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ISSUES TO DEVELOP AT TRIAL

Bruen Series
June 2024

This month's issue continues our Bruen series and offers you a global template to consult and adapt to challenge prosecutions against your client for unlicensed weapon possession brought after the legislature amended New York's gun licensing scheme in Bruen's wake.

As a reminder, two years ago the United States Supreme Court decided New York State Rifle & Pistol Ass'n Inc. v. Bruen, 597 U.S. 1 (2022), holding unconstitutional the "proper-cause" requirement in New York's gun licensing scheme (Penal Law § 400.00) requiring applicants who wanted conceal-carry licenses to show a special need for self-defense. After Bruen, attorneys representing clients facing CPW charges who were subject to the proper-cause licensing requirement argued that the unlawful proper-cause requirement rendered their clients' prosecutions and convictions for unlicensed weapon possession unconstitutional. Some of these challenges reached the Court of Appeals and were largely rejected as unpreserved. It is possible that preserved challenges will eventually again reach the Court of Appeals (or even the Supreme Court).

However, the issues we are now proposing that you develop concern prosecutions brought after New York's legislature hastily revised the licensing scheme to fix the proper-cause problem. The new scheme, again found in Penal Law § 400.00, became effective on September 1, 2022. It eliminated the proper cause requirement but also fiddled with some existing provisions and added others.

As any client charged after September 1, 2022 could only avoid prosecution by obtaining a license subject to the eligibility requirements of the new licensing scheme, any challenge to your client's prosecution based on the unconstitutionality of the scheme must be directed to provisions in the new scheme. Proper-cause is no longer in play.

Our September 2022 ITD provided some initial guidance addressing the new scheme. Now, as the law has developed further, we've developed a global Motion to Dismiss, attached as a pdf at Exhibit A and available in word on our website at https://appellate-litigation.org/Issues-to-Develop-at-Trial, to address various scenarios. The motion contains numerous challenges, some that should apply broadly to many clients, some that are quite client-specific. Here's a run-down of the arguments and how they might apply in a given case.

Please remember these materials are intended to provide support, not legal advice. Please update any materials before using – this area of law is in flux.

- A constitutional challenge to the “good moral character” requirement found in Penal Law § 400.00(1)(b); why its invalidity renders the weapon-possession charges unconstitutional; why, under alternative theories, your client’s failure to apply for a license is no bar to relief; why the lawfulness of other licensing provisions does not render the indictment valid; and why your client was harmed by this provision. **Assuming none of the licensing scheme’s other provisions would have barred your client (or that they are not themselves subject to attack), this challenge to the “good moral character” provision is generally available to any client who is charged with unlicensed weapon possession.**

- A challenge under the 2d Amendment, Equal Protection, and the fundamental right to travel if your client was a non-resident who held an out-of-state license when he was arrested for unlicensed possession in New York. This argument challenges as unconstitutional the exclusion of non-residents from license eligibility as well as the criminalization of travel by branding a licensed gun possessor a felon merely because they travel to New York. **This challenge will be very fact-specific; in particular, your client must hold a valid out-of-state license.**

- A challenge to the indictment as jurisdictionally defective if it does not allege lack of licensure as an element of the charged offense. The Court of Appeals considered this argument and rejected it as unpreserved in *People v David*, 41 N.Y.3d 90 (1923), but suggested it had merit. **This challenge should apply to any client charged with unlicensed weapon possession.**

- A challenge to New York’s complete ban on semi-assault weapons. This argument proposes that the right to bear arms includes the right to possess semi-assault weapons. **This challenge would apply if your client is specifically charged with possessing an assault weapon (which, definitionally in NY, includes such weapons as AR-15s).**

- A 2d Amendment challenge to the classification of Penal Law § 265.03(3) [outside home or place of business] as a C-violent felony. This argument challenges the constitutionality of the classification by invoking the historical tradition test – the State cannot meet its burden of showing an historical tradition for punishing public possession far more seriously than in-home possession. **This challenge should apply to any client charged under Penal Law § 265.03(3).**

Please carefully review the template motion to decide which arguments apply and adapt to fit your client’s circumstances before using

REMEMBER:

- Blank spaces have been highlighted so you can insert your client’s name as well as some lines that may not apply to your client.
- Provide Notice to AG

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Coming soon!

- A 2d Amendment challenge to sentences imposed on CPW2 convictions based on an historical analysis of penalties imposed for *licensing* violations. Remember - your client's crime is not for possessing a gun but for possessing a gun without a license.

- An argument based upon the new social-media law struck down in *Antonyuk*.

EXHIBIT A

Supreme Court of the State of New York
XXXXXX County: Criminal Term Part XXXX

The People of the State of New York, Respondent, -against- XXXXXX, Defendant.	Ind. No. XXXXX **Notice of Motion to Dismiss the Indictment**

PLEASE TAKE NOTICE that, upon the affirmation of counsel, and the prior proceedings in this case, the undersigned will move this Supreme Court, Criminal Term, Part __, on the ___ day of __, 2024, at 9:30 a.m., or as soon thereafter as counsel may be heard, for an Order dismissing the indictment under the Second and Fourteenth Amendments and the Privileges and Immunities Clause of the United States Constitutions as well as the due-process and equal-protection clauses of the United States and New York Constitutions. C.P.L. § 210.20(1)(a), (h), and § 210.25(3).

Dated: New York, New York
XXXXXXX

____
XXXXX

TO: XXXX, XXXXX County District Atty.
Attn: ADA ___________

Clerk of the Supreme Court, XXXX County
Criminal Term

Supreme Court of the State of New York
XXXXXX County: Criminal Term Part XXXX

The People of the State of New York, Respondent, -against- XXXXXX, Defendant.	Ind. No. XXXXX **Affirmation of Counsel**

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

1. I represent XXXXX in the above-captioned case. I am familiar with the facts of this case and the prior proceedings held in it.

2. This affirmation is made in support of XXXX's Motion to Dismiss.

3. Unless otherwise indicated, all allegations of fact are based upon my inspection of the record in this case, initial investigations of the facts and circumstances surrounding the incident, and are made on information and belief.

4. [**Lay out indictment and factual allegations**].

5. At the time of his arrest, XXXX had not applied for a public-carry license under New York Law.

6. New York licensing laws prohibit New Yorkers from acquiring a license to publicly carry a firearm unless they establish "good moral character," defined as the "essential character, temperament and judgment necessary to be entrusted with

[safe use of] a weapon." Penal Law § 400.00(1)(b) (L. 2022, ch. 371, § 1, 26 (eff. September 1, 2022)). As shown in the attached memorandum of law, that licensing standard violates the Second Amendment.

7. The remaining licensing provisions would not have prevented XXX from obtaining a license. *See* Penal Law § 400.00(1) (listing the license-eligibility requirements). XXXXX was over 21, and was a United States citizen. He held a valid [STATE] concealed carry gun license, which he had obtained in [XXXX]. He had never been convicted anywhere of a misdemeanor or felony, was not a fugitive from justice, was not an unlawful user of or addicted to any controlled substance, had never been dishonorably discharged from the Armed forces, had not ever stated whether he suffered from any mental illness, had never been involuntarily committed or civilly confined in a secure treatment facility, had never had his gun license revoked nor was under a suspension or ineligibility order issued under provisions of the CPL or the Family Court Act, and had never had a guardian appointed. *See generally* Former Penal Law § 400.00(1).

8. Accordingly, the indictment here is directly traceable to the good-moral-character standard.

9. As the attached Memorandum of Law sets forth, the charges contained in the indictment accusing XXXXX of criminal possession of a weapon violate the Second and Fourteenth Amendments on their face and as applied to XXXX, and violate equal protection, due process and the Privileges and Immunities Clause of Article IV of the U.S. Constitution. Accordingly, as the statutes "defining the

offense[s] charged" are unconstitutional, C.P.L. § 210.20(1)(a), (h), and § 210.25(3), the indictment must be dismissed, or, in the alternative, a hearing ordered.

10. As this motion implicates the constitutionality of, among other provisions, Penal Law § 400.00(1)(b) (to obtain a license, one must show "good moral character"), incorporated by Penal Law § 265.20(a)(3) (a license confers immunity from weapon-possession prosecution under Article 265), a copy of this motion with notice of constitutional challenge has been served upon the Attorney General. *See* Ex. A; Under C.P.L.R § 1012(b) and Executive Law § 71,

DATED: New York, New York
XXXXXXX

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XXXXXXXXXXX

Supreme Court of the State of New York
XXXXXX County: Criminal Term Part XXXX

The People of the State of New York, Respondent, -against- XXXXXX, Defendant.	Ind. No. XXXXX Notice of Motion to Dismiss the Indictment

MEMORANDUM OF LAW

The State lacks the constitutional authority to punish XXXX for declining to submit to an unconstitutional licensing standard—the good-moral-character standard—that the Legislature adopted in 2022. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 597 U.S. 1 (2022); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). Accordingly, this Court should dismiss the weapon-possession charges in the indictment because there is a "jurisdictional or legal impediment to conviction" for the charged offenses, C.P.L. § 210.20(h), and "[t]he statute[s] defining th[ose] offense[s] . . . unconstitutional or otherwise invalid," C.P.L. § 210.25(3).

I. The Good-Moral-Character Provision Is Unconstitutional.

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). A license confers immunity and thus is a complete defense to a weapon-possession charge. Penal Law § 265.20(a)(3).

The Second Amendment guarantees the right to "keep and bear Arms." *Bruen* categorically invalidated New York's former-statutory requirement that, to obtain the license necessary to gain immunity, the individual must prove "proper cause" to keep

and bear arms in public. Former Penal Law § 400.00(2)(f). In so holding, the Court confirmed a rule of constitutional law governing all Second Amendment challenges: the State bears the burden of establishing that the restriction at issue is, "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 34. That tradition must be firmly rooted at the time of the nation's founding. *Id.* at 46; *id.* at 37 ("A final word on historical method: Strictly speaking, New York is bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second. Nonetheless, we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government.").

Under *Bruen*, the good-moral-character provision fails. The State cannot establish a founding-era tradition of blocking the fundamental right because, in a government official's subjective opinion, the applicant lacks the "essential character, temperament and judgment necessary to be entrusted with [safe use of] a weapon." Penal Law § 400.00(1)(b). Like the "proper cause" standard struck down in *Bruen* (Former Penal Law § 400.00(2)(f)), an arbitrary requirement that a New Yorker show he has the "essential character, temperament and judgment necessary" to safely exercise a constitutional right vests virtually unfettered power in the government to decide whether the exercise of a constitutional right is appropriate. *Bruen*, 597 U.S. at 39 n.9 (drawing a distinction between constitutional licensing standards that contain "'narrow, objective, and definite standards' guiding licensing officials" (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969)) and those

"requiring the 'appraisal of facts, the exercise of judgment, and the formation of an opinion' (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940))—features that typify proper-cause standards like New York's."). No founding era statutes, at either the state or federal level, embraced such an unfettered and subjective power. *Range v. AG of the United States*, 69 F.4th 96, 102-03 (3d Cir. 2023) (rejecting "devolv[ing] authority to legislators to decide whom to exclude from 'the people'" by exercising "unreviewable power to manipulate the Second Amendment by choosing a label") (int. quotation marks omitted); *United States v. Daniels*, 77 F.4th 337, 353 (5th Cir. 2023) ("[L]egislature cannot have unchecked power to designate group of persons as 'dangerous' and thereby disarm them," which would "render the Second Amendment a dead letter.")

The historical record confirms that the good-moral-character provision is unconstitutional. That history indicates that discretionary "[l]icensing schemes were a post-Civil War phenomenon" and thus post-dated the Fourteenth Amendment's ratification in 1868. *See Antonyuk v. Chiumento*, 89 F.4th 271, 322 (2d Cir. 2023) ("many licensing schemes originated in the cities of the post-Civil War period"); *id.* at 323-24 ("Accompanying the nineteenth-century explosive growth of cities was the development of governance institutions that were more tightly organized, specialized, and bureaucratic than those required by the towns of the late eighteenth and early nineteenth centuries. . . . In context, it makes sense that licensing regimes were instituted by cities rather than states, and that such schemes were not enacted until after the Civil War."); *id.* at 319 n.31 ("Licensing schemes were a post-Civil War

phenomenon."); *id.* at 318 n.28 (citing Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 Clev. St. L. Rev. 373, 419 n.245 (2016) (cataloguing licensing restrictions that emerged during the Reconstruction era and beyond)). As there is no founding-era tradition of disarming Americans based on a bureaucrat's arbitrary assessment of their "character, temperament, and judgment," the moral-character provision violates the Second Amendment.

This Court should decline to follow the Second Circuit's analysis in *Antonyuk*. 89 F.4th at 312-27. As *Antonyuk* acknowledged, there is *no* founding era tradition of discretionary-licensing standards, such as a "spongy" good-moral-character standard that is "susceptible to abuse." *Id.* at 316-24. Nevertheless, *Antonyuk* approved New York's good-moral-character provision by relying upon post-Civil-War licensing provisions (largely from the 1880's and beyond) that gave local officials discretion to determine whether a license was appropriate. *Id.* From that premise, the Second Circuit reasoned that the Fourteenth Amendment, which incorporated the Second Amendment into the States, somehow absorbed this discretionary-licensing tradition when it was ratified in 1868.

Antonyuk got the analysis wrong. It's the tradition in place in 1791, not 1868, that controls. *Bruen*, 597 U.S. at 34, 37, 46; *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2258-59 (2020) ("a tradition [that] arose in the second half of the 19th century . . . cannot by itself establish an early American tradition."). While there may be a "scholarly debate" on whether 1791 or 1868 is the controlling date in the

Fourteenth Amendment context, *Bruen*, 597 U.S. at 37, there has never been a real debate about that issue in the only place it matters: the United States Supreme Court. *Id.* at 37 ("[W]e have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government."); *see also*, *e.g.*, *Virginia v. Moore*, 553 U.S. 164, 168 (2008) ("We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve.").

The unprecedented theory that constitutional provisions can provide less protection against state power depending upon the government at issue (state or federal) rests on the mistaken theory that the meaning of the Constitution can morph over time. That's wrong. *E.g.*, *South Carolina v. United States*, 199 U.S. 437, 448 (1905) ("The Constitution['s] . . . meaning does not alter. That which it meant when adopted it means now."). And that flawed theory would result in a patchwork of constitutional law that defines the *same* Amendments differently based on whether the claim is against a state or the federal government.

Even if the relevant date were 1868, not 1791, there was no well-established tradition of discretionary licensing in 1868. *Antonyuk* even recognized that discretionary-licensing standards emerged after 1868. 89 F.4th at 316-24 (discussing Reconstruction-era statutes from the 1870's and beyond). A new statutory approach that was the "result of changes in [post-Civil-War] American society in the [19th] century, including urbanization" and the "greater concern" that "city people"

purportedly have "about interpersonal violence," cannot retroactively modify the Second or Fourteenth Amendment's scope. *Id.* at 322. The "post-Civil War world" may have been "transformed by rapid urbanization. *Id.* But such urbanization cannot "transform" the meaning of the Second or Fourteenth Amendment. *See also South Carolina v. United States*, 199 U.S. 437, 448 (1905) ("The Constitution['s] … meaning does not alter. That which it meant when adopted it means now.").

II. As XXXX's path to immunity from prosecution required him to satisfy an unconstitutional good-moral-character standard, the weapon-possession charges are unconstitutional.

A. The State cannot prosecute XXXX for failing to submit to an unconstitutional good-moral-character standard.

As the unconstitutional good-moral-character requirement was XXXX's path to immunity from criminal prosecution (Penal Law § 265.20(a)(3)), the weapon charges lodged against him were unconstitutional. As the Supreme Court has repeatedly held, the State lacks the constitutional authority to punish an individual for failing to submit to an unconstitutional licensing/permitting standard. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). The State cannot prosecute an individual for failing to submit to an unconstitutional firearms-licensing standard any more than it can prosecute for failing to submit to an unconstitutional marriage-license standard (e.g, a person must show "good cause to wed") or an unconstitutional professional-licensing requirement (an attorney must pledge allegiance to the Democratic or Republican Party to be licensed).

B. It is irrelevant that XXXX did not try to satisfy the unconstitutional moral character standard by applying for a license.

"Standing" rules are no barrier to relief here. XXXX has standing even though he did not apply for a license and seek to satisfy the unconstitutional good-moral-character standard.

The Court of Appeals recently addressed a variety of *Bruen* claims and rejected them as unpreserved. *See People v. Cabrera*, 41 N.Y.3d 35 (2023); *People v. Garcia*, 41 N.Y.3d 62 (2023); *People v. Pastrana*, 41 N.Y.3d 23 (2023); *People v. Telfair*, 41 N.Y.3d 107 (2023). But the Court took no position on standing, although this was another threshold issue the prosecution had pressed. Judge Rivera, whose *Garcia* dissent rejected a preservation bar, rejected the prosecution's standing argument too: "The United States Supreme Court has consistently held that a defendant has standing to challenge the constitutionality of a licensing scheme that underlies their criminal prosecution, even if the defendant did not apply for the license . . . . [I]t is the fact of the prosecution that confers standing." *Garcia,* 41 N.Y.3d at 74 (citing *Shuttlesworth*, 394 U.S. at 151 (the defendant, convicted under a statute that criminalized participating in public demonstrations without a permit, had standing to challenge law even though he did not apply for permit), *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958), citing in turn, *Smith v. Cahoon*, 283 U.S. 553, 562 (1931), *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

Judge Rivera was right. The 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 . . . of a judgment of conviction under such an ordinance. '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.'" *Staub*, 355 U.S. at 319 (citing *Smith*, 283 U. S. at 562 and *Lovell*, 303 U. S. at 452, quoting *Jones v. City of Opelika*, 316 U.S. 584, 602 (1942) (Stone, J., dissenting), *adopted per curiam on rehearing*, 319 U.S. 103, 104 (1943)).

While an individual must first seek judicial review of an unconstitutional *court order* to preserve the right to later challenge its constitutionality as a defense to a contempt charge, that rule does not, under *Shuttlesworth*, apply to challenges to criminal penalties imposed under unconstitutional statutes. *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (an individual cannot violate a court order without first challenging its constitutionality); *Shuttlesworth*, 394 U.S. at 158 n.7 (distinguishing *Walker* and explaining that "[t]he legal and constitutional issues involved in the *Walker* case were quite different from those involved here," as they involved an attempt to "defend contempt charges by asserting the unconstitutionality of [an] injunction") (quoting *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 179 (1968)); 2 Smolla & Nimmer on Freedom of Speech § 15:73 (April 2023 update) ("The contrast between disobedience of a court order and disobedience of a criminal law is vividly demonstrated by the contrasting result in" *Shuttlesworth* and *Walker*).

Nor are civil-injunction-standing cases applicable, as Judge Rivera's dissent acknowledges too. *Garcia*, 41 N.Y.3d at 74 (Rivera, J., dissenting). A civil litigant must first "yield" – that is, subject themselves to the putative unconstitutional policy

– because, absent an actual denial of a claimed benefit, the challenger has sustained no injury. *Allen*, 468 U.S. at 746 (plaintiff parents could not challenge educational system as discriminatory absent a showing that their children had been denied opportunities); *Moose Lodge*, 407 U.S. at 166-168 (no standing to challenge discriminatory club-membership policy because plaintiff had not sought membership).

The situation is markedly different where the defendant is asserting the constitutional challenge as a defense to a criminal prosecution. Where a defendant is criminally charged with violating an unconstitutional licensing standard, as here, he has standing to challenge the licensing standard. *Staub*, 355 U.S. at 319; *see also People v. Mosqueda*, 97 Cal. App. 5th 399 (Cal. App. 2023) (unpublished section of the opinion). The criminal charge for failing to comply with an unconstitutional standard alone confers standing. *See Smith*, 283 U.S. at 562 ("appellant has been arrested and held for trial" and was in "jeopardy"—he therefore had "standing" to challenge the unconstitutional transportation-licensing standard on equal-protection and due-process grounds). The Supreme Court's criminal cases—*Smith, Shuttlesworth*, and

Staub—are all in accord as they all found standing on that precise basis. [1]

Nor is the *Shuttlesworth-Smith-Staub* doctrine confined to the First Amendment context. In *Smith*, which held that a defendant can challenge a transportation-licensing standard without first applying for one, Mr. Smith was not making a First Amendment argument at all. Instead, the Supreme Court held that he had standing to challenge the licensing law on due-process and equal-protection grounds even though he had not applied for a license. 283 U.S. at 557-68.

More fundamentally, *Bruen* itself rejected the State's suggestion that we can dole out constitutional protections by ranking rights on a subjective hierarchy: "[T]he 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." 597 U.S. at 70 (internal quotation marks omitted).

C. Even if an application were generally required to maintain standing, that theory has no application here because XXXX was categorically ineligible due to [X factor], thus rendering an application futile.

XXXX was categorically ineligible for a license because, as shown further below (Section II), he was not even a part-time resident of New York. *Osterweil v. Bartlett*,

[1] *People v. Castillo* stated, in conclusory dictum, that "Regardless of whether defendant validly waived his right to appeal, [he] lacked standing to challenge New York's gun licensing scheme because he did not apply for a gun license." 207 N.Y.S.3d 525, 526 (1st Dept. April 23, 2024) (citing *United States v. Decastro,* 682 F.3d 160, 164 [2d Cir.2012]). *Castillo*'s reliance on *Decastro* was misplaced because *Decastro* ignored the difference between standing in civil and criminal cases. Citing only civil cases, and making no reference to *Smith, Staub, or Shuttlesworth*, *Decastro* held that "because Decastro failed to apply for a gun license in New York, he lacks standing . . . 'As a general matter, to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to [it].'" 682 F.3d at 164 (quoting *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997) (civil injunction case) and citing *Allen v. Wright*, 468 U.S. 737, 746 (1984), and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972)). The Second Circuit did not discuss, and ultimately overlooked, *Smith, Staub, and Shuttlesworth*, likely because the parties did not cite them to the Court. *See* Decastro's 2d Cir. Briefs at 2010 WL 5809079 and 2011 WL 2530868.

21 N.Y.3d 580, 582, 587 (2013); Penal Law § 400.00(3)(a) (license applications must be made in the "city or county" of New York "where the applicant *resides*") (emphasis added). As a licensing application would have necessarily been futile, XXX has standing to challenge the licensing laws even though he did not apply. *People v. Archibald*, 225 A.D.3d 548 (1st Dept 2024) (defendant has standing to challenge a "complete ban" on "large capacity ammunition feeding devices" even if he had not applied for a license); *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012) (futility excuses the absence of an application) (citing *Bach v. Pataki,* 408 F.3d 75, 82-83 (2d Cir. 2005) (challenge to residency restriction was justiciable despite plaintiff's failure to apply for a license because he was statutorily ineligible for a license and therefore submitting an application would have been a "futile gesture" (internal quotation marks omitted)).

D. The constitutionality of *other* licensing provisions does not authorize the State to punish individuals for failing to comply with unconstitutional licensing standards.

The prosecution may also argue that, since the *entire* licensing scheme is not unconstitutional, the indictment survives. That's wrong.

The *Smith/Staub/Shuttlesworth* doctrine applies regardless of whether every nook and cranny of a state-regulatory scheme is unconstitutional. The simple answer to this quantity-based formalism is that the number of constitutional violations in a statutory scheme does not matter. Where just one provision conditions access to a legal defense on compliance with an unconstitutional standard, it is unconstitutional to prosecute someone for failing to comply with that "void" law. *Moore v. Harper*, 143

S.Ct. 2065 (2023) ("an act of the legislature, repugnant to the constitution, is void") (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Anything less would allow the State to incarcerate people for failing to comply with unconstitutional provisions of a statutory scheme so long as it happened to insert some constitutional ones too. Where that formalism comes from is anyone's guess. But it's not from the Constitution.

The Supreme Court's cases refute such illogical formalism too. *Shuttlesworth*, for example, did not invalidate Birmingham's parade-permit requirement that a "written application" be made or that the applicant describe "the probable number of persons [involved]." 394 U.S. at 149-150. And yet the defendant there prevailed because just one provision of the Birmingham licensing law was unconstitutional. 394 U.S. at 150-51.

The consequences of a formalistic "every-provision-must-be-invalid" approach are troubling. Under that approach, the State could prosecute people for failing to submit to unconstitutional laws so long as the State includes some valid provisions in its scheme. For instance, the State could condition access to a law license on an attorney's swearing an oath to a political party and then prosecute those who practiced law without submitting to the oath rule so long as the licensing scheme has other constitutional requirements (e.g., the bar-exam requirement). The formalistic theory that the "whole licensing statute" must be invalid has troubling implications for liberty. It should be rejected here.

E. This indictment is directly traceable to the unconstitutional proper-cause requirement.

No other *lawful* restrictions could have barred XXXX from obtaining a license. As established above, XXXX met the licensing eligibility requirements in Penal Law § 400.00(1). As no other lawful licensing provisions sever the causal link between the unconstitutional good-moral-character requirement and this indictment, that invalid requirement taints the indictment and requires dismissal. *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (injury must be "fairly traceable to the challenged action of the defendant" and a favorable legal decision must actually redress the injury) (ellipsis and quotation marks omitted); *People v. Sovey*, 77 Misc.3d 518, 522 (N.Y. Sup. Ct. 2022) (defendant "should not be prosecuted if he is able to demonstrate, as the defense alleges, he would have met the remaining constitutional standards for gun possession."); *cf. United States v. Miselis*, 972 F.3d 518, 547 (4th Cir. 2020) (conviction upheld because record "establishes conclusively that the defendants' [ ] conduct falls under the statute's surviving purposes").

Should the Court nonetheless conclude that further factual or legal development is necessary to determine whether the indictment is traceable to the good-moral-character provision—that is, whether there would have been other constitutional bases to deny a license—a hearing is required.

Accordingly, the Court should dismiss the indictment or order a hearing.

II. The indictment violates the Second Amendment as applied to XXXX, and his rights to equal protection and the fundamental right to travel.

At the time he was charged here, XXX was a resident of XXXX who had met all the requirements of his home state to publicly carry a gun. The indicted charges

violate the Second Amendment as applied to XXXX because he was neither a New York resident nor part-time property owner and thus could not secure immunity through licensure.

In *Osterweil v. Bartlett*, 21 N.Y.3d 580, 582, 587 (2013), the Court of Appeals held that a licensing applicant who "owns a part-time residence in New York but makes his permanent domicile elsewhere is eligible for a New York handgun license in the city of county where his part-time residence is located." XXXX, whose permanent domicile was [STATE], did not reside in New York, even on a part-time basis; and he neither owned nor rented property here. Therefore, under *Osterweil*, he was categorically ineligible for a license.

As New York's licensing scheme disarmed XXXX as a non-resident even though he complied with his home state laws with respect to firearm possession, the charges lodged against him are unconstitutional under the Second Amendment, unless the prosecution can show some historical analogue justifying disparate treatment of nonresidents. *Bruen*, 597 U.S. at 27. The prosecution cannot shoulder that burden as there is no draconian founding-era tradition of cutting off Second Amendment rights on the basis of out-of-state residency.

Alternatively, even if *Osterweil* were read broadly to confer eligibility on transient travelers into New York who neither owned nor leased property in New York, because XXXX was not "usually a resident," the licensing officer would have still needed to declare "in the license the particular reason for the issuance and the names of the persons certifying to the good character of the applicant." Former Penal

Law § 400.00(7). Therefore, even if XXXX wasn't statutorily ineligible on non-residency grounds, the scheme still unconstitutionally imposed a discriminatory requirement under Former Penal Law § 400.00(7), because it required nonresidents to show a "particular reason" for a license—a requirement similar to the "proper cause requirement" *Bruen* struck down. As the prosecution cannot show a historical basis in this Nation's historical traditions for this discriminatory requirement, it is unconstitutional. *See generally Commonwealth v. Donnell*, No. 2211CR2835 (Lowell Dist. Ct. Mass. Aug. 3, 2023), available at https://www.docdroid.net/524o4XV/opinion-coffey-comm-v-donnell-pdf (dismissing indictment where prosecution was unable to establish historical precedent for disarming New Hampshire license holder who traveled to Massachusetts).

The charges also violate equal protection and XXXX's fundamental right to travel under the Privileges and Immunities Clause, which states that the "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." That Clause protects the right of citizens to travel, and, specifically, the "right to be treated as a welcome visitor rather than as an unfriendly alien when temporarily present in [a] second State." *Saenz v. Roe*, 526 U.S. 489, 501 (1999). XXXX, a [STATE] license holder, should not have become a felon merely because he travelled to New York. He should have been able to get a license, the same as any New York resident, unless otherwise disqualified under lawful criteria. *See Donnell*, *supra*, at 7-8 (in dismissing the indictment, the court stated, "This Court can think of no other constitutional right which a person loses simply by traveling beyond

his home state's border into another state continuing to exercise that right and instantaneously becomes a felon subject to a mandatory minimum sentence").

In sum, because XXXX was a law-abiding resident of XXXXX who held a valid concealed carry license from his home state, he could not lose that right and become a felon simply by traveling into New York. The indictment should be dismissed or, alternatively, a hearing ordered.

III. The indictment is jurisdictionally defective because, while lack of licensure is an essential element of each of the charged weapon-possession offenses, the indictment does not allege that element.

An indictment requires a "statement in each count that the grand jury . . . accuses the defendant or defendants of a designated offense." C.P.L. § 200.50(4). That requirement provides the defendant "with fair notice of the accusations made against him, so that he will be able to prepare a defense." *People v. Sanchez*, 84 N.Y. 2d 440, 445 (1994). Where an indictment alleges that a defendant has violated a particular section of the Penal Law, all of the elements of that section are deemed sufficiently pled. *People v. D'Angelo*, 98 N.Y.2d 733, 734-35 (2002). An indictment is jurisdictionally defective, however, "if it does not effectively charge the defendant with the commission of a particular crime." *Id.* at 734.

Here, the indictment was facially insufficient because it fails to allege that the possession here was unlicensed. Pre-*Bruen*, the licensure exemption (Penal Law § 265.20(a)(3)), operated as a "'proviso that need not be pleaded but may be raised by the accused as a bar to prosecution or a defense at trial.'" *People v. David*, 41 N.Y.3d 90, 96 (2023) (quoting *People v. Santana*, 7 N.Y.3d 234, 236 (2006)); *id.* at 98 (even

under pre-*Bruen* law, the Court of Appeals had held that the CPW statutes "shift[ ] only the burden of production to the defendant. Critically, the burden of persuasion on licensure always remains with the People.") (citing Penal Law § 25.00[1]). *Bruen* doomed that scheme and its allocation of the burden of production on licensure to the accused. As *David* observed, *Bruen* "effected a substantial change in Second Amendment jurisprudence." 41 N.Y.3d at 97. *Bruen* confirmed that the right to public carry is firmly within the Second Amendment's ambit and presumptively protected. Although the Court of Appeals did not reach the merits of this argument because it was unpreserved, the Court nonetheless acknowledged the "meaningful" and "significant" "questions" *Bruen* raised about whether "lack of licensure is an essential element." *Id.* at 97, 99-100.

Given both the sea change *Bruen* effected and that only unlicensed possession can be punished as a crime in New York (*Hughes*, 22 N.Y.3d at 50), lack of licensure must now be considered an essential element that the prosecution must allege and prove beyond a reasonable doubt. Since the statutes XXXX was accused of violating do not include that element, the prosecution's reference to those statutes in the indictment did not "effectively charge [XXXX] with the commission" of the relevant offenses. *D'Angelo*, 98 N.Y.2d at 734-35; *cf. Commonwealth v. Guardado*, 491 Mass. 666, 667 (Mass 2023) (striking down an affirmative licensure defense as violating due process because lack of licensure must be an essential element of the crime under *Bruen*).

Accordingly, the indictment must be dismissed as jurisdictionally defective and

violative of due process. U.S. Const., amends. II, XIV; N.Y. Const. Art. I § 6; C.P.L. §§ 210.20(h); 210.25(3).

IV. New York's total ban on semi-automatic AR-15-style firearms is unconstitutional.

New York impermissibly burdened XXXX's Second Amendment rights by criminalizing his possession of a semi-assault weapon without providing *any* path for him to secure immunity from prosecution.

New York categorically bans "assault weapons," which definitionally includes semi-assault weapons, excluding them from the licensure exemption and from any of the licensing exemptions. *See* Penal Law § 265.00(22) (defining assault weapon); Penal Law 265.20(3) (excluding assault weapons from the licensure exemption); Former Penal Law § 400.00(2) (excluding assault weapons from any of the licenses that might be issued). Count Z of the indictment charge XXXX with possessing an assault weapon. Count Z must be dismissed because, as established below, New York's outright ban on assault weapons is unconstitutional.

Nearly 30 years ago, the Supreme Court stated that AR-15 rifles "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 610, 612 (1994). Since then, *Heller* and *Bruen* have established that the Second Amendment extends presumptively to "all . . . bearable arms," with *Heller* rejecting as "bordering on the frivolous" the notion that only arms in existence in the 18th century are protected by the Second Amendment. *District of Columbia v. Heller*, 554 U.S.570, 582 (2008). Current Supreme Court justices have signaled their favorable opinions on this question. *See Heller v. District of Columbia*, 670 F.3d 1244, 1285

(D.C. Cir. 2011) (Kavanaugh, J., dissenting) (stating that such weapons are "in common use," and describing a "ban on a class of arms" as "equivalent to a ban on a category of speech."); *see also Friedman v. City of Highland Park*, 577 U.S. 1039 (2015) (Thomas, J., dissenting from the denial of certiorari) (City's ban was "highly suspect because it broadly prohibits common semiautomatic firearms used for lawful purposes" and the Second Amendment grants citizens the right to keep such weapons); *Caetano v. Massachusetts*, 577 U.S. 411, 416 (2016) (Alito, J., concurring) (identifying semi-automatic weapons, along with revolvers, as those "most commonly used today for self-defense" and rejecting "dangerous and unusual" as the metric for identifying arms that fall outside the Second Amendment.

XXXX's right to bear arms thus included the right to possess a semi-assault weapon, subject to lawful regulation. Because it was not XXXX's *unlicensed* possession of the semi-assault weapon that the state criminalized, but his possession of the weapon by itself, the count charging him with criminal possession of an assault weapon must be dismissed because it impermissibly burdened XXXX's Second Amendment right to bear arms. Alternatively, a hearing must be ordered to determine whether the prosecution can establish an historical analogue for categorically banning the possession of semi-assault weapons.

V. The State violated XXXX's Second Amendment rights by classifying possession of a weapon outside home or place of business as a C-violent felony while imposing a drastically lesser sanction for in-home possession.

Post-*Bruen*, classifying the public possession of a weapon (outside home or place of business) as a C-violent felony—with a mandatory minimum prison sentence

of 3.5 years and a maximum of 15 years—while sparing in-home possession that harsh treatment, violates the Second Amendment. *Hughes*, 22 N.Y.3d at 51-52 ("We assume without deciding that the punishment imposed on defendant is subject to Second Amendment scrutiny."); *Bruen*, 597 U.S. at 29, 57 (examining whether a proposed historical analogue restricted similar conduct *and* whether it imposed a "comparable burden"); *Heller*, 554 U.S. at 632-33 (founding-era laws regulating "the firing of guns . . . provide no support for" constitutionality of in-home-disarmament statute at issue since they punished such conduct with "a small fine and forfeiture of the weapon" not "a year in prison"). The State cannot meet its burden of showing an historical tradition for punishing public possession far-more seriously than in-home possession, an offense that is either an A misdemeanor or E felony, has no mandatory prison sentence, and has a maximum of four years. Penal Law § 265.01-b; Penal Law § 265.01(1).

Bruen put in-home and public-carry possession on equal constitutional footing, expressly reaffirming that the Second Amendment protects the public possession of a firearm. The Second Amendment does not allow any distinction to be made between inside-the-home possession and public carry. 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."). As the right to bear arms for self-defense is "'the *central component o*f the [Second Amendment] right itself,'" confining the right to "'bear'" arms to the home would "make little sense." *Id.* at 32-33, quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (emphasis in original); *id.* at 33 ("[M]any Americans hazard

greater danger outside the home than in it.”).

Given *Bruen*’s rejection of any constitutional distinction between in-home and public carry, classifying public carry as a “violent” offense – in the absence of any actual use or threatened use of the gun – levies a presumptively impermissible burden on the exercise of Second Amendment rights beyond the State’s lawful regulatory power.

At a minimum, a hearing is required to decide whether there is any historical precedent for classifying the peaceful possession of a gun in public as a violent felony.

CONCLUSION

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

DATED: XXXX, New York
Date

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XXXXXXXXX

[PROVIDE NOTICE TO THE ATTORNEY GENERAL BY MAILING THESE PAPERS AND A NOTICE OF CONSTITUTIONAL CHALLENGE TO THE AG AND ATTACHING PROOF OF SUCH SERVICE, ALONG WITH THE NOTICE ITSELF AS AN EXHIBIT]

THE SERVICE ADDRESS CHANGES BASED UPON THE LOCATION OF THE TRIAL COURT. TO CONFIRM THE SERVICE ADDRESS: https://ag.ny.gov/libraries-documents/opinions/appeals-opinions-resource-center/notification-constitutional.

XXXXXXXXXXX

The People of the State of New York, Respondent, -against- CLIENT, Defendant.	X Cty. Ind. No. ####

NOTICE OF CONSTITUTIONAL CHALLENGE

Please take notice that, under CPLR § 1012(b) and Executive Law § 71, Defendant hereby notifies the Attorney General of the State of New York that, in his motion before X County Supreme Court, in the above matter, he asserts, among other constitutional challenges, that Penal Law § 400.00(1)(b), as incorporated by Penal Law § 265.20(a)(3) and Penal Law 265.03(1)(b), violate the Second Amendment to the United States Constitution. A copy of defendant's **motion** in this matter is attached.

New York, New York
DATE

Yours, etc.,
XXXXXXXXX

TO: Office of the Attorney General
Division of Appeals & Opinions
28 Liberty St.
New York, NY 10005

XXXXXXXXXXX

The People of the State of New York, Respondent, -against- CLIENT, Defendant.	X Cty. Ind. No. ####

AFFIRMATION OF SERVICE UPON THE ATTORNEY GENERAL

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

XXXXXX, an attorney admitted to practice law in this State, affirms under penalty of perjury:

1. I am not a party to this action, am over 18 years of age, and I am associated with XXXX.

2. On XXXXXX, the enclosed **MOTION TO DISMISS THE INDICTMENT** and **NOTICE OF CONSTITUTIONAL CHALLENGE** were served upon the Attorney General of New York by mailing these documents to the Attorney General at: Office of the Attorney General Division of Appeals & Opinions, 28 Liberty St., New York, NY 10005, the address designated for such service, by depositing these documents in a first class, postpaid, properly addressed wrapper, in a depository under the exclusive care and custody of the United States Postal Service within the State of New York. These documents were also e-mailed to Nikki Kowalski, Deputy Solicitor General for Criminal Matters at nikki.kowalski@ag.ny.gov.

Dated: XXX, New York
XXXX

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