

25-6940

IN THE
Supreme Court of the United States

OMAR JOHNSON,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Uncomfortable with the position it took before the New York Court of Appeals,¹ the State retreats, presenting a flurry of procedural and waived factual arguments. The State even declares that the important Second Amendment question presented is somehow a one off even though it is implicated *whenever* a criminal defendant is charged with unlicensed-firearms-possession charge—a routine event in American criminal courts these days. *See* Pet. QP (“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?”).

None of the State’s strained contentions should persuade this Court to stay its hand. This Court should grant certiorari; decide whether, and under what circumstances, an American can be prosecuted for failing to comply with an unconstitutional licensing requirement; and confirm that the Second Amendment right is not a right without a remedy in criminal cases.

¹ *See* State’s COA Br. at A132 (arguing that an individual can be prosecuted for refusing to submit to an unconstitutional licensing regime because such individuals are “thumb[ing] [their] nose[s] at New York’s licensing process”); *id.* at A111, A120-22 (pressing that an individual must first seek judicial review of a firearm-licensing law’s constitutionality to preserve the right to assert that issue as a defense to a criminal charge).

I. There are no procedural impediments to this Court’s review.

The State argues that the Court of Appeals found Petitioner’s Second Amendment argument—that is, the proper-cause standard tainted the indictment because it was causally connected to the lack of a license—unpreserved at the trial level. *See* Pet. Br. 13-15; Attorney General Intvr. BIO 7 (“Intvr. BIO”) (citing COA Decision: Pet. App. 17 (“We are able to discern from the defendant’s [trial-level] 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.”)). This procedural “dodge” fails. *See Wilson v. Hawaii*, 145 S. Ct. 18, 20 (2024) (Thomas, J., opinion respecting denial of cert).

Any finding that Petitioner preserved the argument that the *entire* licensing scheme is invalid—the weakest argument imaginable in this context—but did not preserve the contention that the proper-cause standard tainted his indictment, would be an “unforeseeable and unsupported state-court decision on a question of state procedure.” *See Cruz v. Arizona*, 598 U.S. 17, 26 (2023) (“[A]n unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court’s review of a federal question.’ ‘Novelty in procedural requirements cannot . . . thwart review [here] for by those who, in justified reliance upon prior decisions, seek

vindication in state courts of their federal constitutional rights.’ This Court has applied this principle for over a century.”) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958); other citations omitted). Accordingly, the Court of Appeals’ preservation finding is not an “adequate ground to preclude” federal review. *Id.*

Before the New York trial court (where a claim must be preserved under New York law), Petitioner explicitly and clearly raised his present Second Amendment claim that the proper-cause requirement tainted the unlicensed-weapon-possession indictment. *See* Pet. App. 43-44 (detailing that this Court struck down the proper-cause requirement in *Bruen*); Pet. App. 43 (Headnote: “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”) (emphasis added); *id.* at Pet. App. 45-46 (“[U]nless the government proves the 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. 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.”) (quoting *Magnus v. United States*, 11 A.3d 237, 242-43 (D.C. 2011)).

Given the crystal-clear specificity of Petitioner’s trial-level motion papers, the Court of Appeals’ preservation finding was an unforeseeable departure from longstanding state-procedural law, which merely requires that an appellant provide the trial court with notice of his appellate claim. See N.Y. Crim. Proc. Law 470.05(2) (“For purposes of appeal, a question of law with respect to a ruling . . . is presented when a protest thereto was registered . . . Such protest . . . is sufficient if the party made his position with respect to the ruling or instruction known to the court[.]”); *People v. Lewis*, 23 N.Y.3d 179, 188 (2014) (claim preserved where “court was on notice of defendant’s argument [but] tacitly denied it.”); *People v. Chestnut*, 19 N.Y.3d 606, 611 n.2 (2012) (“for preservation purposes, a party must make a specific objection regarding a claimed error in order to afford the trial court an opportunity to correct the error. [The rule’s] ‘specific objection’ requirement should not be applied in the overly technical way the dissent urges; nor should a party’s adherence to this requirement focus on minutiae or emphasize form over substance”); *People v. Gray*, 86 N.Y.2d 10, 20 (1995) (“The chief purpose of demanding notice through objection or motion in a trial court, as with any specific objection, is to bring the claim to the trial court’s attention. A general motion fails at this task.”).

The question presented was not only preserved at the trial level, but the trial court specifically discerned it: “Defense’s argument that ‘all the counts in the indictment must be dismissed because *but for* New York’s unconstitutional gun-licensing scheme, Mr. Johnson would have been able to legally possess the firearm he is charged with possessing,’ is misplaced.” Trial-Court Decision: Pet. App. 67 (emphasis added) (quoting Motion Papers: Pet. App. A43). Finding a lack of preservation on this record is just as unreasonable as it was in *Pitchford v. Cain*, 2026 WL 1485608, at *5, 608 U.S. ____ (May 28, 2026), which found a state-waiver theory unreasonable where the trial court was plainly on notice of the *Batson*-jury-selection claim later raised in federal court.²

The State adds an appeal-waiver argument that it *lost* in the New York Court of Appeals. *See* Intvr. Br. 15 (“The New York Court of Appeals rejected respondents’ procedural defenses . . . ”); COA Decision: Pet. App. 10-11 (“[A] waiver that precludes appellate review of a facial constitutional challenge to a criminal statute should not be enforced.”). As the New York Court of Appeals found that, under New York law, challenges to the

² The State’s claim that Petitioner “did not allege or submit proof that he met any of the remaining licensing criteria” is just wrong. BIO (Bx. DA) 7 (citing Pet. App. 39-47). Petitioner argued, in a headnote no less, that the proper-cause standard was the “but-for” cause of this unlicensed-possession indictment and that, independent of the proper-cause requirement, there were no bases upon which to disarm him. Pet. App. 43-46. Petitioner plainly alleged that he was not otherwise subject to disarmament on non-proper-cause grounds.

constitutionality of a state statute are categorically non-waivable, this Court lacks jurisdiction to adopt an appeal-waiver theory. *See, e.g., Cone v. Bell*, 556 U.S. 449, 468-69 (2009) (“When a state court declines to find that a claim has been waived by a petitioner’s alleged failure to comply with state procedural rules, our respect for the state-court judgment counsels us to do the same. Although we have an independent duty to scrutinize the application of state rules that bar our review of federal claims, we have no concomitant duty to apply state procedural bars where state courts have themselves declined to do so.”) (citation omitted); *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

True, as the State observes, whether there was a knowing waiver is generally a federal question. BIO (Bx. DA) at 21. But the New York Court of Appeals did not find the waiver unknowing under federal law. Instead, the Court held that, under state law, an appeal waiver is categorically inapplicable to a constitutional challenge to a statute. Pet. App. 11. That state-law decision is beyond this Court’s federal-review power.

II. The severability analysis and the constitutionality of every licensing provision are irrelevant to the important question presented.

The State obsesses over “severability.” BIO (Bx. DA) 14-16; Intvr. BIO 12-13. But severability analysis is irrelevant to Petitioner’s claim. Pet. 14. The question presented is whether, *assuming* the proper-cause

provision's severability, that provision nevertheless tainted the indictment because there were no other lawful bases to deny a license.

The State addresses another irrelevant question: whether Petitioner can successfully launch a facial attack on *every single* licensing provision in New York law, including, apparently, inapplicable provisions, such as an age restriction and an order-of-protection bar. See N.Y. Penal Law § 400.00(1)(a)-(o) (enumerating all of the ineligibility factors); Intvr. BIO 13-14. But, again, Petitioner is not making that impossible argument. Instead, the proper-cause standard is facially unconstitutional, as *Bruen* held, since it imposes an unconstitutional standard on licensing applications. Pet. App. 13-15. And that provision deprived Petitioner of a lawful path to immunity from felony-unlicensed-possession charges. *Id.* Even if the remaining New York provisions were constitutional, the remaining question in a criminal-unlicensed-possession case is whether the unconstitutional provision tainted the indictment. Here, it did.

III. The precise timing of Petitioner's arrest and a purported Georgia robbery conviction do not matter either.

The State claims that, because Mr. Johnson's July 19, 2022 arrest occurred several weeks after *Bruen* struck down the proper-cause provision (June 23, 2022), he was not harmed by a licensing provision in effect during the many years before the *Bruen* decision. BIO (Bx. DA) 12-13. He could have, the State's theory seems to go, tracked this Court's docket, made a firearm-license application the instant *Bruen* came down on June 23, 2022,

and then hoped that—despite a six-month-statutory time frame—the licensing bureaucracy would have granted his application within a few weeks. *See* Penal Law § 400.00(4-b) (requiring that license applications be resolved within six months).

But the Court of Appeals did not decide the Second Amendment claim on these timing grounds. And the State concedes that it did not preserve such a claim at the trial level either. BIO (Bx. DA) 12-13. Having failed to raise that argument before the trial court, it is waived under New York law. *People v. Agard*, 127 A.D.3d 602, 602 (N.Y. App. Div. 2015) (State cannot raise arguments for the first time on appeal that it did not press before the trial court); *People v. Santiago*, 91 A.D.3d 438, 439 (N.Y. App. Div. 2012) (same); *People v. Nieves*, 67 N.Y.2d 125, 135-36 (1986) (same).³

The State’s waived timing argument also makes no sense. Mr. Johnson was certainly harmed by a firearms-licensing provision in effect during the years before *Bruen* since it prevented him from obtaining a license—and thus immunity—during those many years. Perhaps he could

³ The State cites hearsay documents alleging threats and an assault that were never subject to adversarial testing. BIO (Bx. DA) 7 (citing Resp. App. 2-4). But Petitioner was not prosecuted for threats or assault; he was prosecuted for weapon possession alone. *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) (even if defendant’s “conduct could be proscribed by a properly drawn statute,” the defendant can still challenge a statute that criminalizes constitutional protected activity). References to a purported assault and alleged threats are therefore immaterial.

have pulled off the impossible and secured a post-*Bruen* license within a few weeks, but that does not matter. A person exercising the Second Amendment right has been injured by a licensing standard in effect for years even if they had a short post-repeal window to shuffle an application through the licensing bureaucracy.

The State adds that a purported 2001 robbery conviction from Georgia disarmed Petitioner, severing the causal link between the proper-cause requirement and the lack of a license. BIO (Bx. DA) 25; Intvr. BIO 8, 15. Again, this point is irrelevant and waived. This fact-specific argument was never raised before the trial court; was not the basis for the New York Court of Appeals' decision; and dubiously relies on a passing reference in a post-plea "presentence investigation report" (Resp. App. 20) that petitioner had no opportunity to refute when litigating the Second Amendment claim months earlier before his plea. As this so-called Georgia robbery issue is waived and procedurally barred, the State cannot defend the judgment below on such grounds.

The State does not really deny that its reliance on a purported Georgia robbery conviction is waived, but insists Petitioner must somehow refute that factual claim on a cold record because it implicates Article III standing, which is non-waivable. Intvr. BIO 8-9. Wrong too. Petitioner has standing to seek reversal of an unlicensed-weapon-possession judgment on Second Amendment grounds as he was convicted and sentenced under that

judgment, thus creating a live “Case[], in Law and Equity, arising under this Constitution.” U.S. Const., Art. III § 2. The framers would be baffled by the contention that this Second Amendment appeal neither presents a “case” nor a “controversy.” *See also ASARCO Inc. v. Kadish*, 490 U.S. 605, 618 (1989) (“Petitioners insist that, as a result of the state-court judgment, the case has taken on such definite shape that they are under a defined and specific legal obligation, one which causes them direct injury. We agree.”).

Contrary to the State’s innovative theory, the *merits* of petitioner’s claim for reversal of the judgment, including whether certain constitutional defects sufficiently tainted the judgment, are not non-waivable Article III “standing” issues. Instead, the question of taint/harm is a merits and remedy question. *See also Hemphill v. New York*, 595 U.S. 140, 156 n.5 (2022) (remanding for a resolution of harmless error without treating it as a “standing” issue); *Lovins v. Parker*, 712 F.3d 283, 303 (6th Cir. 2013) (“harmless error defense can be waived”); *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49, 56 (1st Cir. 2001) (“we think that the likelihood and extent of impact are properly addressed in connection with the merits and issues of harmless error”) (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946) (“Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the

failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.”)).

If the State were right that harmless error—that is, whether there is a causal connection between a constitutional defect and the state-court judgment—implicates Article III standing, this Court’s review power would be severely constrained. For one, the impact of a constitutional violation (be it an unconstitutional statute or an erroneous trial-level ruling) on the judgment would, on the State’s theory, always be a threshold jurisdictional issue in this Court. But the opposite is true: this Court has a “general custom of allowing state courts initially to[, on remand,] assess the effect of erroneously admitted evidence in light of substantive state criminal law.” *Hemphill*, 595 U.S. at 156 n.5 (finding constitutional error and remanding for a resolution of harmless error without treating it as a “standing” issue) (quoting *Lilly v. Virginia*, 527 U.S. 116, 139 (1999)).

Further, under the State’s theory, a litigant could sit on their hands throughout state court, fail to raise any harmless-error argument, and then, as here, conveniently raise that argument in this Court on an undeveloped record (owing to the waiver), invoking a non-waivable standing defense. That gotcha game is not the law. On the contrary, factual allegations relevant to the harm worked by a constitutional violation, such

as the State's newfound interest in a Georgia robbery conviction, are waivable.⁴

IV. The question presented is of monumental importance.

The bald claim that “determination of the question presented will have very limited prospective impact” is confounding. BIO (Bx. DA) 27. The question presented applies *whenever* the State prosecutes an American for a firearm-possession-licensing violation where the licensing scheme contains an unconstitutional standard. And state governments are on the warpath here, frequently prosecuting unlicensed-possession charges. Pet. 11. New York has perhaps taken the lead in that effort, charging, convicting, and/or incarcerating tens of thousands of individuals for that offense in the last decade. Pet. 11-12. New Yorkers, and Americans at large, are routinely prosecuted under firearms-licensing regimes containing provisions of dubious constitutionality: a good-moral-character standard; a must-be-21 requirement; or a prior-misdemeanor-disarmament provision. *See, e.g.*, N.Y. Penal Law § 400.00(1)(a)-(o). The question presented governs the litigation of a constitutional defense in all those cases. This Court should intervene.

⁴ Suppose a trial court erroneously finds a police report admissible under the Confrontation Clause but the State either declines to rely upon that report at trial or it has no impact on the verdict. While such an error would be harmless since the error did not taint the judgment, it is quite radical to suggest (as the State does here) that the harmless-error question is a non-waivable Article III standing issue. *Intvr. Br.* 8-9.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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