charged with possessing and the defendant is only charged with the offenses on the indictment because he did not obtain a license under an unconstitutional licensing system.

The People respond that the Supreme Court has never held that a person has the right to possess an unlicensed firearm or prohibited state governments from requiring a person to obtain a permit to carry a firearm in public. The People further argue that the defendant lacks standing to raise his Second Amendment claim, the defendant's background and history disqualify him from possessing a firearm, and the Supreme Court's decision in *Bruen* only invalidated the "proper cause" requirement.

Defendant's Right to Carry a Firearm in Public

In *Heller*, the Supreme Court held that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, specifically, self-defense in the home. The Court struck down the District of Columbia statutes which prohibited the possession of handguns in the home and required lawfully- owned firearms to be kept inoperable. (554 U.S.635). However, the Court clearly stated that "the Second Amendment is not unlimited" and held that "nothing in our opinion should be taken to cast doubt on long standing prohibitions on the possession of firearms by felons and the mentally ill, or law forbidding the carrying firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." (*Id.* at 626- 27). Therefore, *Heller* stands for the proposition that States may regulate gun possession in the home (i.e., impose licensing restrictions), however,

States may not regulate it in a way that effectively prohibits gun possession in the home.

In *Bruen*, the Supreme Court reiterated that the rights secured by the Second Amendment are not unlimited. (*New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597_____, 142 S. Ct. 2111, 2128 --- L.Ed.2d_____[2022])(citing *Heller* at 626). Specifically, the Court engaged in an exhaustive analysis of historical evidence from antebellum America and found that the manner of public carry has been subjected to reasonable regulation, however, “none of these limitations prevented law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose.” (597 U.S. at ----, 142 S. Ct. at 2142-45). The Court struck down the “proper cause” requirement because it further conditioned the issuance of an unrestricted license to carry on a citizen’s showing of special need which effectively prevented law-abiding citizens from being able to carry a gun for self-defense in a manner inconsistent with historical tradition. (597 U.S. at ----, 142 S. Ct. at 2142-45).

Therefore, Defense’s argument that, “all the counts in the indictment must be dismissed because, but for New York’s unconstitutional gun- licensing system, Mr. Johnson would have been able to legally possess the firearm that he is charged with possessing” is misplaced. *Bruen* did not invalidate all of New York’s carry-permit licensing requirements or hold that States cannot regulate unlicensed gun possession. To the contrary, as the Court explained through their historical analysis, “the right to keep and bear arms has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms.” (597 U.S. at ----, 142 S. Ct. at 2156). The Court’s constitutional concerns with respect to New York’s carry-permit licensing requirements were limited to their holding that the “proper cause” requirement for unrestricted licenses effectively prevents law-abiding citizens from carrying a gun for the purpose of self-defense. The Court’s invalidation of the proper cause requirement did not effectively render the entire licensing statute to be unconstitutional as the defense suggests, rather, the Court raised no constitutional concerns regarding New York’s other carry-permit licensing requirements. In fact, these other carry-permit requirements are almost identical to the “shall- issue” regime requirements in other states that the Court recognized as raising no constitutional concerns. (597 U.S. at ----, 142 S. Ct. at 2162) (Kavanaugh, J., concurring).

Standing

The defense maintains that Mr. Johnson has standing to challenge New York’s licensing system because the Constitution does not require Mr. Johnson to first attempt to obtain a license under an unconstitutional licensing scheme. The defense relies on *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) to stand for the proposition that someone “faced with an unconstitutional licensing law may ignore it” and still maintain standing to challenge the constitutionality of such a scheme. In *Shuttlesworth*, the petitioner was convicted of an ordinance that was later found to be unconstitutional.

However, unlike *Shuttlesworth*, *Bruen* did not strike down New York’s entire gun licensing law. To be sure, *Bruen* only struck down New York’s proper cause standard which one must meet to obtain an unrestricted firearm license. Therefore, the standard set forth in *Shuttlesworth* cannot

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apply. Likewise, the line of D.C. Court of Appeals cases cited by the defense also do not apply because these cases rely on statutes that were found to be entirely unconstitutional in *Heller*.

Accordingly, to maintain standing, the defense must establish that Mr. Johnson has either applied for a license under the statute or make a substantial showing that it would have been futile to do so. (*United States v. Decastro*, 682 F.3d 160.164 [2d Cir. 2012]; *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997)).

Here, the defense fails to establish the futility of applying for any kind of firearm license. Defense's argument regarding proper cause is unavailing as that requirement only applied to unrestricted licenses. Therefore, because defense's challenge is based specifically on the holding in *Bruen* regarding New York's firearm licensing statute, and Mr. Johnson has failed to apply for any firearm license or establish that it was futile to do so, the defendant lacks standing for this challenge. (*United States v. Decastro*, 682 F.3d 160.164 [2d Cir. 2012]).

For the aforementioned reasons, defense's motion to dismiss is denied.

This constitutes the Decision and Order of the Court.



Naita A. Semaj, J.S.C.

HON. NAITA A. SEMAJ

Dated: 11/22/22

To be argued by
ABIGAIL EVERETT
(10 minutes)

New York Supreme Court

Appellate Division -- First Department

PEOPLE OF THE STATE OF NEW YORK

Respondent,

- against -

OMAR JOHNSON,

Defendant-Appellant.

Bronx County
Ind. No. 73320/22
App. Case No. 2023-01900

BRIEF FOR DEFENDANT-APPELLANT

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October 2023

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The proceeding ended with Mr. Johnson being instructed, “Mr. Johnson, you have the right to appeal the judgment of the Court” (S 3).

ARGUMENT

POINT I

THE INDICTMENT AGAINST OMAR JOHNSON – WHICH CHARGED POSSESSION OF A GUN AND AMMUNITION – IS UNCONSTITUTIONAL, IN LIGHT OF NEW YORK STATE RIFLE & PISTOL ASS’N V. BRUEN, 597 U.S. ___, 142 S. CT. 2111 (2022).²

Mr. Johnson delivered food for Uber Eats and he kept a gun in his moped for his “personal protection.” The Supreme Court’s landmark decision in Bruen, 142 S. Ct. 2111, required that the lower court grant the defense motion to dismiss the indictment charging him with illegal gun possession. With Bruen, the Supreme Court made clear that New York’s gun licensing scheme under Penal Law § 265.20 is unconstitutional. See id. at 2138 (“Under Heller’s text-and-history standard, the proper-cause requirement [in New York’s licensing scheme] is therefore unconstitutional.”). Accordingly, the court below erred in denying the motion to dismiss the indictment. Reversal of Mr. Johnson’s conviction is required.

² On September 13, 2023, the New York Court of Appeals heard argument in a group of cases that present a Bruen challenge to Penal Law Section 265.03(3). See People v. Pastrana, 205 A.D.3d 461 (1st Dep’t 2022), lv. granted, 38 N.Y.3d 1135 (2022).

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A. The Lower Court Erred in Finding Mr. Johnson's Conviction Constitutional.

The Second Amendment to the United States Constitution provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. In District of Columbia v. Heller, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation." Id. at 592.

While not unlimited, Second Amendment rights can be subject only to "lawful regulatory measures." Heller, 554 U.S. at 626-27, and fn 26. Bruen set forth a two-part test to determine the scope of Second Amendment rights. "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." 142 S. Ct. at 2126. The burden then shifts to the government to demonstrate that a regulation is "consistent with this Nation's historical tradition" of firearm regulation. Id. Pursuant to Bruen and Heller, Mr. Johnson, a food delivery person, had a fundamental right to possess the gun which he kept for self protection in his moped. Moreover, inherent in this right to possess the weapon for lawful use was his coexistent right to possess ammunition.

New York requires individuals who want to possess a firearm to first obtain a license. People v. Hughes, 22 N.Y.3d 44, 50 (2013) ("New York's criminal weapon possession laws prohibit

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only unlicensed possession of handguns.”). Prior to Bruen, licenses would be granted only upon a showing of “proper cause,” interpreted as “a special need for self-protection distinguishable from that of the general community.” Penal Law § 400.00(2)(f); see In re Klenosky, 75 A.D.2d 793 (1st Dep’t 1980), abrogated by Bruen, 142 S. Ct. 2111.

The Bruen Court found the proper-cause requirement unconstitutional, as our “Nation’s historical tradition of firearm regulation,” never required an individual to show good cause before exercising the fundamental right to bear arms. 142 S. Ct. at 2126, 2135, 2138. Thus, the firearm regulations embodied in the Penal Law subjected Mr. Johnson to an unconstitutional restriction on his Second-Amendment rights.

In Bruen, the Court also rejected the home/public distinction embodied in Penal Law § 265.03(3). 142 S. Ct. at 2134 (“Nothing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms.”). This holding presents an additional infirmity with Mr. Johnson’s conviction under Penal Law § 265.03(3). Mr. Johnson could not have been convicted under this provision if his possession had been in his home or place of business, rather than in his moped. This distinction is particularly unfair to Mr. Johnson. Though his moped may not technically have been his “place of business,” Mr. Johnson used his moped to make food deliveries - a job that carries clear risk. He kept the gun in

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the moped for self-protection. There is no allegation in this case that he removed the gun from the moped at other times.

Furthermore, the lower court erred in denying Mr. Johnson's motion on the basis that it was only the "proper cause" requirement that had been struck and that, without this requirement, the licensing law was constitutional (Decision at 2). In fact, there are a number of provisions within the licensing law that raise constitutional questions. For example, the "good moral character" provision of former Penal Law Section 400.00(1)(b) is without the necessary historical underpinning and suffers from the same kind of unbridled discretion as the "proper cause" provision. See Antonyuk v. Hochul, 639 F. Supp. 232, 299-300 (N.D.N.Y. 2022). Similarly, federal courts since Bruen have struck 21-and-over age restrictions like the one in Penal Law Section 400.00(1)(a). See Firearms Policy Coalition v. McCraw, 623 F. Supp.3d 740, 748 (N.D.Tex. 2022); Worth v. Harrington, ___ F. Supp.3d ___, 2023 WL 2745673, at *6 (D.Minn. 2023). Former Penal Law Section 400.00(1)(e), barring an individual from possessing a gun if they are an "unlawful user" of a controlled substance is also constitutionally suspect. See United States v. Daniels, 77 F.4th 337, 342 (5th Cir. 2023) (invalidating similar provision in 18 U.S.C. Section 922(g)(3) as lacking in historical tradition). The provision regarding individuals who have suffered mental illness, as well as that

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allowing for a “good cause” license denial, are likely unconstitutional as well.

In addition, it is unlikely that Mr. Johnson’s remote Georgia conviction would provide a legitimate basis to deny him a gun license. It is, of course, the State’s burden to justify the total prohibition on the right to bear arms in self-defense to all convicted felons. Yet, applying Bruen’s historical test, the Court in United States v. Bullock, __ F. Supp.3d __, 2023 WL 4232309 (S.D.Miss. June 28, 2023), found that the government had failed to establish a tradition of felon disarmament. Indeed, the Bullock Court noted that the U.S. Department of Justice had conceded in briefs filed before the First and Fourth Circuits that criminal laws outlawing felons from gun possession were “firmly rooted in the twentieth century and likely bear little resemblance to laws in effect at the time the Second Amendment was ratified.” Id. at *28. A similar conclusion was reached in a deeply-researched article in the Harvard Journal of Law and Public Policy. See Marshall, Kevin, “Why Can’t Martha Stewart Have a Gun?” 32 Harv. J.L.Pol’y 695 (Spring 2009).

Because the Second Amendment’s plain text covers Mr. Johnson’s conduct, that Amendment “presumptively protects” it. Bruen, 142 S. Ct. at 2126-30, 2156 (reiterating that the Second Amendment guarantees to “all Americans” the right to keep and bear arms); Heller, 554 U.S. at 581 (explaining that the Second

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Amendment right “belongs to all Americans”). The Government has not met its burden to overcome that presumption.

B. Contrary to the Lower Court’s Conclusion, Mr. Johnson Has Standing to Challenge His Conviction on Second Amendment Grounds.

The lower court erroneously concluded that, because he did not apply for a gun license, Mr. Johnson does not have standing to challenge the indictment against him on Second Amendment grounds. While some lower courts have concluded that an individual who did not apply for a gun license does not have standing to challenge the gun possession charges against him on Second Amendment grounds, neither this Court nor the Court of Appeals has adopted this position. Further, the position of the lower courts is contrary to well-established law.

Where a statute requires a license in violation of a constitutional right, a person may not be prosecuted for failing to try to obtain that license. In Staub v. City of Baxley, 355 U.S. 313 (1958), a First Amendment case, the appellant was convicted of violating a city ordinance that prohibited solicitation of membership for an organization without a permit but had not applied for a permit before challenging the ordinance’s constitutionality. Id. at 314, 322. The Court struck down the licensing scheme as facially invalid. Id. at 325.

In reaching its decision, the Supreme Court explained that “[t]he decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its

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face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance.” Id. at 319. “The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands.” Id.; accord Lovell v. City of Griffin, 303 U.S. 444, 452 (1938); Smith v. Cahoon, 283 U.S. 553, 562 (1931).

The failure to attempt to obtain a New York license to exercise a fundamental right under an unconstitutional licensing scheme is not a barrier to challenging that scheme. The Bruen Court held that rights the Second Amendment bestowed cannot be treated differently than rights protected by any other amendment, including, and especially, the First. “The constitutional right to bear arms in public for self-defense is not ‘a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.’” 142 S. Ct. at 2156. Staub’s reasoning, therefore, applies equally here. Just as the appellant there could not be punished for exercising the right of free expression without having attempted to secure a permit under the facially invalid statute, so too was Mr. Johnson permitted to freely exercise his right to possess a firearm in the face of an unconstitutional licensing law without first attempting to secure a license.

Relying on these Supreme Court cases, post-Heller cases have found standing for defendants who had not sought a license

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but, instead, raised the Second Amendment issue as a defense to criminal charges. See, e.g., Magnus v. United States, 11 A.3d 237 (D.C. 2011); Plummer v. United States, 983 A.2d 323 (D.C. 2009); see also People v. Diaz, Case No. 21FEI19850 (Superior Court of Cal. Sacramento July 27, 2022) (sustaining demurrer to firearm charges subject to licensing scheme containing “proper cause” standard: “When the licensing statute and criminal statutes are considered together . . . the defendant cannot be punished for exercising his right to public carry.”).

Standing is also established here by applying the futility doctrine: Mr. Johnson was not required to seek a license when it would have been futile for him to do so. See, e.g., United States v. Decastro, 682 F.3d 160, 164 (2d Cir. 2012). In Decastro, the court explained that the requirement that one seek a license prior to challenging a gun licensing law is excused when the defendant makes a showing that submitting an application would have been futile. Id. (citations omitted). Here, it is clear that Mr. Johnson would not have been able to meet the “proper cause” standard in effect at the time he was charged – making any attempt to seek a license futile.

C. A Bruen Claim Cannot be Waived; In the Alternative, The Purported Appeal Waiver Here is Invalid.

Because a Bruen claim “relates to ‘a right of constitutional dimension going to ‘the very heart of the process,’” it cannot be waived. People v. Benjamin, 216 A.D.3d

To be argued by
EMILY A. ALDRIDGE
(10 MINUTES REQUESTED)

New York Supreme Court

Appellate Division - First Department

Appellate Case No. 2023-01900
Bronx County Ind. No. 73320/2022

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

OMAR JOHNSON,

Defendant-Appellant.

BRIEF FOR RESPONDENT

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Monroig, 17 A.D.3d 870, 871 (3d Dept. 2005) (“defendant waived his constitutional double jeopardy claim by his express waiver of the right to appeal”).

To be sure, the Fourth Department held that a *Bruen* challenge survives an appeal waiver (DB 14-15). *See People v. Benjamin*, 216 A.D.3d 1457 (4th Dept. 2023). The People submit, however, that the precedents cited above state the better rule. After all, if a *Bruen* claim can be rejected as unpreserved, as recently acknowledged by the Court of Appeals, there is no principled reason to conclude that it cannot also be waived. *See Cabrera*, 2023 WL 8039656, at *8. Defendant erroneously relies on *People v. Pimentel*, 149 A.D.3d 505, 505 (1st Dept. 2017), which addressed unique federal terrorism prosecution interests and is inapposite to the case at bar (DB 15).

Thus, the totality of the circumstances clearly demonstrate that defendant understood the appellate rights he waived and did so knowingly, intelligently, and voluntarily, thereby foreclosing his right to challenge his indictment and conviction as unconstitutional and his sentence as excessive.

POINT II

Contrary To Defendant’s Largely Unpreserved Claims, He Had No Second Amendment Right to Possess An Unlicensed Firearm (responding to defendant’s Point I, Subpoints A and B).

Even if this Court finds that defendant’s Second Amendment claim survived his valid appeal waiver, this Court should reject that claim as barred and meritless. Defendant raises unpreserved arguments challenging specific provisions of New York’s

gun licensing law and Penal Law § 265.03(3) that may not be considered by this Court for the first time on appeal. Furthermore, defendant lacks standing to challenge New York's gun licensing system because he did not attempt to obtain a gun license. Therefore, he should not be heard to challenge his prosecution for *unlicensed* firearm possession, thereby rendering criminal courts *de facto* licensing authorities. Reviewability aside, defendant's claims lack merit. *Bruen* did not decriminalize the *unlicensed*, public possession of loaded firearms. To the contrary, the Court recognized that states may regulate the possession of firearms. Defendant, therefore, was properly prosecuted for unlicensed gun possession here.

A. Defendant Raises Unpreserved Arguments That May Not Be Considered By This Court for the First Time on Appeal

In his motion to dismiss, defendant raised a general claim that he was prosecuted under a gun licensing system that, he asserted, was rendered entirely unconstitutional by *Bruen* (MTD Memo. at 7-8). On appeal, defendant argues that: (1) Federal District Court decisions identified constitutional issues regarding provisions of New York's gun licensing law restricting gun ownership based on "good moral character," age, unlawful controlled substance use, and mental illness; (2) New York's gun licensing provision barring gun license issuance to convicted felons does not pass *Bruen*'s historical test; and (3) *Bruen* invalidated the home/public distinction in Penal Law § 265.03(3) (DB 9-11). This court should reject these newly raised claims as unpreserved. In any event, they lack merit.

To begin, defendant's general Second Amendment claim asserting that *Bruen* invalidated New York's entire gun licensing system did not preserve his current claims that (1) federal decisions effectively invalidated specific provisions of New York's gun licensing law (DB 10-11); (2) New York's restriction on gun ownership by felons fails *Bruen*'s historical test; and (3) *Bruen* invalidated the home/public distinction in Penal Law § 265.03(3) (DB 9-11). Declining to address this preservation defect, defendant introduces these new arguments targeting specific provisions of New York's licensing law and Penal Law § 265.03(3) as though properly posed by the non-specific claim in his motion to dismiss that *Bruen* rendered unconstitutional New York's gun licensing system. Even where a motion to dismiss is made, the preservation requirement compels that the argument be "specifically directed" at the alleged error. *People v. Gray*, 86 N.Y.2d 10, 19 (1995). In this case, defendant never previously directed any arguments to the specific alleged errors of the licensing provisions limiting gun ownership based on felony history, good moral character, age, unlawful controlled substance use, or mental illness or the home/public distinction in Penal Law § 265.03(3). Indeed, neither the prosecutor in his opposition nor the court in its decision addressed these challenged provisions. As the Court of Appeals recently held, Second Amendment challenges to New York's statutory scheme require such preservation. *See Cabrera*, 2023 WL 8039656, at *1. Defendant's failure to preserve his specific challenges to his indictment and conviction, therefore, are fatal to those appellate claims.

The lack of preservation is significant. As discussed below, *Bruen* reaffirmed the longstanding rule that a state may prevent individuals who, among other things, have disqualifying criminal or drug histories from possessing guns. Preservation, therefore, was necessary to afford the court and parties an opportunity to create an adequate record in the absence of a gun license application—to determine whether, after *Bruen*, defendant satisfied the remaining, valid conditions for the issuance of a gun license. *See* Penal Law § 400.00(1). For instance, defendant might have been disqualified from owning a gun due to his prior felony conviction, history of drug addiction, lack of good moral character, or any other disqualifying condition.

Furthermore, by failing to preserve his claim under *Bruen*'s historical test, defendant denied the People the opportunity to show that New York's felon licensing restriction is consistent with "our 'Nation's historic tradition of firearm regulation.'" *Bruen*, 597 U.S. at 17. Likewise, defendant denied the People the opportunity to address *Bruen*'s asserted rejection of the home/public distinction in Penal Law § 265.03(3). Critically, in *Cabrera*, the Court found that:

The advent of the one-step history and tradition test does not, alone, compel the conclusion that New York's criminal possession of a weapon statutes are facially unconstitutional. Rather, that determination must be made by closely analyzing historical analogues to assess whether our modern regulations are consistent with historical tradition. The nature of that complex inquiry only underscores the importance of preservation (*see United States v. Bullock*, No. 18-CR-165-CWR-FKB, — F.Supp.3d —, 2023 WL 4232309 [S.D. Miss. June 28, 2023] [noting difficulty of judicial analysis of historical analogues without benefit of

expert reports or amicus briefs]). By way of comparison, when the U.S. Supreme Court considered a single component of New York's licensing scheme in *Bruen*, it had the benefit of an extensive record, hundreds of pages of briefing on historical analogues and over 80 amici submissions. We simply do not have the record, at this juncture, to give the constitutional questions regarding Penal Law § 265.03(3) the careful consideration they deserve.

Cabrera, 2023 WL 8039656, at *8. Thus, by failing to raise these claims before the motion court, defendant left the record incomplete, rendering this issue not only unpreserved but factually unreviewable. See *People v. Kinchen*, 60 N.Y.2d 772, 774 (1983) (factual record insufficient to permit appellate review of right to counsel claim); *People v. Charleston*, 54 N.Y.2d 622, 623 (1981) (same). The People should not be required to develop this record for the first time on appeal.

Lastly, this case is not “one of those rare cases” where interest of justice review is warranted. *People v. Telesford*, 149 A.D.3d 170, 183 (1st Dept. 2017). Defendant chose to disregard the law and his conditions of probation and contribute to the risk of gun violence by carrying a loaded firearm in his moped. Having received the precise sentence he bargained for, review of his unpreserved claims is unwarranted.

B. Defendant Lacks Standing To Raise His Second Amendment Claims Because He Did Not Apply For A Gun License.

Defendant lacks standing to challenge New York's gun laws because he did not apply for a gun license. By arguing that he had a constitutional right to carry a gun in public, defendant improperly asks this Court to assume the role of a gun licensing

authority to determine whether he possesses the requisite background and character that would qualify him to obtain a gun license and a concealed carry permit.

Unlike the plaintiffs in *Bruen*, defendant did not seek to obtain a New York gun license by lawful means. This is fatal to his claims that the state had no right to prosecute him for *unlicensed* firearm possession. As the Second Circuit has observed, if a defendant “failed to apply for a gun license in New York, he lacks standing to challenge the licensing laws of the state.” *Decastro*, 682 F.3d at 164; accord *People v. Williams*, 76 Misc.3d 925, 927 (Sup. Ct. Kings Co. 2022) (*Bruen* “does not preclude the prosecution for unlawful possession of a firearm of a defendant who did not previously apply for, and was denied, a license”); *People v. Rodriguez*, 76 Misc.3d 494, 499 (Sup. Ct. N.Y. Co. 2022) (“Failing to seek a license before roaming the streets with a loaded firearm is not abiding by the law, and nothing in the Second Amendment requires that it be tolerated”); *People v. Brown*, 2022 WL 2821817, at *4 (N.Y. Sup. July 15, 2022) (“[I]t would be contradictory to find that a person who never applied for a license and violated existing law by arming themselves with a gun in a public place[]...to be either ‘responsible’ or ‘law-abiding’”). Indeed, as a general rule, a person may not challenge the constitutionality of a regulatory scheme without first making a good faith effort to “submit to the challenged policy.” *Decastro*, 682 F.3d at 164; see *Allen v. Wright*, 468 U.S. 737, 746, 755 (1984); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972).

There is a good reason for this rule. In *Bruen*, other than invalidating the “proper cause” requirement, the Supreme Court left the remainder of New York’s gun licensing

scheme intact, including the requirement of a background and criminal-record check. It would be anomalous to permit defendant to challenge those regulations without first submitting to a background check—as the plaintiffs in *Bruen* did. Because defendant did not even attempt to submit to the licensing process, he should not be heard to raise a Second Amendment challenge to his prosecution for possessing an unlicensed firearm. *See Decastro*, 682 F.3d at 164. In fact, by failing to apply for a license, defendant circumvented the lawful licensing process. He instead asks this Court to act as a *de facto* licensing board—a task that the criminal and appellate courts are not well situated to perform.

If defendant believed that New York’s gun licensing and possession laws, or any portion thereof, were unconstitutional, he should have followed a lawful process in attempting to vindicate his rights. He could have applied for a gun license and, when that license was denied, filed a civil suit challenging the determination—like the plaintiffs in *Bruen*. Instead, taking the law into his own hands, defendant illegally obtained a firearm and carried a loaded, unregistered gun in the moped that he used to deliver food around New York City. Neither the Second Amendment nor *Bruen* empowers anyone to carry an illegal, unregistered, loaded firearm in public simply because they believe they have a Second Amendment right to do so. To permit such lawlessness would pose a grave danger to public safety. Indeed, if the standing rule were discarded, as defendant suggests, it would incentivize those who are disinclined to abide by the law to carry loaded firearms in public in defiance of a state’s “reasonable, well-

defined restrictions.” *Bruen*, 597 U.S. at 70; accord *People v. Frazzini*, 78 Misc. 3d 1233(A), 2023 WL 3239952, at *2 (Sup. Ct. Erie Co. May 3, 2023) (“If the defendant wished to specifically challenge the constitutionality of the ‘serious offense’ prohibition to obtaining a pistol permit license..., she would need to apply for and be denied a pistol permit on those grounds.... Upon a denial of a pistol permit, the applicant can file an Article 78 proceeding challenging the decision. The constitutionality of the ‘serious offense’ prohibition would be a logical point of appeal if applicable in that particular case”).

Defendant’s reliance on First Amendment jurisprudence is misplaced (DB 12 (citing *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938))). Critical differences exist between First and Second Amendment rights. As explained in Part C, below, the Supreme Court held in *Bruen* that the right to bear arms is afforded only to law-abiding citizens; it can be denied to people whose backgrounds indicate that their possession of a weapon endangers the public. By contrast, a predicate felon or illegal drug user cannot be subjected to a background check before being allowed to speak. A person whose freedom of speech is restricted by an unconstitutional licensing regime need not, therefore, submit to the licensing process to challenge it. On the other hand, states have the right to impose rules regarding who may own a firearm. Hence, a prospective gun owner is required to submit to the licensing process before asserting his Second Amendment rights in court. Indeed, the plaintiffs in *Bruen* submitted to the licensing process and passed the requisite background checks before

suing to challenge the denial of their unrestricted carry permit applications. Moreover, the unpublished California trial court decision adopting First Amendment standing principles, cited by defendant, has no precedential value here and should not be followed (DB 14). *See People v. Diaz*, Case No. 21FEI19850 (Sacramento Super. Ct. July 27, 2022).

To be sure, following the Supreme Court’s decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), local District of Columbia courts recognized the standing of certain defendants to challenge their gun convictions in the absence of any attempts to obtain gun licenses (DB 13-14). *See Magnus v. United States*, 11 A.3d 237 (D.C. 2011); *Plummer v. United States*, 983 A.2d 323 (D.C. 2009). As noted by the court below, *Plummer* and *Magnus* concerned a District of Columbia law that imposed an “absolute prohibition” on gun ownership by ordinary citizens (Judgment Roll: Dec. at 2-3). *Plummer*, 983 A.2d at 342; *see Magnus*, 11 A.3d at 242-43. By contrast, New York law permits ordinary citizens to apply for gun licenses if they satisfy various other requirements not disturbed by *Bruen*. Here, unlike the defendants in *Plummer* and *Magnus*, defendant was not absolutely prohibited from exercising his Second Amendment right; he could have obtained a gun license if he had fulfilled the necessary requirements. Therefore, *Magnus* and *Plummer* do not control here. To be sure, the Second Circuit has remarked that a defendant may demonstrate standing by making a substantial showing that it would have been futile to apply for a New York gun license (DB 14). *See Decastro*, 682 F.3d at 164; *accord Bach v. Pataki*, 408 F.3d 75, 82-83 (2d Cir. 2005). But for the reasons explained

above, that exception should not apply here, given New York’s strong interest in keeping unlicensed, unregulated firearms off of the streets. If a person wishes to obtain a firearm—and if they believe that New York’s gun regulations are unconstitutional—they should seek to obtain a gun by lawful means, including a civil suit if necessary. Under no circumstances should they be permitted to obtain a gun illegally and carry an unregistered, loaded firearm as defendant did here. *Accord Bruen*, 597 U.S. at 9 (holding that the Second Amendment protection of the right to carry handguns publicly for self-defense only applies to “law-abiding citizens”).

C. *Bruen* Did Not Invalidate Defendant’s Conviction For Possessing An Unlicensed Firearm

Even if defendant’s Second Amendment claims were reviewable, they would fail. The Supreme Court has long held that states may require gun owners to obtain a license and *Bruen* did not alter that rule. *Bruen* left the vast majority of New York’s gun licensing rules undisturbed and invalidated only one aspect of New York’s scheme: the “proper cause” requirement for obtaining a concealed carry permit. *Bruen* left the remainder of New York’s gun licensing rules undisturbed. Thus, defendant was properly prosecuted for possessing an unlicensed firearm.

1. New York’s Gun Licensing Scheme

Under New York law, it is illegal to possess an unlicensed firearm. The degree of crime depends on various factors, including whether the firearm is loaded, whether it is possessed outside one’s home or place of business, and whether the defendant

harbors the intent to use it unlawfully. *See* Penal Law § 265.01 *et seq.* Pertinent here, under Penal Law § 265.01(1), a person who possesses “any firearm” is guilty of Criminal Possession of a Weapon in the Fourth Degree, a class A misdemeanor. If the defendant has previously been convicted of a crime, the charge can be elevated to Criminal Possession of a Weapon in the Third Degree, a class D felony. *See* Penal Law § 265.02(1). Additionally, possession of a loaded firearm outside one’s home or place of business, possession of a loaded firearm by a person previously convicted of a crime, or possession of any firearm with the intent to use it unlawfully against another constitutes a class C felony offense. *See* Penal Law §§ 265.03(1)(b), (3).

A person may avoid criminal liability for possessing a firearm if he or she has a valid New York gun license. *See* Penal Law § 265.20(3). To obtain a gun license in New York, an applicant must submit to an investigation, and the licensing officer must find that “all statements in a proper application for a license are true.” Penal Law § 400.00(1). The applicant must be 21 years of age or older and of good moral character. *See* Penal Law § 400.00(1)(a)-(b). An applicant may be disqualified if, among other things, he or she has a prior conviction for a felony or other serious offense, has an outstanding warrant for a felony or serious offense, is a fugitive from justice, is an unlawful user of or addicted to a controlled substance, has a history of mental illness, or has an outstanding order of protection—or if other “good cause” exists for denying the license. Penal Law § 400.00(1)(c)-(n).

Further, at the time of defendant’s arrest, to obtain a license authorizing the carrying of a concealed firearm outside one’s home or place of business, an applicant needed to show “proper cause,” *see* Penal Law § 400.00(2)(f) (former), which was defined as “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Matter of Klenosky v. New York City Police Dept.*, 75 A.D.2d 793 (1st Dept. 1980), *aff’d*, 53 N.Y.2d 685 (1981).³

Thus, contrary to defendant’s intimation, there was far more to obtaining a gun license in New York than the “proper cause” requirement that *Bruen* invalidated. In fact, the “proper cause” requirement applied only to obtaining a special kind of license—a concealed carry permit—and was not part of the threshold standard for obtaining a New York gun license in the first instance.

2. *Bruen* Did Not Invalidate New York’s Gun Licensing Scheme In Its Entirety

The Supreme Court has never held that a person has the right to possess an unlicensed firearm. Nor has the Court prohibited state and local governments from requiring that a person obtain a permit to carry a handgun in public. In *Heller*, 554 U.S. at 635, the Supreme Court held that the District of Columbia’s “ban on handgun possession in the home violate[d] the Second Amendment, as [did] its prohibition

³ Following *Bruen*, the Legislature eliminated the “proper cause” requirement for obtaining a concealed carry permit. In its place, the Legislature substituted additional requirements, including the completion of a training class, an expanded background check including character references, a review of social media accounts, an in-person interview, and an expanded list of disqualifying prior convictions. *See* Penal Law §§ 400.00(1)(o), (2)(f).

against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” In *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 791 (2010), the Court applied this right to possess a firearm to the states.

Critically, in *Heller*, the Court made clear that “the right secured by the Second Amendment is not unlimited.” *Heller*, 554 U.S. at 626. The right to keep and bear arms is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* For instance, “nothing” in the *Heller* decision “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” *Id.* Further, the Second Amendment does not prohibit localities from enacting “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27. The *Heller* Court “[identif]ied] these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n.26; accord *McDonald*, 561 U.S. at 786.

Bruen did not disturb those holdings. The plaintiffs in *Bruen*—“law-abiding, adult citizens” of New York State—challenged the “proper cause” requirement for a concealed carry permit. *Bruen*, 597 U.S. at 15. Both plaintiffs submitted to and passed required background checks and were issued restricted licenses, which allowed them to carry handguns outside the home for certain limited purposes. However, they were denied full concealed carry permits because they had not demonstrated a special need to carry a concealed weapon in public. *See id.* In its fact-specific ruling, the Court held

that the Second Amendment protects the right to carry a weapon in public for self-defense, which may not be conditioned on “demonstrating to government officers some special need.” *Id.* at 70. Thus, the Court held that “New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.” *Id.*

Bruen did not disturb any other aspect of New York’s gun licensing scheme. In fact, the Court reiterated that the Second Amendment right was subject to “well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms.” *Bruen*, 597 U.S. at 38. Instead, in invalidating New York’s “proper cause” requirement, the Court focused on the level of discretion conferred on licensing officers. The Court observed that 43 states issued “concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability.” *Id.* at 13. The Court declared that nothing in its “analysis should be interpreted to suggest the unconstitutionality of the 43 States’ ‘shall-issue’ licensing regimes, under which a general desire for self-defense is sufficient to obtain a [permit].” *Id.* at 39 n.9 (internal quotation omitted). The Court emphasized that the regimes of the 43 other states, “which often require applicants to undergo a background check or pass a firearms safety course,” were not unconstitutional, as they were “designed to ensure only that those bearing arms in the

jurisdiction are, in fact, ‘law-abiding, responsible citizens.’” *Id.* (quoting *Heller*, 554 U.S. at 635).

Concurring in *Bruen*, Justice Kavanaugh (joined by the Chief Justice) observed that “the Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense.” *Bruen*, 597 U.S. at 79 (Kavanaugh, J., concurring). Justice Kavanaugh remarked that New York may continue to require licenses for carrying handguns for self-defense so long as it “employ[s] objective licensing requirements like those used by the 43 shall-issue States.” *Id.* at 80. Citing *Heller*, Justice Kavanaugh observed that “the Second Amendment allows a variety of gun regulations,” including “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 81 (Kavanaugh, J., concurring) (internal quotation marks omitted).

Justice Alito echoed those comments, observing that the Court had not “disturbed anything that we said in *Heller* or *McDonald*...about restrictions that may be imposed on the possession or carrying of guns.” *Bruen*, 597 U.S. at 72 (Alito, J., concurring). Justice Alito added that the *Bruen* “holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun.” *Id.*

Thus, the Supreme Court’s opinion in *Bruen* and the concurring opinions joined by three of the six Justices in the *Bruen* majority make clear that New York may continue

to require that a person obtain a license to purchase or possess a firearm and a concealed carry permit to carry a handgun in public. The state merely may not require a concealed carry permit applicant to show a “special need” to carry a firearm for self-defense. In all other respects, the Court left New York’s licensing scheme undisturbed.

Hence, defendant wrongly asserts that *Bruen* rendered Penal Law § 265.03(3) unconstitutional (DB 9). Instead, *Bruen* invalidated only a small part of New York’s licensing scheme: the proper cause requirement for obtaining a concealed carry permit. That requirement was irrelevant to defendant’s conviction for attempted weapon possession, because defendant failed to establish that he met the threshold requirements for obtaining any sort of New York gun license, much less a concealed carry permit.

Moreover, in *Heller* and *Bruen*, the Supreme Court made clear that only “law-abiding, responsible citizens” have the right to bear arms. *Bruen*, 597 U.S. at 39 n.9; *Heller*, 554 U.S. at 635. Here, defendant had a prior felony conviction in Georgia for armed robbery (PSI at 3). In addition, he had a history of substance abuse, and in the instant case, he was caught with an unlicensed, loaded gun in his moped after hitting his domestic partner and threatening her and her mother with death, just six months after the expiration of his term of probation for his prior armed robbery conviction. Thus, the record reflects that defendant was not a “law-abiding, responsible citizen” entitled to the protection of the Second Amendment. And, because defendant had no personal Second Amendment right to possess a firearm, he may not bring a facial challenge to New York’s gun laws. *See Decastro*, 682 F.3d at 163 (“a person to whom a

statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court”) (*quoting Parker v. Levy*, 417 U.S. 733, 759 (1974) (internal quotation marks omitted)); *People v. Jones*, 122 A.D.3d 549, 550 (1st Dept. 2014) (a defendant who had a “prior felony conviction” could not “legitimately” raise a Second Amendment challenge to his weapon possession conviction).

Further, as defendant does not dispute, the “proper cause” requirement is easily severable from the remainder of New York’s gun licensing scheme. “Severability is...a matter of state law.” *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996); *see City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976) (it is a “state-law question” whether the challenged statute “will be totally invalidated” or whether only the unconstitutional portion “will be struck down”); *Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 389 (2d Cir. 2000) (whether the unconstitutional portion may be severed from the remainder of the statute “is a matter governed by state law”). In New York, severability turns on “whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether.” *CWM Chem. Servs., L.L.C. v. Roth*, 6 N.Y.3d 410, 423 (2006) (*quoting People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920)). The answer “must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch, instead of at the roots.”

Id.

Here, the valid and invalid portions of the gun licensing scheme are separate. Penal Law § 400.00(1)—which sets forth the requirements to acquire a gun license—is distinct from Penal Law § 400.00(2)(f)—which addresses the requirements for a concealed carry permit. The general licensing requirement of former section 400.00(1) is complete in itself and is capable of independent application without reference to section 400.00(2)(f). Consequently, excision of Penal Law § 400.00(2)(f) does not preclude enforcement of the remainder of the statute.

The Legislature surely would have wanted New York’s remaining gun licensing regulations to survive, even without the proper cause provision. After all, if Penal Law § 400.00 is invalidated in its entirety, any individual—regardless of their criminal, drug addiction, or mental health background—could carry a loaded firearm in public without consequences. That would pose a grave threat to public safety. In fact, the Legislature demonstrated its intent by swiftly amending the statute to include new concealed carry regulations following the *Bruen* decision.⁴ Plainly, then, the legislature wished for New York to maintain a robust gun licensing scheme. Unsurprisingly, every court to consider the question to date has held that New York’s laws criminalizing the unlicensed possession of a firearm survive *Bruen*. See, e.g., *People v. Hibbert*, ___ A.D.3d ___, 2023 WL 8632127, at *1 (1st Dept. Dec. 14, 2023); *People v. Adames*, 216 A.D.3d

⁴ Penal Law §§ 400.00(1)(n), (o) (enacted July 1, 2022).

519, 519-520 (1st Dept. 2023); *Domino v. McGinty*, 210 A.D.3d 1150, 1152 n.1 (3d Dept. 2022).

3. Defendant's Remaining, Unpreserved Second Amendment Claims Are Likewise Meritless

Equally unavailing are defendant's newfound appellate arguments that New York's provisions restricting gun licensure based on felony criminal history, good moral character, age, unlawful controlled substance use, and mental illness are unconstitutional (DB 10-11). Initially, as discussed, defendant did not raise those specific claims below; therefore, they are unpreserved. Regardless, they lack merit.

Defendant is wrong to assert, for the first time on appeal, that laws prohibiting felons from possessing firearms fail *Bruen's* historic test (DB 11). The Supreme Court explored the history of the Second Amendment extensively in *Heller*, *McDonald*, and *Bruen* and concluded that felons may be prohibited from bearing arms. Indeed, because of the Supreme Court's repeated, unequivocal pronouncements, such prohibitions remain uncontroversial (*see United States v. Charles*, 633 F.Supp.3d 874, 888 (W.D. Tex. 2022) (This "Nation has a longstanding history of excluding felons from the rights of 'the people'")) and federal courts have continued to uphold felon-in-possession laws post-*Bruen*. *See e.g. United States v. Hampton*, ___ F.Supp.3d ___, 2023 WL 3934546, at *12 (S.D.N.Y. June 9, 2023). As defendant's cited law review article—which was not relied upon below and is therefore outside the record on appeal—acknowledges, a prohibition on defendant's ownership of a gun here is supported by consistent, long-standing

APL-2024-00111

To be argued by

BENJAMIN RUTKIN-BECKER

(15 minutes requested)

Court of Appeals



State of New York



THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- *against* -

OMAR JOHNSON,

Defendant-Appellant.

DEFENDANT-APPELLANT'S BRIEF

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not be held to have knowingly and intelligently waived a right that he retained at the time he negotiated his plea.¹¹

Accordingly, Mr. Johnson did not validly waive his Second Amendment claim.

POINT II:

THE MOTION COURT ERRONEOUSLY DENIED MR. JOHNSON'S SECOND AMENDMENT CLAIM, WHICH MINIMALLY REQUIRED A HEARING.

Mr. Johnson never used or threatened to use the firearm he was prosecuted for possessing: rather, he kept it safely stowed in his moped, should his dangerous job as a delivery person ever require him to protect himself. The Supreme Court made clear in *Bruen* that individuals have a Second Amendment right to carry a gun for self-protection, which New York's "proper cause" requirement unconstitutionally restricted. Mr. Johnson's resulting Second Amendment challenge to the charges raises questions that this Court left open in a prior series of appeals raising unpreserved *Bruen*-based Second Amendment challenges. Here, the trial court wrongly denied Mr. Johnson's dismissal motion without finding any historical tradition to justify other of

¹¹ Similarly, a guilty plea is not voluntary, knowing, and intelligent where a defendant is misinformed about the issues that survive the guilty plea. *See, e.g., People v. Hernandez*, 176 A.D.3d 1100, 1101 (2d Dep't 2019) (finding error where a plea "is predicated upon a false assurance that, notwithstanding the plea, the defendant can nonetheless contest" a forfeited issue).

In the guilty plea context, because the claim is forfeited by operation of law and thus cannot be raised under any circumstances, defendants are entitled to vacatur. In the appellate waiver context, no similar legal bar exists to preclude review of issues. A reasonable belief that an issue survives a waiver can and should be honored. Thus, the proper remedy here is appellate review.

New York’s discretionary licensing requirements. This Court should reverse and dismiss the charges or remit the case to the trial court to conduct the correct inquiry.

The Second Amendment guarantees an “individual right to possess and carry weapons in case of confrontation.” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); U.S. Const., amend II. This right applies equally publicly as in the home. *Bruen*, 597 U.S. at 32 (“Nothing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms.”). Mr. Johnson thus had a Second Amendment right to possess a gun for self-defense purposes, subject only to “lawful regulatory measures.” *Heller*, 554 U.S. at 626-27.

In *Bruen*, the Supreme Court set forth a two-part test to determine the scope of Second Amendment rights. “[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” 597 U.S. at 17. The State then bears the burden of establishing that the restriction at issue is “consistent with this Nation’s historical tradition of firearm regulation.” *Id.* That tradition must have been firmly rooted at the time of the nation’s founding. *Id.* at 46.

New York law only criminalizes the public possession of a firearm if it is unlicensed. Penal Law § 265.20(a)(3); *People v. Hughes*, 22 N.Y.3d 44, 50 (2013). Under New York’s licensing scheme at the time of Mr. Johnson’s arrest, individuals had to demonstrate, among other things: (1) “good moral character,” with no further definition, to obtain any firearm; and (2) “proper cause,” interpreted as “a special need

for self-protection distinguishable from that of the general community,” to bear arms in public. Former Penal Law § 400.00(1)(b),(2)(f); see *In re Klenosky*, 75 A.D.2d 793 (1st Dep’t 1980). *Bruen* struck down the “proper cause” requirement, as our “Nation’s historical tradition of firearm regulation” never required a showing of good cause to exercise Second Amendment rights. 597 U.S. at 17, 33-34, 38-39. *Bruen* did not specifically address “the rest of New York’s licensing scheme or the interplay between the invalidation of New York’s proper cause requirement and state statutes criminalizing unlicensed possession of a firearm.” *Cabrera*, 41 N.Y.3d at 50 (2023). As this Court recognized, however, *Bruen*’s newfound methodology “effected a dramatic change in how States may regulate [weapon] possession.” *Id.* at 46.

In *Cabrera*, this Court held that post-*Bruen* challenges to New York’s weapon possession statutes require preservation. Mr. Johnson raised his Second Amendment claim below. The trial court’s ruling, summarily affirmed by the First Department after finding review foreclosed by the waiver, was flawed and requires this Court’s correction. First, the court erroneously held that Mr. Johnson lacked standing to raise a facial challenge to the licensing scheme underpinning his criminal charges. Second, the court failed to faithfully apply *Bruen* in summarily denying Mr. Johnson’s motion without the prosecution presenting any proof of how New York’s licensing requirements satisfy the historical tradition test. For these reasons, Mr. Johnson’s motion should be granted. Alternatively, this Court should order a hearing to develop the relevant historical record

and correctly apply *Bruen*. See *People v. Morales*, 65 N.Y.2d 997, 998 (1985) (remitting to lower court for correct application of legal standard).

A. Mr. Johnson Has Standing to Raise His Second Amendment Claim.

Mr. Johnson was not required to have applied for a license to challenge the entirety of the licensing scheme as unconstitutional. The lower court erred as a matter of law in finding otherwise.

As the Supreme Court has repeatedly held, the State lacks the constitutional authority to punish an individual for failing to submit to a facially unconstitutional licensing/permitting scheme. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969) (a person faced with a facially “unconstitutional licensing law may ignore it” and challenge a subsequent prosecution); *Staub v. City of Baxley*, 355 U.S. 313, 314, 322, 325 (1958) (finding standing to challenge a facially invalid ordinance that prohibited solicitation of membership for an organization without a permit, notwithstanding defendant’s failure to apply for it); *id.* at 319 (“The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance.”); *Smith v. Caboon*, 283 U.S. 553, 562 (1933) (noting that the general requirement that individuals first apply for licenses they wish to challenge is “not applicable where a statute is invalid upon its face and an attempt is made to enforce its penalties in violation of a constitutional right”).

A majority of this Court, in denying *Bruen* claims on preservation grounds, declined to reach the same question standing at issue here. *See Cabrera*, 41 N.Y.3d at 51 (“We take no position on whether Cabrera would have had standing to bring his *Bruen* claims had he timely raised them”). Judge Rivera’s partial dissent, however, reached that question and correctly distilled the relevant caselaw, cited above: “When evaluating standing in criminal cases, the Supreme Court has consistently held that when a defendant is being prosecuted based on a licensing scheme challenged as unconstitutional, as is the case here, it is the fact of the prosecution that confers standing.” *People v. Garcia*, 41 N.Y.3d 62, 74 (2023) (Rivera, J., dissenting). California’s appellate courts have reached the same conclusion, consistently addressing defendants’ facial challenges to California’s licensing scheme following *Bruen*.¹² *See In re D.L.*, 310 Cal.Rptr.3d 562, 574-77 (Cal. Ct. App. 2023) (finding standing for facial *Bruen* challenge based on the Supreme Court’s *Caboon* line of cases, discussed above, and distinguishing the *Decastro* decision discussed *infra*); *In re T.F.-G.*, 312 Cal.Rptr.3d 685, 701 (Cal. Ct. App. 2023) (holding standing exists to challenge delinquency “adjudication under a penal statute—an enforcement mechanism of the regulatory regime that [the accused] contends is unconstitutional”). Mr. Johnson has standing to challenge his prosecution based on licensing requirements that he alleges are unconstitutional.

¹² Prior to *Bruen*, California had a “good cause” requirement for concealed carry licensure that the State’s Attorney General conceded was indistinguishable from New York’s “proper cause” requirement. Former CAL PENAL CODE §§ 26150(b)(2), 26155(b)(2); *see In re D.L.*, 310 Cal.Rptr.3d at 147-48.

In contesting standing in Mr. Johnson’s and similar *Bruen* challenges, the prosecution has principally relied on the Second Circuit’s decision in *United States v. Decastro*, which required an individual to either have applied for a license or demonstrate futility in doing so in order to challenge a licensing requirement. 682 F.3d 160, 164 (2d Cir. 2012). The trial court ruled that Mr. Johnson lacked standing because he failed to meet this test (A48). *Decastro* does not foreclose Mr. Johnson’s claim.

As the Second Circuit has recently clarified, a “criminal conviction surely qualifie[s] as an Article III injury-in-fact.” *Decastro*’s holding is about “traceability.” *Antonyuk v. James*, Nos. 22-2908(L), 22-2972(Con), 2023 WL 11963034 at * 22 n. 21 (2d Cir., Oct. 24, 2024). *Decastro* had failed to show that he would have been subject to an unconstitutional licensing provision, thus “sever[ing] the causal chain connecting the challenged rule to his conviction.” *Id.* at 22 & n. 21. Here, Mr. Johnson challenged New York’s licensing in its entirety following *Bruen*. Adjudicating his claim thus does not require determining whether, and why, he would have been denied a license as well as the closer question of Mr. Johnson’s standing to raise an as-applied challenge. As Mr. Johnson alleged that his conviction was traceable to an unconstitutional licensing regime, he had standing even under *Decastro*. See *Plummer v. United States*, 983 A.2d 323, 341-42 (D.C. 2009) (finding standing to challenge law that “effectively foreclosed any attempt to exercise [Plummer’s] Second Amendment right,” notwithstanding failure to

apply for a license).¹³ This Court must proceed to the merits of Mr. Johnson’s Second Amendment claim.

B. The Trial Court Failed to Properly Apply *Bruen*.

The first question preserved for this Court’s review on the merits is one of remedy. *Bruen* identified a constitutional infirmity at the heart of New York’s concealed carry licensing scheme. Mr. Johnson’s possession of a weapon for self-protection purposes was constitutionally protected conduct subject only to “lawful regulation.” *Heller*, 554 U.S. at 626-27; *Bruen*, 597 U.S. at 32. But because Mr. Johnson could not have shown a “special need” to carry his firearm, he lacked any path to immunity for exercising his core Second Amendment rights. His prosecution for failing to comply with an unlawful proper cause requirement was unconstitutional. *See Shuttlesworth*, 349 U.S. at 150-51 (invalidating conviction where State punished only unlicensed activity based on unconstitutional licensing requirement, despite *some* valid requirements that an application be submitted “in writing” and provide information to licensing officials).

Moreover, *Bruen*’s analysis extends beyond the “proper cause” provision. *See Cabrera*, 41 N.Y.3d at 46 (recognizing *Bruen*’s far-reaching consequences). Below, Mr. Johnson alleged that New York’s gun licensing violated the Second Amendment. As was not contested, the licensing requirement plainly covered Mr. Johnson’s

¹³ The prosecution’s standing arguments, which the trial court adopted, presupposed that Mr. Johnson was wrong on the merits. For example, the court reasoned that Mr. Johnson’s cited cases, including *Shuttlesworth* and *Plummer*, were inapplicable because *Bruen* did not facially invalidate New York’s licensing standards (A 39-40). Yet that is precisely what Mr. Johnson alleged.

constitutionally protected right to public carry. *Bruen* then required the prosecution to demonstrate the historical tradition underpinning New York’s licensing requirements. 597 U.S. at 17.

The prosecution failed to meet its burden. While the prosecution argued that the proper cause requirement was severable, nothing in this record demonstrates the validity of New York’s other licensing provisions. The prosecution merely sought to limit *Bruen* to its facts, arguing without any analysis under the historical tradition test that *Bruen* applied only to the proper cause requirement. Nor was the uncontested fact that States might generally impose licensing requirements consistent with *Bruen* relevant to upholding New York’s specific law at issue. Because the prosecution offered no historical evidence to support New York’s regulations, Mr. Johnson was entitled to dismissal of the charges. *See id.* at 19 (placing the burden on the State to “affirmatively prove” the validity of the challenged law by way of historical evidence); *id.* at 25 n. 6 (noting that, under the “principle of party presentation,” courts may “decide a case based on the historical record compiled by the parties.”). At a minimum, the lower court erred by summarily denying Mr. Johnson’s motion without any application of *Bruen*’s historical tradition test.

The court was also incorrect to conclude that *Bruen* “raised no constitutional concerns regarding New York’s other carry-permit licensing requirements,” outside of proper cause. Certainly, our Legislature did not believe as much. *See Antonyuk*, 2023 WL

11963034 at *3-5 (overviewing the comprehensive amendments to New York’s licensing scheme, beyond striking the “proper cause” requirement, as part of the Legislature’s post-*Bruen* “Concealed Carry Improvement Act”). And for good reason. Prior to *Bruen*, New York provided licensing officers with discretion to deny licenses to anyone they deemed to lack “good moral character,” a term that lacked any definition or objective criteria. Such unbridled discretion fails *Bruen*’s historical tradition test. *See Bruen*, 597 U.S. at 13-15 (noting that New York was one of a minority of states enabling licensing officials to deny licenses “based on a perceived lack of need or *suitability*”) (emphasis added); *id.* at 38 n. 9 (contrasting constitutional regimes with “narrow, objective, and definite standards” to guide licensing officials, from those like New York’s requiring “the appraisal of facts, the exercise of judgment, and the formation of an opinion’’)).¹⁴

Even aside from the “proper cause” requirement, then, New York was an outlier and not like the 43 “shall-issue” licensing States that *Bruen* approved of (*cf.* Trial Court Decision: A 39 (erroneously finding that New York’s licensing requirements, aside from proper cause, were “almost identical” to shall-issue requirements)).¹⁵ Mr. Johnson’s Second Amendment challenge required more than the motion court’s cursory analysis.

¹⁴ The prosecution’s own reading of *Bruen* calls New York’s licensing scheme into serious doubt (*see* Pros. App. Br.: A 132 (“[I]n invalidating New York’s ‘proper cause’ requirement, the Court focused on the level of discretion conferred on licensing officers’’)).

¹⁵ Notably, the Supreme Court provided examples of states with “discretionary criteria” ostensibly similar to New York’s “good moral character” that, in practice, operated as constitutionally

To the contrary, Mr. Johnson’s challenge to New York’s gun licensing standards necessitated a “complex inquiry,” made by “closely analyzing historical analogues to assess whether our modern regulations are consistent with historical tradition.” *Cabrera*, 41 N.Y.3d at 50 (requiring preservation of Second Amendment to facilitate the “development of a record that would allow for careful and deliberate adjudication” under *Bruen*’s test). That did not happen below. Because the prosecution failed to justify the constitutionality of the charges, this Court should order dismissal. Alternatively, this

permissible “shall-issue” regimes by granting high rates of licenses or clearly defining suitability criteria to cabin discretion. *See id.* at 13 n. 1; *Antonyuk*, 2023 WL 11963034 at *11-12, 33-35 (overviewing this part of the *Bruen* decision).

In line with these States and *Bruen*’s constitutional command, shortly after *Bruen* the Legislature provided a newfound definition for “good moral character,” which relates it to an individual’s dangerousness. *Antonyuk*, 2023 WL 11963034 at *24. Finding the amended provision facially constitutional under *Bruen*, the Second Circuit recently noted: “A statutory scheme that gave officials discretion . . . such that they could grant or deny licenses as they saw fit, would plainly not pass muster.” *Id.* at *28. The “good moral character” standard, as was in effect at the time of Mr. Johnson’s arrest, presented precisely this issue and was facially invalid.

On the other hand, the Second Circuit found a historical tradition for licensing schemes that provide “bounded discretion” to determine whether a described standard is met individual cases. *Id.* at *27-33. Because the statute now provides a definition that officials could constitutionally apply to individuals who were dangerous, the Second Circuit left it in place. *Id.*

As a practical matter, then, a ruling in Mr. Johnson’s favor will not have widespread effects. Prior to the June 2022 *Bruen* decision, Second Amendment challenges to New York’s penal law were rarely, if ever, preserved as this Court has required. Meanwhile, the Legislature’s amendments to the statutory scheme went into effect in September 2022, and have since been upheld in almost its entirety. Mr. Johnson is one of likely few individuals who both preserved a *Bruen* claim and would have been unconstitutionally denied a firearm at the time of their arrest.

Court should order a hearing at which the prosecution must demonstrate the constitutionality of New York’s licensing at the time of Mr. Johnson’s arrest.¹⁶

CONCLUSION

The Court should reverse Mr. Johnson’s conviction and dismiss the charges. In the alternative, at a minimum, the Court must remit to the trial court to apply the correct legal standard. *See People v. Morales*, 65 N.Y.2d 997, 998 (1985) (remitting for decision in accordance with correct legal standard).

Respectfully submitted,

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¹⁶ A hearing to develop the historical tradition record is fully consistent with the challenge raised below and would not turn into a “quasi-administrative hearing” over what licensing provisions applied to Mr. Johnson. *Compare People v. Pastrana*, 41 N.Y.3d 23, 31 (2023) (Rivera, J., dissenting) (finding remittal appropriate to develop historical record under *Bruen*), *with Garcia*, at 81-82 (Rivera, J., dissenting) (finding remittal inappropriate to assess individual eligibility for a license).

APL-2024-00111

To be argued by:
EMILY A. ALDRIDGE
(15 MINUTES REQUESTED)

**Court of Appeals
State of New York**

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

OMAR JOHNSON,

Defendant-Appellant.

BRIEF FOR RESPONDENT

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March 17, 2025

POINT II

Defendant's Second Amendment Claim Is Partially Unpreserved. Further, Defendant Lacks Standing To Challenge New York's Gun Licensing Scheme. In Any Event, *Bruen* Did Not Prevent The State From Prosecuting Defendant For Carrying A Loaded, Unlicensed Firearm In Public.

Even if this Court finds that defendant's Second Amendment claim survives his valid appeal waiver, this Court should reject that claim as barred and meritless. *First*, defendant's claim is partially unpreserved, because he contests aspects of New York's gun licensing laws for the first time on appeal.

Second, defendant lacks standing to challenge New York's gun licensing scheme because he did not submit to the required background check or attempt to obtain a gun license lawfully. This Court should not countenance his actions in procuring a firearm illegally, carrying it on the city streets in stark violation of New York law, and then asking for permission afterwards. Defendant seeks to avoid the lawful process of applying for a gun license and instead to transform New York's criminal courts into retroactive licensing authorities. That subverts the goal of public safety underlying New York's gun licensing scheme, and it is not the proper role of the criminal judicial system.

Relatedly, this Court has no jurisdiction to hear defendant's complaints about the licensing requirements of Penal Law § 400.00. He was not aggrieved by those licensing requirements, because he did not apply for a license and therefore was not denied a license based on any of the specific provisions in the statute. Instead, he was

prosecuted because he procured and carried an illegal gun without taking any of the required steps for obtaining a gun license, including submitting to a background check.

Third, defendant’s Second Amendment claim fails on the merits. *Bruen* invalidated only one small part of New York’s gun licensing scheme: the “proper cause” requirement for obtaining a concealed carry permit. It did not legalize the carrying of unlicensed weapons, nor did it address—much less invalidate—the remaining provisions of New York’s licensing regime. The Supreme Court’s narrow holding in *Bruen*, therefore, did not prevent the state from prosecuting defendant for unlicensed gun possession.

A. Defendant’s *Bruen* Claim Is Partially Unpreserved.

In his pre-plea motion to dismiss, defendant argued broadly that *Bruen* invalidated New York’s gun possession laws. He did not, however, identify any alleged flaws in the state’s licensing requirements other than the “proper cause” requirement invalidated in *Bruen* (A015-16). Pertinent here, he did not complain about the “good moral character” requirement that he challenges for the first time on appeal to this Court (DB: 33).⁷

Defendant’s newfound appellate argument is unpreserved. To preserve a claim for appeal, a dismissal motion must be “specifically directed” at the alleged error. *People*

⁷ On appeal to the Appellate Division, defendant unsuccessfully raised unpreserved challenges to other aspects of New York’s gun laws (A069-71). He does not renew those claims in this Court.

v. Gray, 86 N.Y.2d 10, 19 (1995). Here, therefore, defendant's failure to challenge the "good moral character" requirement below is fatal to his appellate claim. *See Cabrera*, 41 N.Y.3d at 39. In fact, by failing to raise that claim to the trial court, defendant prevented the People from developing a proper record to defend the challenged provision. *See Kinchen*, 60 N.Y.2d at 774.

B. Defendant Lacks Standing to Challenge the Constitutionality of New York's Gun Licensing Scheme.

As the courts below found, defendant lacks standing to raise a Second Amendment claim. He did not apply for a gun license, submit to the required background check, or follow *any* lawful process to procure a firearm in New York. Instead, he obtained a gun illegally and carried it on the city streets, notwithstanding his violent criminal history. He now asks this Court to sanction that conduct after the fact. This Court should decline to do so. After all, to protect public safety, New York reasonably requires that individuals submit to background checks *before* they carry loaded weapons on city streets.

The Second Circuit's holding in *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012), is instructive. There, the defendant legally acquired a gun in Florida. However, he lacked a license to possess the gun in New York, where he lived. He submitted a false gun registration form, claiming that he lived in Florida, and illegally brought the gun (a Taurus pistol) to New York. *See id.* at 161-62. The defendant was charged by federal authorities with illegally transporting the firearm into his state of residence (New

York) from another state (Florida). *Id.* at 162; *see* U.S.C. 922(a)(3). He moved to dismiss the charges, contending that the federal law was facially unconstitutional. In particular, he asserted that New York City’s gun control laws were so restrictive as to constitute a complete ban, which, he claimed, left him no choice but to purchase a handgun out of state. *Decastro*, 682 F.3d at 162. After the District Court denied the dismissal motion, the defendant was convicted and sentenced to two years’ probation. *Id.* at 163.

The Second Circuit affirmed the defendant’s conviction. Pertinent here, the court ruled that “because [the defendant] failed to apply for a gun license in New York, he lack[ed] standing to challenge the licensing laws of the state.” *Id.* at 164. The Second Circuit explained that “[a]s a general matter, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy.” *Id.* (internal quotation marks omitted). The court noted, too, that the defendant had not made a “substantial showing” that it would have been “futile” for him to apply for a handgun license in New York. *Id.*

The Second Circuit next considered whether the federal law at issue (18 U.S.C. § 922(a)(3))—which applied to the defendant regardless of whether he had a New York gun license—was facially unconstitutional. The court rejected that challenge and affirmed the conviction. *See Decastro*, 682 F.3d at 168-70.

The Second Circuit’s holding in *Decastro* derives from the Supreme Court’s longstanding rule that a party has standing to raise a claim only if the “injury” suffered by the party is “fairly traceable” to the opposing party’s “allegedly unlawful conduct.”

Allen v. Wright, 468 U.S. 737, 751 (1984). In *Decastro*, the Second Circuit found no standing to challenge New York City’s gun licensing regime, because the defendant’s “injury”—that is, his federal conviction under 18 U.S.C. 922(a)(3)—was not fairly traceable to any infirmity in New York’s gun licensing laws. Because the defendant never applied for a New York gun license, he could only speculate as to whether he would have obtained one if he had applied. *Decastro*, 682 U.S. at 164; *accord Allen*, 468 U.S. at 746, 755 (parents lacked standing to challenge the tax-exempt status of allegedly racially discriminatory private schools to which their children had not applied); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972) (plaintiff lacked standing to challenge the allegedly discriminatory membership policy of a club to which he never applied).

That doctrine applies here. Contrary to defendant’s argument, he was not aggrieved by New York’s gun licensing scheme—in particular, by the “proper cause” and “good moral character” requirements on which his appeal focuses (DB: 31-34). Because defendant never applied for a gun license, the record does not reveal whether either of those provisions would have prevented him from obtaining one. Likewise, the record does not reveal whether—if defendant had applied and was denied a license—it would have been because of one of the challenged provisions or, alternatively, because of a provision that is plainly constitutional, such as the prohibition on possession of firearms by convicted felons. Therefore, defendant is wrong to assert that his weapon possession “conviction was traceable to” New York’s allegedly “unconstitutional licensing” requirements (DB: 30).

Simply put, defendant lacks standing to challenge New York’s gun licensing scheme, because it is “speculative” whether the provisions he challenges had anything to do with his failure to obtain a gun license. *See Allen*, 468 U.S. at 752. Indeed, given that defendant—who had a violent felony history—procured a gun illegally and concealed it in his moped, it is equally likely that he would not have sought a gun license—and still would have carried the firearm illegally—even if the challenged provisions had not been in the statute. This Court, therefore, should not entertain defendant’s attempt to litigate the validity of New York’s gun licensing scheme *after* he willfully obtained an illegal gun.

By the same token, defendant cannot fairly argue that he was “aggrieved” by the portions of New York’s licensing scheme he now challenges. Like standing, “aggrievement” is a jurisdictional prerequisite to appellate review. The Appellate Division has jurisdiction to review only those determinations “which may have *adversely affected* the appellant.” CPL § 470.15(1) (emphasis added). This Court “has construed CPL 470.15(1) as a legislative restriction” not only on the Appellate Division’s review power but also, “concomitantly,” on this Court’s review power. *People v. LaFontaine*, 92 N.Y.2d 470, 474 (1998).

Here, the record does not reveal that defendant was “adversely affected” by the licensing provisions of Penal Law § 400.00 he now challenges: namely, the “proper cause” requirement invalidated in *Bruen* and the “good moral character” provision that the *Bruen* Court did not address. Defendant was charged with second-degree weapon

possession under Penal Law § 265.03(3), and he pled guilty to attempting to commit that crime. On appeal, defendant does not identify any offending language in § 265.03(3). Instead, he alleges defects in the licensing scheme set forth in Penal Law § 400.00. But the requirements of § 400.00 did not adversely affect him, because he was not denied a license based on the provisions he now challenges. Defendant was convicted because he possessed a loaded firearm in violation of § 265.03(3), not because he failed to satisfy any particular licensing requirement of § 400.00. Because defendant did not submit to the licensing process or undergo a background check, he should not be heard to parse the licensing provisions of § 400.00, which he made no attempt to satisfy.

By analogy, a person lacks standing to challenge an administrative action unless they suffered some actual harm from the action. “[T]he injury must be more than conjectural.” *New York State Ass’n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 211 (2004). Speculation about a governmental action or decision cannot “supply the missing ingredient of in-fact injury.” *Id.*

So too here. Defendant seeks an advisory opinion about the constitutionality of hypothetical grounds for why he might have been denied a gun license had he applied for one. But it is merely speculative—particularly given defendant’s predicate felon status—(1) whether defendant would have applied for a gun license but for the challenged provisions and (2) if he had applied, whether the application would have been denied because of those provisions. This Court, therefore, can only speculate as

to whether defendant was adversely affected by the challenged provisions of § 400.00, which is insufficient to create an adequate record to support a finding of standing. *See Kinchen*, 60 N.Y.2d at 774.

Significantly, the Fourth Department has joined the First Department in holding that a defendant who never applied for a gun license lacks standing to challenge the constitutionality of the state’s weapon possession laws. *See People v. Davis*, 234 A.D.3d 1356 (4th Dept. 2025). Courts from other jurisdictions have reached similar results. In *State v. Wade*, 301 A.3d 393 (N.J. App. 2023), a New Jersey appellate court ruled that “a motion to dismiss criminal charges is not the proper venue for demonstrating that defendants would have been granted a gun-carry permit but for” the challenged provision of the state’s licensing scheme. *Id.* at 403. The court explained, “If defendants had applied for gun-carry permits, there would be a complete record of why they were not granted the permits,” and the court “would not be left to speculate that defendants were denied the permits because of” the challenged provision. *Id.* The court underscored that even “law-abiding citizens are not free to ignore a statute and presume that they would have been granted a permit but for one potentially invalid provision of a permit statute.” *Id.*; *accord State v. Wilson*, 543 P.3d 440, 444-45 (Haw. 2024) (although the defendant had standing to challenge the constitutionality of the statutes under which he was facing charges, he lacked standing to challenge the constitutionality of the state’s gun licensing regime, because he had not applied for a license), *cert. denied*, 145 S.Ct. 18 (2024); *Bourdeau v. State*, 2023 WL 6567799, at *3-4 (Md.

App. Oct. 10, 2023) (unpublished) (“A person who has not applied for a handgun carry permit does not have standing to challenge the constitutionality of the permitting scheme itself”).

Defendant’s reliance on the First Amendment jurisprudence, such as *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), and *Staub v. City of Baxley*, 355 U.S. 313 (1958), is inapt (DB: 28). Critical differences exist between First and Second Amendment rights. As explained in Part C, below, the Supreme Court held in *Bruen* that the right to bear arms is afforded only to *law-abiding* citizens; it can be denied to people whose backgrounds indicate that their possession of a weapon endangers the community. *See United States v. Rahimi*, 602 U.S. 680 (2024) (persons who pose a credible threat to the physical safety of another may be disarmed). By contrast, a predicate felon or a person with a mental health history may not be subjected to a background check before being allowed to speak. That is because speech, unlike gun possession, rarely implicates public safety.

Similarly, defendant is wrong to rely on *Smith v. Caboon*, 283 U.S. 553, 560 (1931), which concerned the constitutionality of a state licensing requirement for common carriers. That licensing requirement was merely a commercial regulation that lacked the public safety implications of a gun licensing scheme. Again, as *Bruen* recognized, states have the right to insist that individuals obtain a license before carrying a gun. Defendant had no right to flip that procedure on its head by obtaining an illegal gun first and then asking permission to do so from the courts only *after* he was caught.

For those reasons, the People respectfully submit that this Court should not adopt the view expressed in Judge Rivera’s dissent in *People v. Garcia*, which opined, relying on *Shuttlesworth*, *Staub*, and *Smith*, that a defendant facing a criminal weapons charge had standing to challenge the underlying licensing scheme. *Garcia*, 41 N.Y.3d 62, 74 (2023).⁸ As described above, defendant was not aggrieved by the specific licensing provisions he now challenges. Further, because of the public safety risk posed by unlicensed gun possession, individuals should be required to follow a lawful process to vindicate their Second Amendment rights. A person who believes he has a constitutional right to carry a loaded firearm in public should not be able to take the law into his own hands by obtaining an illegal gun and asking for permission only after he is caught.

Defendant’s reliance on *Antonyuk v. James*, 120 F.4th 941 (2d Cir. 2024), is misplaced (DB: 30). Five of the six plaintiffs in *Antonyuk* were licensed gun owners with concealed carry permits who challenged state laws banning the carrying of firearms in sensitive and restricted locations. *Id.* at 958-59. Those plaintiffs obviously had standing. The sixth plaintiff (Sloane) asked the court to strike down aspects of the licensing process, including the requirements that he submit to an in-person interview, undergo firearms training, and make other disclosures. *Id.* at 458-59. The court held

⁸ Likewise, this Court should not follow California intermediate appellate court decisions that reached the same result. *See, e.g., In re D.L.*, 93 Cal.App.5th 144 (Cal. App. 2023).

that Sloane had standing to bring a civil suit challenging the licensing rules, because the injury he allegedly suffered “flows from the application itself, not from his asserted ineligibility for a license.” *Id.* at 979.

The Court distinguished *Decastro*, observing that the defendant there did not have standing, because he failed to show that “he had been or would have been denied a license under the allegedly-unconstitutional rules.” *Antonyuk*, 120 F.4th at 978. Hence, the defendant’s injury in *Decastro* (his criminal conviction) was not fairly traceable to the licensing process. *Id.* at n.21. Similarly, here, as discussed, defendant’s criminal conviction is not traceable to the provisions of New York’s licensing rules that he now challenges.

Further, unlike the defendant here, the plaintiff in *Antonyuk* did not flout the law by procuring an illegal firearm and then asking the courts for permission afterwards. Instead, he filed a civil suit and sought redress in a court of law—the proper way to raise a Second Amendment claim.

Defendant also inaptly relies on a District of Columbia case, *Plummer v. United States*, 983 A.2d 323 (D.C. 2009). There, the court held that a criminal defendant had standing to challenge the District of Columbia’s “absolute prohibition” on gun ownership, because it would have been futile for him to obtain a license. *Id.* at 342; accord *Decastro*, 682 F.3d at 160. Here, by contrast, New York does not have an absolute ban on gun ownership. And, as the trial court found, defendant failed to make a “substantial showing” that it would have been futile for him to apply for a license

(A040). Notably, the First Department has recognized only one exception to the standing doctrine: where the defendant was charged with possessing a weapon for which a license is unavailable, such as an assault rifle or a large capacity magazine. *See People v. Velardo*, 228 A.D.3d 520 (1st Dept. 2024); *People v. Archibald*, 225 A.D.3d 548, 549 (1st Dept. 2024). That is not the case here.

Moreover, even if defendant had made a showing of futility, the People submit that neither *Plummer*, nor the dicta in *Decastro* regarding futility, should state the law of New York. If a futility exception were recognized, the most dangerous gun offenders—including those caught with illegal machine guns or assault rifles—would have automatic standing to raise a Second Amendment claim simply because they could not acquire a license under New York law. This would permit them to invoke their purported Second Amendment rights without ever submitting to a background check or following a lawful process. Notably, the gun case that *Decastro* cites in support of a “futility” exception, *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), was a civil suit in which the plaintiff—a “model citizen”—followed all the rules and then sued for the right to obtain a New York gun license as a nonresident. *Id.* at 76-77. The plaintiff did not take it upon himself to flout New York’s gun laws.

In short, defendant lacks standing here, because his conviction is not fairly traceable to the licensing provisions he now challenges. Further, defendant should not be heard to raise a Second Amendment claim where he armed himself illegally and sought permission to do so after the fact, when he was caught with an illicit firearm. If

defendant were accorded standing to raise a Second Amendment claim, it would incentivize non-law-abiding persons to carry loaded firearms in public in defiance of the state’s “reasonable, well-defined restrictions.” *Bruen*, 597 U.S. at 70. Neither *Bruen* nor any other binding precedent requires that result.

C. *Bruen* Did Not Prevent The State From Prosecuting Defendant For Carrying An Unlicensed, Loaded Firearm On The City Streets.

Even if defendant’s Second Amendment claims were reviewable, they would fail. The Supreme Court has long held that states may require gun owners to obtain a license, and *Bruen* reaffirmed that rule. *Bruen* also made clear that only law-abiding, responsible citizens enjoy the right to bear arms. Contrary to defendant’s argument, the state had no duty to present historical evidence on those points, as they have been established by the Supreme Court and were reaffirmed in *Bruen*. And, in appealing his criminal conviction, defendant may not ask this Court to consider hypothetical challenges to New York’s gun laws that might be brought by others so long as the law was properly applied to him.

1. New York’s Gun Licensing Scheme

Under New York law, it is illegal to possess an unlicensed firearm. The degree of crime depends on various factors, including whether the firearm is loaded, whether it is possessed outside one’s home or place of business, and whether the defendant harbors the intent to use it unlawfully. *See* Penal Law § 265.01 *et seq.* Pertinent here,

possession of a loaded firearm outside one's home or place or business constitutes a class C violent felony. *See* Penal Law §§ 70.02(1)(b), 265.03(3).

A person may avoid criminal liability for possessing a firearm if he or she has a valid New York gun license. *See* Penal Law § 265.20(3). To obtain a license, an applicant must submit to an investigation, and the licensing officer must find that “all statements in a proper application for a license are true.” Penal Law § 400.00(1). The applicant must be of requisite age and good moral character. Penal Law § 400.00(1)(a)-(b). A prior felony conviction, outstanding warrant or order of protection, fugitive status, drug addiction, or history of mental illness may disqualify an applicant. Penal Law § 400.00(1)(c)-(n).

At the time of defendant's arrest, to obtain a special permit authorizing the carrying of a concealed firearm outside one's home or place of business, an applicant needed to show “proper cause” (Penal Law § 400.00(2)(f) (former)), which courts defined as “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *In re Klenosky v. New York City Police Dept.*, 75 A.D.2d 793 (1st Dept. 1980), *aff'd*, 53 N.Y.2d 685 (1981).⁹ Thus, the “proper cause” requirement, which *Bruen* invalidated, applied only to obtaining a special

⁹ Following *Bruen*, the Legislature eliminated the “proper cause” requirement for obtaining a concealed carry permit. In its place, the Legislature substituted additional requirements, including the completion of a training class, an expanded background check including character references, a review of social media accounts, an in-person interview, and an expanded list of disqualifying prior convictions. *See* Penal Law §§ 400.00(1)(o), (2)(f). Those provisions are not at issue here.

kind of license, a concealed carry permit. It was not part of the threshold standard for obtaining a New York gun license in the first place.

2. The Supreme Court Has Affirmed A State’s Right To Require Gun Licensing And To Restrict Gun Possession To Law-Abiding Citizens.

In *Heller v. District of Columbia*, 554 U.S. 570 (2008), the Supreme Court first recognized an individual right to bear arms for self-defense unconnected to military service.¹⁰ There, the Court invalidated the District of Columbia’s total ban on handgun possession in the home for self-defense. *Id.* at 635. Still, the Court made clear that the Second Amendment right is neither “unlimited” nor “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at 626. The Court emphasized that “nothing” in its decision “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” *Id.* Further, the Court recognized that localities may enact “laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27. The Court “identif[ied] these presumptively lawful regulatory measures only as examples,” not as an “exhaustive” list. *Id.* at 627 n.26; accord *McDonald*, 561 U.S. at 786.

Bruen reaffirmed those holdings. The plaintiffs in *Bruen*—“law-abiding, adult citizens” of New York—challenged the “proper cause” requirement for a concealed carry permit. *Bruen*, 597 U.S. at 15. Both individual plaintiffs submitted to and passed

¹⁰ In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court applied this right to the states.

background checks and were issued restricted licenses, which allowed them to carry handguns outside the home for limited purposes. However, they were denied full concealed carry permits because they had not demonstrated a special need to carry a weapon in public. *See id.* In a narrow ruling, the Court held that the Second Amendment protects the right to carry a gun in public for self-defense, which may not be conditioned on “demonstrating to government officers some special need.” *Id.* at 70. The Court noted that the “proper cause” standard authorized New York officials to deny licenses “based on a perceived lack of need or suitability.” *Id.* at 13.

Still, the *Bruen* Court reiterated that the Second Amendment right was subject to “well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms.” *Bruen*, 597 U.S. at 38. The Court expressed approval for the gun licensing regimes of 43 states, “which often require applicants to undergo a background check or pass a firearms safety course.” *Id.* at 38 n.9. The Court explained that these rules were “designed to ensure only that those bearing arms in the jurisdiction are, in fact, law-abiding, responsible citizens.” *Id.* (quoting *Heller*, 554 U.S. at 635).

Concurring in *Bruen*, Justice Kavanaugh (joined by the Chief Justice) observed that “the Court’s decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense.” *Bruen*, 597 U.S. at 79 (Kavanaugh, J., concurring). Justice Kavanaugh observed that New York may continue to require licenses for carrying handguns for self-defense so long as it “employ[s]

objective licensing requirements like those used by the 43 shall-issue States.” *Id.* at 80. Citing *Heller*, Justice Kavanaugh declared that “the Second Amendment allows a variety of gun regulations,” including “prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” *Id.* at 81 (Kavanaugh, J., concurring) (internal quotation marks omitted).

Justice Alito echoed those comments, observing that the Court had not “disturbed anything that we said in *Heller* or *McDonald*...about restrictions that may be imposed on the possession or carrying of guns.” *Bruen*, 597 U.S. at 72 (Alito, J., concurring). Justice Alito added that the *Bruen* “holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun.” *Id.*

Thus, the Supreme Court’s opinion in *Bruen* and concurring opinions joined by three of the six Justices in the *Bruen* majority make clear that New York may continue to require gun licenses, that license applicants may be required to undergo background checks, and that gun ownership may be restricted to law-abiding citizens. The sole holding of *Bruen* was that New York may not require a concealed carry permit applicant to show a “special need” to carry a firearm for self-defense.

Subsequently, in *United States v. Rahimi*, 602 U.S. 680, *supra*, the Supreme Court upheld the defendant’s conviction for possessing a firearm while subject to a civil order of protection, rejecting the defendant’s Second Amendment challenge. The Court explained that an individual who poses a credible threat to the physical safety of another

may be disarmed consistent with the Second Amendment. *Id.* at 690. The Court declared, “Since the founding, our Nation’s firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms. As applied to the facts of this case, [18 U.S.C. § 922(g)(8)] fits comfortably within this tradition.” *Id.* Further, while noting that *Bruen* had applied a historical test, the Court made clear that Second Amendment principles are not “trapped in amber.” *Id.* at 691. Instead, the “appropriate analysis” is whether “the challenged regulation is consistent with the principles that underpin our regulatory tradition”—that is, whether it is “relatively similar” to laws that our tradition is understood to permit.” *Id.* at 692 (internal quotation marks omitted). The Court found that disarming persons who posed a credible threat of physical harm to others was consistent with that tradition. *Id.* at 693-700.

3. *Bruen* Did Not Prevent The State From Prosecuting Defendant For Unlicensed Weapon Possession.

Here, *Bruen* did not prevent the state from prosecuting defendant for possessing an unlicensed weapon on the city streets. As demonstrated above, *Bruen* invalidated only one small portion of New York’s gun licensing regime: the proper cause requirement for obtaining a concealed carry permit. It left intact the remaining requirements for obtaining a gun license, including the requirements that all applicants submit to a background check and not be convicted felons.

Contrary to defendant's contention (DB: 31), he was not prosecuted merely for failing to satisfy the "proper cause" requirement invalidated in *Bruen*. Rather, he was prosecuted because he carried a loaded gun in public without satisfying *any* of the threshold requirements for obtaining a gun license. Indeed, he did not submit to a background check, which was necessary for the licensing authority to evaluate whether there were any disqualifying facts, such as a serious criminal history, a disqualifying mental health history, orders of protection, or substance abuse. As explained above, the state was permitted to require a background check to ensure that defendant was a law-abiding citizen entitled to the protection of the Second Amendment. His failure to submit to that process was a violation of the law. And his brazen act of carrying a loaded gun in public without ever submitting to that lawful process was criminal conduct that the state had the right to prosecute.

This same result holds true regardless of whether defendant's *Bruen* claim is described as a "facial" or an "as-applied" challenge. *First*, a facial challenge to a statute is the "most difficult challenge to mount successfully, because it requires a defendant to establish that no set of circumstances exists under which the Act would be valid." *Rabimi*, 602 U.S. at 693 (internal quotation marks omitted). Thus, to find the statute facially valid, this Court must determine only that New York's gun licensing scheme "is constitutional in some of its applications." *Id.*

That test is easily met here. In *Heller* and *Bruen*, the Supreme Court unequivocally stated that states may have gun licensing schemes, that they may require applicants to

undergo background checks, and that they may deny gun licenses to persons with felony criminal histories and who are suffering from mental illness. Further, in *Rahimi*, the Court ruled that persons who pose a credible threat to the safety of others may be disarmed.

Here, therefore, New York’s licensing scheme is facially constitutional in at least several of its applications, in that it requires background checks and lists prior felony convictions and mental illness as disqualifying factors. Because New York would be justified in denying a gun license to a person who had a prior felony conviction—or whose background check indicated that they posed a credible threat to the physical safety of another—defendant’s facial challenge fails.

Significantly, Judge Rivera recognized as much in *Garcia*, where she opined that the defendant’s challenges to New York’s gun licensing regime should be rejected while dissenting on different grounds not at issue here. *Garcia*, 41 N.Y.3d at 80-82.¹¹ In concluding that the defendant’s facial challenge lacked merit, Judge Rivera noted that the plaintiffs in *Bruen* “did not challenge Penal Law § 265.03(3)—the section defendant was convicted of violating.” *Id.* at 81. Judge Rivera explained further that *Bruen* did not “nullif[y] New York’s regulation of public gun possession,” as demonstrated by “the

¹¹Judge Rivera dissented on the ground that, after *Bruen*, the intent to use a firearm unlawfully cannot be inferred from the mere possession of a gun. *Id.* at 82. Judge Rivera opined, too, that the trial court imposed improper restrictions on defense counsel’s questioning of prospective jurors. *Id.* at 80-89. The majority held that the trial court did not abuse its discretion during *voir dire* and rejected the defendant’s *Bruen* claims as unpreserved. *Id.* at 68-70.

Bruen majority’s reference to certain common regulatory requirements..., as well as Justice Kavanaugh’s concurring opinion, joined by Chief Justice Roberts, that states are not prohibited from imposing licensing requirements for carrying a handgun for self-defense.” *Id.* Judge Rivera observed, therefore, that a “solid majority of the United States Supreme Court recognizes some form of gun possession regulation as constitutional.” *Id.* Defendant’s facial challenge here should be rejected for the same reasons.

Second, defendant cannot succeed on the only challenge that may legitimately be raised on appeal from a criminal conviction—an “as-applied” claim that the law was unconstitutionally applied to him. As the Second Circuit made clear in *Decastro*, “a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.” *Decastro*, 682 F.3d at 163, (quoting *Parker v. Levy*, 417 U.S. 733, 759 (1974)) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) (internal quotations omitted)).¹²

Here, any “as-applied” Second Amendment claim would fail. For one thing, any as-applied challenge would be unpreserved. In his brief, defendant asks this Court to

¹² The only exception is that a facial challenge may be raised to a substantially overbroad law that infringes freedom of speech, even if an as-applied challenge would not succeed. *See, e.g., Americans for Prosperity v. Bonta*, 594 U.S. 595, 615 (2021); *Town of Delaware v. Leifer*, 34 N.Y.3d 234, 244 (2019). The Supreme Court has not “recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.” *United States v. Salerno*, 481 U.S. 739, 745 (1987).

consider only a facial challenge to the statute. He notes that in his pre-plea dismissal motion, he “challenged New York’s licensing in its entirety following *Bruen*,” adding that he did not ask the court to consider whether “he would have been denied a license” had he applied for one (DB: 30; *see* DB: 31 n.13). He even acknowledges that it is unclear whether he had standing to raise an as-applied challenge (DB: 30). This Court may not review that unpreserved claim. *Cabrera*, 41 N.Y.3d at 39.

Further, as discussed in Part B, above, defendant lacks standing to raise an “as-applied” challenge, because he did not apply for a New York gun license. He cannot fairly claim that the licensing laws were inappropriately applied to him, because he never submitted to the process and thus denied the licensing authorities an opportunity to consider his application. A court should determine, after the fact, if defendant would have received a license had he applied for one.

Regardless, the record leaves no doubt that New York’s criminal weapon possession laws were properly applied to defendant. He eschewed a background check, thumbed his nose at New York’s licensing process, and drove on Bronx streets packing a loaded weapon in his moped. The state, therefore, properly prosecuted him for possessing an unlicensed, loaded firearm outside his home or place of business. After all, *Bruen* made clear that states are permitted to require gun licenses and background checks. It was entirely consistent with *Bruen* for the state to enforce those rules by prosecuting defendant for carrying an unlicensed gun.

Similarly, defendant had no right to possess a gun, because he was not a law-abiding citizen. *See Bruen*, 597 U.S. at 38 n.9; *Heller*, 554 U.S. at 626. On the contrary, he was a violent recidivist—a poster child for why gun licensing laws exist. Defendant had previously been convicted of armed robbery in Georgia. In the present case, he was arrested after the police responded to a domestic violence complaint, and an officer heard him threaten to kill the victim and her mother (RA2). Defendant, therefore, posed a credible threat to the safety of others and could lawfully be disarmed. *See Rahimi*, 602 U.S. at 690.

Defendant asserts that his Georgia armed robbery conviction is “irrelevant” to this Court’s determination of his *Bruen* claim, because it was not mentioned in the pre-plea dismissal motion papers (DB: 6 n.2). But the conviction was discussed at defendant’s arraignment (RA9, RA11, RA13), and it was recounted on defendant’s RAP sheet and in the Presentence Report (RA19-20). In fact, defendant acknowledged the Georgia conviction in his Appellate Division brief (A071). Further, at arraignment, defense counsel made a *Bruen* argument, and the prosecutor cited defendant’s out-of-state conviction in response (RA11-13). That conviction, therefore, is properly considered by this Court, notwithstanding defendant’s incorrect assertion in his pre-

plea dismissal motion that he “does not have a violent felony record” (A012 at ¶ 6)—a contention belied by the record and by defendant’s own Appellate Division brief.¹³

Simply put, any “as-applied” challenge is unpreserved, and it would fail for multiple reasons. Nor should this Court grant defendant’s request for a remand to assess the remaining provisions of New York’s licensing scheme under *Bruen*’s historical analysis (DB: 34-35). As explained, the state had every right to enforce its requirement that defendant submit to a background check *before* carrying a loaded firearm in public—and to limit gun possession to law-abiding citizens. As Judge Rivera opined in her *Garcia* dissent, defendant’s failure to apply for a license is “fatal” to his as-applied challenge, “because he has deprived the State of an opportunity to assess his eligibility for a license.” *Garcia*, 41 N.Y.3d at 81 (Rivera, J., dissenting).

As Judge Rivera further explained, “remittal is not appropriate to address the factual deficiencies in defendant’s as-applied claims. *Id.* Rather, “[r]eturning the case to the trial court would devolve the proceeding to a quasi-administrative hearing and circumvent the regulatory structure.” *Id.* at 81-82. Judge Rivera continued, “[p]ermitt[ing] this end run incentivizes gun owners to flout the State’s licensing laws, increasing the risk to the public and gun-related violence. The fact is that the *Bruen*

¹³ This Court may take judicial notice of the lower court records, including defendant’s Appellate Division brief acknowledging his Georgia conviction. *See generally Long v. State of New York*, 7 N.Y.3d 269, 275 (2006) (taking judicial notice of court records demonstrating indictment not dismissed). In fact, defendant included that brief in his appendix to this Court.

majority did not abolish New York’s licensing regime but instead reaffirmed regulation as constitutionally permissible.” *Id.* at 82.

Nothing more need be said to sustain defendant’s conviction. Still, defendant’s unreserved challenge to the “good moral character” requirement of Penal Law § 400.00(1)(b) merits brief comment. For one thing, defendant was not aggrieved by that provision, because he was not denied a license on that basis, as he never applied for a license. Hence, he should not be heard to challenge the good moral character provision in this appeal.

Moreover, that provision does not confer unfettered discretion on licensing officials. Instead, New York courts have upheld that requirement by interpreting it narrowly as a proxy for being a law-abiding citizen—consistent with *Bruen* and *Rahimi*. See *Caputo v. Kelly*, 117 A.D.3d 644, 644-45 (1st Dept. 2014) (the provision is intended to “keep[] guns away from people who have shown they cannot be trusted to obey the law”); *Sanicola v. City of New York*, 224 A.D.3d 578, 579 (1st Dept. 2024) (gun license applicant failed to establish good moral character in light of domestic violence incidents, orders of protection entered against him, and his “lack of candor and concern for the safety of others”).

Likewise, in *Antonyuk*, the Second Circuit upheld the analogous good moral character requirement in New York’s Concealed Carry Improvement Act (CCIA). The court explained that the requirement was “a proxy for dangerousness: whether the applicant, if licensed to carry a firearm, is likely to pose a danger to himself, others, or

public safety.” *Antonyuk*, 120 F.4th at 981. The court held that an inquiry into whether a prospective gun owner could be trusted to use a weapon “only in a manner that does not endanger oneself or others” fell “within the historical tradition of preventing dangerous individuals from carrying guns.” *Id.* at 985. The court rejected the argument that New York conferred too much discretion on licensing officials, noting that “more than a dozen” of the “shall-issue” state licensing regimes cited with approval in *Bruen* “confer some measure of discretion on licensing officers,” and “*Bruen* did not totally foreclose discretion and does not require invalidation of New York’s character requirement.” *Id.* at 995.

Finally, the “proper cause” requirement that *Bruen* invalidated is easily severable from the remainder of New York’s gun licensing scheme. “Severability is... a matter of state law.” *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996); see *City of New Orleans v. Duke*, 427 U.S. 297, 302 (1976). In New York, severability turns on “whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excised, or rejected altogether.” *CWM Chem. Servs., L.L.C. v. Roth*, 6 N.Y.3d 410, 423 (2006) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 (1920)). The answer “must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch, instead of at the roots.” *Id.*

Here, the valid and invalid portions of New York’s gun licensing statute are severable. Penal Law § 400.00(1) sets forth the requirements to obtain a gun license

and is distinct from subsection § 400.00(2), which included the “proper cause” requirement for a special, concealed carry permit.. The general licensing requirements of § 400.00(1) are complete and capable of independent application without reference to former § 400.00(2)(f). In fact, the decision by the Legislature to substitute new requirements for “proper cause” in response to *Bruen* confirms that the invalid provision is severable.¹⁴

Simply put, the Legislature surely would have wanted New York’s remaining gun licensing regulations to survive, even without the proper cause provision. After all, if New York’s gun regulations were invalidated in their entirety, any individual—regardless of their criminal background or history of violence—could carry a loaded firearm in public without consequences. That would pose a grave threat to public safety. Unsurprisingly, every court to consider the question has held that New York’s laws criminalizing the unlicensed possession of a firearm survive *Bruen*. See, e.g., *People v. Rivera*, 233 A.D.3d 548 (1st Dept. 2024); *People v. Outten*, 233 A.D.3d 897, 898 (2d Dept. 2024); *Domino v. McGinty*, 210 A.D.3d 1150, 1152 n.1 (3d Dept. 2022); *People v. Davis*, 234 A.D.3d 1356 (4th Dept. 2025).

In sum, *Bruen* held that the Second Amendment protects the rights of “law-abiding citizens” to obtain concealed-carry permits without having to demonstrate “proper cause.” *Bruen*, 597 U.S. at 71. It did not prevent New York from having a gun

¹⁴ Penal Law §§ 400.00(1)(n), (o) (enacted July 1, 2022).

licensing scheme. Nor did it give defendant the right to possess a firearm in the Bronx without a New York gun license. Therefore, contrary to defendant's partially unpreserved claims—which he also lacks standing to raise—*Bruen* did not prevent defendant's prosecution for toting an unlicensed, loaded firearm on the city streets.

APL-2024-00111

To be argued by

BENJAMIN RUTKIN-BECKER

(15 minutes requested)

Court of Appeals



State of New York



THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

OMAR JOHNSON,

Defendant-Appellant.

REPLY-BRIEF FOR DEFENDANT-APPELLANT

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and intelligently waive his ability to challenge it on appeal). This Court cannot find that Mr. Johnson knowingly waived a claim that was neither included in the waiver nor properly waivable under then-binding precedent.

Point II

Mr. Johnson’s Conviction Should be Reversed and the Charges Dismissed or, Minimally, a Hearing Ordered (Replying to RB Point II and AG Points II, III).

A. Mr. Johnson has Standing.

As is uncontested, Mr. Johnson desired to carry a firearm in public for self-protection purposes. At the time of Mr. Johnson’s arrest, New York unconstitutionally barred individuals from exercising this Second Amendment right absent an additional showing of proper cause. *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17, 33-34, 38-39 (2022).

Supreme Court precedent dictates that Mr. Johnson may challenge his conviction for violating New York’s facially unconstitutional licensing scheme (*see* MB 28 (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), *Staub v. City of Baxley*, 355 U.S. 313 (1958), and *Smith v. Caboon*, 283 U.S. 553 (1933)). *Accord* *People v. Garcia*, 41 N.Y.3d 62, 74 (2023) (Rivera, J., dissenting). The United States Supreme Court has “uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance.” *Staub*, 355 U.S. at 319.

Intervenor and Respondent misapprehend this caselaw in claiming that it does not apply equally to Mr. Johnson’s Second Amendment challenge. They argue that Mr. Johnson’s prosecution cannot be traced to an unconstitutional licensing scheme: both because firearm possession may lawfully be conditioned on obtaining a license, and because New York’s licensing scheme included other valid components in addition to the unconstitutional proper-cause requirement that Mr. Johnson was required to satisfy (RB 4, 30-32; AG 44).

Each of these facts were just as true in *Shuttlesworth*, which concerned prosecution for failure to obtain a license for a public demonstration. As municipalities “rightfully exercise a great deal of control in the interest of traffic regulation and public safety,” the Court agreed that the First Amendment right to “communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways” was properly subject to lawful regulation. 394 U.S. at 152; see *Wilson v. Hawaii*, 145 S. Ct. 18, 22 (2024) (Gorsuch, J., statement respecting the denial of certiorari) (noting it “is surely true” that states can continue to require firearm licenses following *Bruen*, “[b]ut it’s just as true that state licensing regimes can sometimes be so restrictive that they violate the Second Amendment”).

The permitting law at issue in *Shuttlesworth* contained plainly constitutional provisions akin to a background check. 394 U.S. at 149 (requiring applicants to disclose basic information such as the number of expected participants in the demonstration).

The problem was that the permitting regime ultimately conferred discretion “to grant or withhold a permit upon broad criteria unrelated to proper regulation.” *Id.* at 153.

New York’s proper-cause requirement was similarly untethered from proper regulation of the Second Amendment and was likewise found facially invalid. *See Antonyuk v. James*, 120 F.4th 941, 986 (2d Cir. 2024) (“*Bruen* was a facial challenge and proceeded accordingly . . . How [the proper-cause] rule was applied in particular cases was irrelevant given its facial constitutional flaw.”). Mr. Johnson is not challenging any particular application of New York licensing to him, but rather alleges that he was subject to an unconstitutional standard that made it impossible for him to lawfully exercise his Second Amendment right to public carry for self-defense purposes.

Smith, *Staub*, *Shuttlesworth* confirm standing here, notwithstanding the State’s attempts to distinguish them. Intervenor notes that the ordinances at issue in this trio of cases were facially invalid under prior Supreme Court precedent (AG 50-53), but no language from those decisions illogically suggests that the standing analysis turned on an assessment of the degree to which the constitutional issue was “foreclosed” by prior decisions.

Respondent’s repeated appeals to public safety echo the means-end scrutiny that *Bruen* explicitly disavowed (*see* RB 4, 30, 32; *id.* at 38 (distinguishing *Smith* on the sole basis that it involved “merely a commercial regulation that lacked the public safety implications of a gun licensing scheme”)). 597 U.S. at 19. And Respondent’s specific request that this Court decline to apply First Amendment caselaw to the Second

Amendment, (RB 37-39), flies in the face of *Bruen*'s admonition that the Second Amendment "is not a second class right." 597 U.S. at 70. To the extent other States' courts have been willing to diminish Second Amendment rights by adopting similar arguments, these decisions should not be followed (*see* RB 37-38 (citing cases)). *See, e.g., State v. Wade*, 301 A.3d 393, 404 (N.J. App. 2023) ("We [decline] to apply wholesale First Amendment caselaw to a Second Amendment analysis"). *Compare Wilson*, 145 S. Ct. at 19, 20 (Thomas, J., and Alito, J., statement respecting the denial of certiorari) (noting that "the Second Amendment warrants the same respect as any other constitutional right" and criticizing "lower courts' continued insistence on treating the Second Amendment right [] cavalierly" by barring it as a defense) (quotation omitted).

It does not help Respondent's standing argument to invoke public safety since *Heller* and *Bruen* guarantee a right to bear arms in order to *promote* public safety. *See Bruen*, 597 U.S. at 26 (quoting *Heller v. District of Columbia*, 554 U.S. 570, 635 (2008) ("The Second Amendment 'is the very product of an interest balancing by the people' and it 'surely elevates above all other interests' the right to self-defense); *McDonald v. Chicago*, 561 U.S. 742, 767 (2010) (quoting *Heller*, 554 U.S. at 599) ("Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is 'the central component' of the Second Amendment right"). Public safety may justify lawful restrictions on gun possession but provides no basis to deprive a person of the right to raise a constitutional defense to their conviction for exercising the Second Amendment right.

Since the filing of Mr. Johnson’s initial brief, the three Supreme Court Justices to have opined on this precise issue have provided strong support for Mr. Johnson’s view of standing. *See Wilson*, 145 S. Ct. at 20-21 (Thomas, J., and Alito, J., concurring) (“States cannot mandate that would-be gun owners go through an unconstitutional licensing process before they may invoke their Second Amendment rights” in criminal proceedings); *id.* at 22-23 (Gorsuch, J., concurring) (“The trouble with” a Hawaii Supreme Court’s decision, which found that the defendant had at most standing to challenge the State’s firearm licensing requirements but not his prosecution for violating them, is that the statutes “work hand in glove”). This Court should find that Mr. Johnson has standing to raise his facial challenge.

B. Mr. Johnson’s Conviction is Unconstitutional.

Mr. Johnson’s conviction runs afoul of the Second Amendment. Respondent’s and Intervenor’s merits arguments, much like their standing arguments, minimize the import of *Bruen*’s invalidation of the proper-cause requirement and appeal to public policy arguments against *Bruen*’s reading of the Second Amendment.

Respondent and Intervenor argue that, as *Bruen* only invalidated a single provision of New York’s public-possession licensing scheme, Mr. Johnson and other New Yorkers could still be prosecuted for violating it. As with standing, they highlight two features of Second Amendment rights: (1) not all individuals enjoy them (it is a limited right); and (2) they are subject to lawful regulation (it is a qualified right).

These features are not unique to the Second Amendment. *See supra* p. 11 (noting that *Shuttlesworth* concerned a facially invalid licensing requirement despite some lawful provisions). Take voting rights, for example. Some individuals do not have the right to vote, and others are constitutionally permitted to lose it. *See Richardson v. Ramirez*, 418 U.S. 24 (1978) (upholding felony disenfranchisement as constitutional). Meanwhile, those with the franchise are subject to lawful regulation: including, in New York, a registration requirement. *See Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (holding that State’s interests in regulating elections permit “reasonable, nondiscriminatory restrictions” upon voters’ rights); N.Y. Election Law § 5-100. Similarly, the right to marry is both limited to couples of a certain age and is qualified. It is a misdemeanor to solemnize a marriage without a license in this State. *See* N.Y. Dom. Rel. Law § 13-b.

Respondent’s and Intervenor’s exclusive focus on the provisions not explicitly invalidated by *Bruen* misses the mark (*see* RB at 48-49 (arguing that Mr. Johnson was lawfully prosecuted for failing to pursue a license); AG 57 (citing *Bruen*’s endorsement of background checks)). If New York required voting registrants to—as part of the otherwise wholly legal application and signature process—demonstrate a special need to vote, could they be prosecuted for skipping this step before voting? Likewise, if couples had to prove proper cause to wed, or were barred from engaging in same-sex marriage, would this Court find them guilty of a misdemeanor unless they attempted to procure a license?

The correct answer is no to both questions. The rights to vote, marry, or possess a firearm for self-defense cannot be conditioned upon filling out applications with pre-ordained results. A person cannot be prosecuted for violating an unlawful licensing *standard*: that is, one that renders a constitutional right functionally nonexistent. *See Shuttlesworth*, 149 U.S. at 153; *Wilson*, 145 S. Ct. at 21 (Thomas, J., and Alito, J.) (commenting that, had the Hawaii Supreme Court properly addressed the merits of a defense to criminal prosecution for failure to satisfy a proper-cause requirement akin to New York’s, “it would have found the licensing regime at issue unconstitutional and upheld the dismissal of [] public-carry charges.”).

Reaching this conclusion does not permit everyone to public carry, or to carry any weapon of one’s choice, or to use a weapon in any manner (*cf.* AG 59-60 (citing language from trial court opinions that Mr. Johnson’s argument carries these consequences)). This case concerns a single pistol found inside Mr. Johnson’s moped, which he never used or threatened to use (*see* A 42 (plea minutes)). Had he possessed a different weapon, or did anything unlawful with it, he might have been charged with numerous other crimes. Nor is New York’s ability to regulate firearm possession through its amended licensing scheme—which was crafted to account for *Bruen*’s history and tradition test and took effect a few months after Mr. Johnson’s arrest—in dispute here (*see* MB 33-34 n. 15; RB 43 & n. 9). And of course, an individual who does not enjoy constitutional protections may not raise them as a defense, notwithstanding the unconstitutionality of the applicable licensing standard.

To return to the voting and marriage examples: a 13-year-old who attempts to wed or vote is barred from doing so—and can thus be penalized for doing so—even if the State erects unconstitutional barriers to the exercise of those rights (e.g., “proper cause” to vote or wed”). Here, the prosecution could easily have argued below that Mr. Johnson did not enjoy Second Amendment protection, and the parties would have litigated this question. As the arraignment minutes in Respondent’s appendix demonstrate, the prosecution had notice of a claim grounded in Mr. Johnson’s purported background. But the prosecution opted not to raise this as a ground to deny Mr. Johnson’s motion, and thereby waived their newfound arguments to this Court that his criminal history categorically barred him from possessing a weapon.⁶ See *People v. Hunter*, 17 N.Y.3d 725 (2011) (prosecution did not preserve appellate arguments on defendant’s lack of standing by failing to raise them at suppression hearing); *People v. Rodriguez*, 50 N.Y.2d 553, 557-58 (1980) (finding that the defense “consciously abandoned” a speedy trial claim, where the record evidenced defendant’s knowledge of the potential claim and ultimate decision not to raise it).

As this case comes to this Court, Mr. Johnson had a Second Amendment right to possess a firearm for self-defense purposes that New York simply failed to recognize.

⁶ Our main brief acknowledged that the records, which have never been tested at an adversarial process, indicated Mr. Johnson may have a prior felony (MB 6 n. 2). That factual issue does not matter, however, because the prosecution’s legal arguments based on the purported fact of Mr. Johnson’s criminal history were not preserved and thus waived below.

Because New York provided him no constitutional path to immunity for exercising his core Second Amendment rights, the charges against him must be dismissed (MB 31).

Assuming that New York’s licensing requirements were severable, as Respondent claims (RB 55-56), that would still not allow the government to prosecute Mr. Johnson for failing to apply for a license under the unconstitutional proper-cause regime. *See Shuttlesworth*, 394 U.S. at 155 (finding that a narrowing construction could not “serve to restore constitutional validity to a conviction that occurred [] under the ordinance as written”).

Mr. Johnson challenged the entirety of New York’s licensing regime below. The prosecution did not demonstrate any historical tradition underpinning New York’s requirements, as *Bruen* required. 597 U.S. at 17. The court erred by summarily denying Mr. Johnson’s motion in the absence of such evidence (MB 32). Even were this Court to accept the argument that Mr. Johnson could lawfully be prosecuted for failing to have complied with constitutional aspects of New York’s licensing scheme, a hearing would be required to determine the validity of such provisions (MB 32-35).⁷

⁷ At the time of Mr. Johnson’s arrest, for example, obtaining any license in New York required satisfying an undefined and vague “good moral character” standard that provided licensing officials unfettered discretion to deny a license. Respondent wrongly suggests that the Second Circuit found an analogous “good moral character” provision constitutional in *Antonyuk* (RB 54). On the contrary, the *Antonyuk* Court upheld New York’s restyled good moral character provision in large part because, following *Bruen*, the Legislature for the first time supplied a definition that limited officers’ discretion (*see* MB 34 n. 15; AG 47 n. 17 (acknowledging this Legislative change)).

CONCLUSION

The Court should reverse Mr. Johnson's conviction and dismiss the charges. In the alternative, at a minimum, the Court must remit to the trial court for a hearing.

Respectfully submitted,

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