

No. 25-6940

**In The
Supreme Court of the United States**

OMAR JOHNSON,

Petitioner,

v.

State of NEW YORK,

Respondent.

BRIEF IN OPPOSITION FOR INTERVENOR
ATTORNEY GENERAL OF THE STATE OF NEW YORK

LETITIA JAMES

*Attorney General
State of New York*

BARBARA D. UNDERWOOD*

Solicitor General

ESTER MURDUKHAYEVA

Deputy Solicitor General

STEPHEN J. YANNI

Assistant Solicitor General

28 Liberty Street

New York, New York 10005

(212) 416-8016

barbara.underwood@ag.ny.gov

**Counsel of Record*

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COUNTERSTATEMENT OF QUESTION PRESENTED

In *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), this Court held that a provision of New York law requiring individuals to demonstrate “proper cause” to obtain a license to carry a concealed firearm violated the Second Amendment.

The question presented is:

Whether the New York Court of Appeals correctly held that the proper-cause requirement was severable from the remainder of New York’s firearm licensing scheme in rejecting petitioner Omar Johnson’s challenge to his conviction for unlawful gun possession.

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INTRODUCTION

Petitioner Omar Johnson pleaded guilty to possessing a weapon without a valid license in violation of New York law. He challenged his conviction on the ground that this Court’s decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), which invalidated a licensing provision requiring individuals to demonstrate “proper cause” to obtain a concealed-carry license, rendered New York’s entire firearm licensing scheme unconstitutional on its face.¹

The state trial and intermediate appellate courts rejected petitioner’s claim, and the New York Court of Appeals affirmed. The Court of Appeals held that petitioner had standing to assert his Second Amendment claim without having first applied for a license. But the court rejected the claim on the merits, holding that the proper-cause requirement was severable from the remainder of the statutory scheme.

Petitioner now asks this Court to review a different question: Whether his conviction should be invalidated because it was the “direct result” of the proper-cause requirement. The petition should be denied.

First, this case does not implicate the question presented, which alone warrants denial of the petition. Petitioner did not raise below any challenge to the proper-cause requirement specifically. Instead, as the Court of Appeals expressly found, the only claim petitioner preserved was a facial challenge to New York’s firearm licensing scheme in its entirety. In any event, petitioner would lack standing to assert a chal-

¹ This brief is submitted by respondent New York State Attorney General Letitia James, intervenor in defense of the constitutionality of the state statute at issue in this case. *See* 28 U.S.C. § 2403; N.Y. Exec. Law § 71.

lenge to the proper-cause requirement because his prior felony conviction independently disqualifies him from obtaining a license.

Second, petitioner identifies no relevant split in authority requiring this Court's intervention. The courts to have considered facial challenges to firearm licensing laws based on the presence of one invalid provision have agreed that the offending provision can be severed. And this case does not implicate the question of whether criminal defendants must apply for a firearm license before they may assert a constitutional challenge to the validity of a particular licensing law. *See Wilson v. Hawaii*, 145 S. Ct. 18, 18 (2024) (statement of Thomas, J.); *id.* at 22 (statement of Gorsuch, J.). The New York Court of Appeals imposed no such requirement here.

Third, the New York Court of Appeals correctly rejected petitioner's claim on the merits. Petitioner's facial challenge fails because the proper-cause requirement previously contained in the statute was severable from the remainder of New York's licensing scheme, and the statute prohibiting possession of a firearm without a valid license had numerous constitutional applications at the time of petitioner's offense. The Court of Appeals' ruling in this case is also of diminishing importance because the proper-cause requirement was both invalidated by *Bruen* and eliminated by the Legislature shortly thereafter.

STATEMENT

A. New York’s Firearm Licensing Scheme

New York prohibits possessing a firearm outside of the home without a valid license. *See* N.Y. Penal Law § 265.03(3) (criminalizing possession of a loaded firearm outside of a person’s home or business); *id.* § 265.20(a)(3) (providing exception for license holders); *see also* *Frey v. City of New York*, 157 F.4th 118, 124-25 (2d Cir. 2025).

To obtain a license to carry a concealed pistol or revolver in public, applicants must submit to an investigation and demonstrate to a licensing officer that they satisfy certain eligibility criteria. N.Y. Penal Law § 400.00(1). For example, applicants must be at least twenty-one years of age, be of good moral character, have no convictions or outstanding warrants for a felony or other serious offense, and not be present in the United States illegally or unlawfully. *Id.* As part of the licensing process, law enforcement officials conduct a background check of applicants’ criminal records and history of mental illness. *Id.* § 400.00(4).

Previously, New York law also required an applicant to show “proper cause” to obtain a concealed-carry license. On June 23, 2022, this Court in *Bruen* held that the “proper cause” requirement violated the Second Amendment insofar as it demanded showing “a special need for self-defense.” 597 U.S. at 38. At the same time, the Court reaffirmed the constitutionality of “shall-issue” licensing schemes that “often require applicants to undergo a background check or pass a firearms safety course” and “are designed to ensure only that those bearing arms in the jurisdiction are, in fact, ‘law-

abiding, responsible citizens.” *Id.* at 38 n.9 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

The day after *Bruen* was decided, New York Governor Kathy Hochul convened an extraordinary legislative session to bring New York law into compliance with that ruling. *See* N.Y. Governor, Proclamation (June 24, 2022). On July 1, 2022, the Legislature enacted the Concealed Carry Improvement Act, which eliminated the proper-cause requirement that *Bruen* declared unconstitutional and made several other changes to the State’s firearm licensing and possession laws. *See* Ch. 371, 2022 N.Y. Laws 4083. The act took effect on September 1, 2022. *Id.* § 26, 2022 N.Y. Laws at 4097.

B. The Proceedings Below

In July 2022, one month after *Bruen* was decided, petitioner Omar Johnson was arrested in Bronx County, New York, for possessing a loaded pistol without a valid license. A grand jury indicted petitioner on multiple counts of criminal weapon possession and possession of ammunition. Pet. App. 6-7.

Petitioner moved to dismiss the indictment on the ground that New York’s firearm “licensing system” was facially unconstitutional under *Bruen*. Pet. App. 44; *see also* Pet. App. 7. The state trial court denied the motion, explaining that “*Bruen* did not invalidate all of New York’s carry-permit licensing requirements or hold that States cannot regulate unlicensed gun possession.” Pet. App. 67. To the contrary, aside from the proper-cause requirement, New York’s licensing criteria were “almost identical to the ‘shall-issue’ regime requirements in other states that [*Bruen*]

recognized as raising no constitutional concerns.” Pet. App. 67. Alternatively, the court determined that petitioner lacked standing to challenge the licensing scheme because he had never applied for a concealed-carry license. Pet. App. 67-68.

Petitioner subsequently pleaded guilty to attempted criminal possession of a weapon in the second degree, Penal Law § 265.03(3), and was sentenced to five years’ probation. As part of his plea agreement, petitioner waived his right to appeal. Pet. App. 7.

The state intermediate appellate court affirmed petitioner’s conviction. Pet. App. 1-4. The court held that petitioner’s appeal waiver foreclosed review of his Second Amendment claim. Pet. App. 1-3. Alternatively, the court ruled that petitioner lacked standing to challenge the constitutionality of New York’s licensing scheme and that the claim would fail on the merits in any event. Pet. App. 3-4.

The New York Court of Appeals granted leave to appeal and affirmed the judgment of conviction. *People v. Johnson*, 2025 N.Y. Slip Op. 06528, 2025 WL 3259873 (N.Y. 2025) (reproduced at Pet. App. 5-36). Although the court held that petitioner was not barred from raising his Second Amendment claim by his appeal waiver or by lack of standing (Pet. App. 13-17), it rejected petitioner’s claim on the merits. As a preliminary matter, the court “could discern from [petitioner’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.” Pet. App. 17. Thus, the court explained, petitioner’s claim

turned on whether the proper-cause requirement was severable from the rest of the licensing scheme.

The court determined that the proper-cause requirement was severable because it “was just one aspect of a much broader scheme that includes a variety of distinct requirements.” Pet. App. 18-19. And it was “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.” Pet. App. 19. In addition, the court identified indisputably constitutional applications of the licensing scheme, such as the prohibition on felons possessing firearms. For these reasons, the court rejected petitioner’s facial challenge.² Pet. App. 19-20.

REASONS FOR DENYING THE PETITION

A. This Case Does Not Implicate the Question Presented in the Petition.

This Court should deny the petition because it raises a question that was never presented below: Whether petitioner can be prosecuted as the “direct result” of New York’s since-repealed proper-cause requirement. *See* Pet. Question Presented. As the New York Court of Appeals expressly found, petitioner argued only that “*Bruen’s* invalidation of the ‘proper cause’ requirement rendered New York’s *entire firearm licensing scheme* facially unconstitutional.” Pet. App. 17 (emphasis added). This fundamental vehicle problem alone warrants denial of the petition. The petition also suffers from additional defects, as discussed below.

² Three judges concurred in the result and would have affirmed on the ground that petitioner’s appeal waiver barred his Second Amendment claim. Pet. App. 22-36.

1. Petitioner barely contests the Court of Appeals’ rejection of his facial challenge. *See* Pet. 13-15. Instead, he strains to argue that the court denied him standing to pursue anything *other* than a facial challenge to the licensing scheme as a whole. *See id.* at 9-10. But the Court of Appeals did not determine that petitioner lacked standing to assert some other, narrower claim. Instead, the court determined that petitioner had *preserved* only one claim: a challenge to the “entire firearm licensing scheme.” Pet. App. 17. And it agreed with petitioner that he had standing to pursue that claim. Pet. App. 13-17.

This Court has no jurisdiction to review the state law determination that petitioner failed to preserve any claim other than a challenge to the entire licensing scheme. *See Sochor v. Florida*, 504 U.S. 527, 534 (1992) (state court’s determination that claim was not preserved for appeal constituted adequate and independent state ground). While petitioner takes issue with how the New York Court of Appeals characterized the claim he preserved (Pet. 15-16), he does not attempt to argue that this Court has jurisdiction to review that finding.

In any event, the Court of Appeals’ determination that petitioner preserved no other claim is amply supported by the record. Under New York law, to preserve a question of law for review by the Court of Appeals, “an objection or exception must be made with sufficient specificity at trial.” *People v. Robinson*, 88 N.Y.2d 1001, 1002 (1996). Here, petitioner’s motion to dismiss the indictment argued that *Bruen* “struck down New York’s public carry licensing system” (Pet. App. 43) and that “the licensing system is unconstitutional” (Pet. App. 44). In the Court of Appeals, petitioner reiter-

ated that he had “challenged the entirety of New York’s licensing regime below.” Pet. App. 148. Petitioner’s current assertions that he raised in the trial court a “challenge to New York’s proper cause standard” and argued that the proper-cause requirement “was the but-for cause of his unlicensed possession” (Pet. 13-14) are not supported by the record.³

2. Even assuming *arguendo* that petitioner had challenged the proper-cause requirement specifically, he would be required to establish his standing to raise the issue in this Court. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617-24 (1989). But petitioner cannot do so because his prior felony conviction independently disqualifies him from obtaining a concealed-carry license. *See* Penal Law § 400.00(1)(c). It is undisputed that petitioner has a prior conviction for armed robbery in Georgia. *See, e.g.*, Pet. App. 24 n.1, 133. The petition does not dispute the existence of this prior conviction (*see* Pet. 5 n.1), and petitioner acknowledged the prior conviction in his state court briefing (Pet. App. 74). Because petitioner’s inability to obtain a license is not traceable to the enforcement of the proper-cause requirement, he lacks standing to challenge it. *See, e.g., Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 413 (2013); *see also* Pet. 13 (agreeing that an allegedly unconstitutional licensing provision must be “causally connected to the defendant’s lack of a license”).

³ Petitioner’s citations in this Court to excerpts of his appellate briefing are insufficient to overcome the Court of Appeals’ conclusion that he failed to adequately preserve his claim in the trial court, as New York law requires. *See* Pet. 13, 16 (citing Pet. App. 72, 105.)

Petitioner’s contention that respondents did not adequately preserve arguments about his prior conviction (Pet. 5 n.1) is irrelevant for purposes of assessing his own standing.⁴ *See Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658, 662-63 (2019) (“As a jurisdictional requirement, standing to litigate cannot be waived or forfeited.”). And even if a constitutional challenge to the proper-cause requirement could have proceeded in state court without satisfying the elements of article III standing,⁵ this Court would lack jurisdiction to review a resulting state court judgment rejecting the federal claim. *See ASARCO Inc.*, 490 U.S. at 623-24 (state court judgment must impose distinct injury on litigant to establish standing in this Court where otherwise lacking); *see also Virginia v. Hicks*, 539 U.S. 113, 120-21 (2003) (same).

B. There Is No Split in Authority Requiring This Court’s Intervention.

Petitioner identifies no relevant split in authority warranting this Court’s review. In particular, there is no split as to whether a severability analysis is appropriate in assessing the merits of a facial challenge to a State’s entire firearm licensing scheme. On that question, courts agree that a severability analysis is required. To the extent courts have disagreed on the separate question of whether standing to

⁴ The Bronx County District Attorney asserted below that the State did preserve in the trial court the argument that petitioner’s prior felony (rather than the proper-cause requirement) was the cause of his ineligibility for a firearm license. Pet. App. 133.

⁵ *See* Pet. App. 14 (noting that New York Court of Appeals has not “explicitly embraced the federal requirement of traceability”).

challenge a licensing law requires first applying for a license, this case presents no opportunity to address that issue.

1. In each of petitioner's cases addressing the merits of a facial challenge to a firearm licensing scheme based on the presence of one unlawful provision, the court performed a severability analysis and concluded that the provision was severable from the remainder of the statute. *See Commonwealth v. Rodriguez*, 496 Mass. 627, 640-42 & n.8 (2025); *People v. Bey*, 108 Cal. App. 5th 144, 166 (2025). The New York Court of Appeals followed the same approach here. Pet. App. 17-21. Petitioner identifies no case in which a court has determined that a severability analysis is inappropriate under these circumstances.

Petitioner suggests that the District of Columbia Court of Appeals gives litigants like petitioner a hearing to establish their entitlement to Second Amendment protection (Pet. 9), but the case he cites involved an as-applied challenge, which requires individualized fact-finding. *See Ward v. United States*, 318 A.3d 520, 534-36 (D.C. 2024). In contrast, when the same court earlier considered a facial challenge to the District's firearm licensing scheme after the invalidation of the District's "good reason" law (a provision similar to New York's proper-cause requirement), the court conducted a severability analysis and rejected the claim. *See Hooks v. United States*, 191 A.3d 1141, 1145-46 (D.C. 2018).

2. This case provides no occasion to address whether and when a criminal defendant must apply for a firearm license before challenging a licensing provision. The New York Court of Appeals *agreed* with petitioner that he was not required to do

so here, joining California and Massachusetts in rejecting such a requirement for facial claims. Pet. App. 17 (citing *Rodriguez*, 496 Mass. at 640, and *Bey*, 108 Cal. App. 5th at 164). In so holding, the New York Court of Appeals followed *Staub v. City of Baxley*, 355 U.S. 313 (1958), and *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969), on which petitioner relies (*see* Pet. 8, 10-11). And the New York court noted its disagreement with a contrary ruling of the Rhode Island Supreme Court.⁶ Pet. App. 17 (citing *State v. Ortiz*, 317 A.3d 737, 41-45 (R.I. 2024)). Accordingly, this case does not present the question of whether criminal defendants must apply for a license to establish standing to challenge their convictions on Second Amendment grounds. *See Wilson*, 145 S. Ct. at 18 (statement of Thomas, J.); *id.* at 22 (statement of Gorsuch, J.).

Separately, some courts have held that applying for a license is necessary to establish standing in the context of an as-applied challenge. *See State v. Wilson*, 154 Haw. 8, 13 (2024), *cert. denied*, 145 S. Ct. 18 (2024); *Rodriguez*, 496 Mass. at 640. These cases are irrelevant here because petitioner did not raise an as-applied challenge. In any event, petitioner does not identify any split in authority concerning as-

⁶ Other cases holding that a litigant must apply for a license before asserting a facial challenge include *State v. Wade*, 476 N.J. Super. 490, 507-08, 511 (App. Div. 2023), and *Bourdeau v. State*, No. 1196, 2023 WL 6567799, at *2-4 (Md. App. Ct. Oct. 10, 2023).

applied challenges. Petitioner identifies *Ward* as conflicting with *Wilson* and *Rodriguez* (Pet. 9), but *Ward* did not address the defendant’s standing.⁷ See 318 A.3d 520.

C. The Decision Below Is Correct.

Nor does this case present an occasion for simple error correction, because the New York Court of Appeals correctly rejected petitioner’s facial challenge to New York’s entire firearm licensing scheme by concluding that (i) the invalid proper-cause requirement was severable from the remainder of the statute and (ii) the statute had constitutional applications. Pet. App. 17-21.

1. A facial challenge is “the ‘most difficult challenge to mount successfully,’ because it requires a defendant to ‘establish that no set of circumstances exists under with the Act would be valid.’” *United States v. Rahimi*, 602 U.S. 680, 693 (2024) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). To defeat a facial challenge, the government need only demonstrate that the statute “is constitutional in some of its applications.” *Id.*

The severability of a state statute is a question of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996). Under New York law, courts determine whether an unconstitutional provision is severable from a larger statute by asking “whether the legislature, if partial invalidity had been foreseen, would have wished the statute to

⁷ The D.C. Court of Appeals previously held that applying for a license was not necessary in the unique and distinguishable context of an “invalid and unlawful outright ban” on the possession of handguns in the home by ordinary residents. *Plummer v. United States*, 983 A.2d 323, 337, 340-42 (D.C. 2009). *Wilson* and *Rodriguez* did not involve similar bans.

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) (quotation marks omitted). In answering that question, courts consider “how the statutory rule will function” without the invalid provision. *Id.* (quotation marks omitted). This Court undertakes a similar inquiry when it evaluates the severability of federal statutes. *See, e.g., Seila Law LLC v. Consumer Fin. Protection Bureau*, 591 U.S. 197, 235 (2020) (plurality op.) (assessing whether remainder of statute is “capable of functioning independently” and “fully operative”).

The New York Court of Appeals correctly applied these principles in rejecting petitioner’s facial challenge. First, applying state law, the court asked “[w]hether the ‘proper cause’ requirement infected the rest of the licensing scheme so as to render it unconstitutional.” Pet. App. 18. The court determined that the proper-cause requirement did not have such an effect; the proper-cause requirement was one part of a broader regulatory scheme that could continue to operate without it. *See* Pet. App. 18-19. Petitioner does not and cannot contest that state law determination here. *See Coleman v. Thompson*, 501 U.S. 722, 729 (1991) (explaining that this Court lacks jurisdiction to review state court decision resting on adequate and independent state law ground); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623-24 (1985) (declining to rule on severability of state statute because it was question of state law).

Second, applying this Court’s standard for evaluating facial claims, the Court of Appeals correctly identified constitutional applications of the statute. For example, New York lawfully prohibits gun possession by convicted felons—which prohibition

petitioner does not contest. Pet. App. 19-20. Indeed, this Court has emphasized that its Second Amendment precedents do not “cast doubt on longstanding prohibitions on the possession of firearms by felons.” *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); see *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010); *Bruen*, 597 U.S. at 81 (Kavanaugh, J., concurring).

2. Rather than dispute any of the foregoing, petitioner improperly attempts to reframe his claim as whether the “‘proper-cause’ requirement was the but-for cause of his unlicensed possession.” See Pet. 13. On that view, petitioner argues, the Court of Appeals should not have performed a severability analysis at all. See Pet. 14. But as explained above, the only claim petitioner raised below was a facial challenge to the entirety of New York’s licensing scheme. See *supra* at 6-8. And petitioner does not dispute that a severability analysis was required to assess *that* claim.

For the same reasons, the Court of Appeals properly considered whether there existed any set of circumstances under which the licensing scheme was valid. See *Rahimi*, 602 U.S. at 693. Contrary to petitioner’s assertions (Pet. 15), that inquiry necessarily involves the consideration of theoretical applications of the statute. See, e.g., *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 455-58 (2008).

Shuttlesworth does not aid petitioner on the merits of his claim (Pet. 10-12). In *Shuttlesworth*, the speech licensing ordinance at issue conferred upon a city commission “virtually unbridled and absolute power to prohibit any ‘parade,’ ‘procession,’ or ‘demonstration’ on the city’s streets or public ways.” 394 U.S. at 150 (footnote

omitted). This provision, which governed every application of the ordinance, was squarely unconstitutional under several of this Court’s precedents. *See id.* at 149-51.

Here, by contrast, *Bruen* invalidated only the proper-cause requirement and left intact New York’s other licensing requirements. *See* 597 U.S. at 38 n.9, 70-71. And petitioner failed to show that the entire licensing law at issue, New York Penal Law article 400, confers unbridled discretion on licensing officers or is otherwise void on its face.⁸

In any event, petitioner’s assertion that the proper-cause requirement was the but-for cause of his conviction (Pet. 13) rests on pure speculation and is belied by the record. Petitioner’s prior conviction for armed robbery would have prevented him from obtaining a concealed-carry license regardless of the proper-cause requirement. *See supra* at 8-9.

3. Finally, there is no merit to petitioner’s assertion that the decision below will have widespread detrimental effects. The decision below does not subjugate Second Amendment rights or improperly reject a Second Amendment defense on procedural grounds (Pet. 11). Quite the opposite: The New York Court of Appeals rejected respondents’ procedural defenses and allowed petitioner’s Second Amendment claim to proceed. And the court’s ruling is of limited continuing importance because the proper-cause requirement was both invalidated by *Bruen* and eliminated by the Legislature. *See supra* at 3-4. Thus, petitioner is a member of a finite and

⁸ *Magnus v. United States* is distinguishable on the same basis. *See* 11 A.3d 237, 242-43 (D.C. 2011) (explaining that “unconstitutional ban made registration of a handgun impossible”).

rapidly diminishing group of people who could conceivably attempt to connect their inability to obtain a firearm license to the proper-cause requirement.

Petitioner is mistaken in suggesting that there is something nefarious about the fact that New York appellate courts have not vacated many weapons-related convictions since *Bruen*. See Pet. 7. Numerous challenges have been rejected on the ground that the defendants had not adequately preserved the claims for appellate review. See, e.g., *People v. Cabrera*, 41 N.Y.3d 35, 45-51 (2023); *People v. Garcia*, 41 N.Y.3d 62, 66 (2023). In any event, nothing in the Court of Appeals' decision here forecloses a defendant from challenging a specific licensing provision as unconstitutional (Pet. 12-13).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
May 15, 2026

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York

/s/ Barbara D. Underwood

BARBARA D. UNDERWOOD*
Solicitor General

ESTER MURDUKHAYEVA
Deputy Solicitor General

STEPHEN J. YANNI
Assistant Solicitor General

barbara.underwood@ag.ny.gov

* *Counsel of Record*