APL-2022-00011

To be argued by:
ANDREW W. AMEND
10 minutes requested

Supreme Court, Kings County, Ind. No. 4576/2017

State of New York
Court of Appeals

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

SEBASTIAN TELFAIR,

Defendant-Appellant,

ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Intervenor.

BRIEF FOR INTERVENOR ATTORNEY GENERAL

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PRELIMINARY STATEMENT

The Attorney General intervenes pursuant to Executive Law § 71 to defend the constitutionality of Penal Law § 265.03(3)—one of the statutes defining Criminal Possession of a Weapon in the Second Degree.[1] Defendant Sebastian Telfair's challenges to § 265.03(3) are unpreserved for appellate review and defendant lacks standing to bring the challenges. In any event, the challenges are meritless.

Defendant was convicted of violating § 265.03(3) for possessing a loaded, unlicensed firearm—specifically, a handgun—in his car.[2] He did not argue in the trial court or on appeal that the statute violated the Second Amendment. He now belatedly claims the statute is unconstitutional under *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), but his arguments are unavailing. In *Bruen*, the Supreme Court struck down only one

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[1] This brief does not address the other unrelated issues in this case.

[2] New York's relevant statutory provisions define a "firearm" to include "any pistol or revolver," Penal Law § 265.00(3)(a), but generally exclude rifles and shotguns (other than shortened or altered versions or assault weapons), *id.* § 265.00(3).

provision of New York's firearms licensing scheme: the requirement that a person applying for a license to carry a concealed firearm in public for self-defense must show "proper cause," interpreted to mean a special need for self-protection distinguishable from that of the general community. *Bruen* did not pass on any other aspect of New York's firearms licensing system, and in fact, endorsed many aspects of licensing laws.

Defendant argues that *Bruen* invalidated New York's entire firearms licensing regime and, by extension, statutes like § 265.03(3) that criminalize the unlicensed possession of firearms. In addition, defendant, who claims to have been a resident of Florida at the time of his arrest, argues that New York's gun laws—which he asserts make licenses available only to residents and in-state workers—discriminate against him in violation of the Privileges and Immunities Clause of the U.S. Constitution. Defendant's constitutional claims should be rejected.

Preliminarily, this Court lacks jurisdiction to consider them because defendant failed to preserve them in the trial court, and no exception to the preservation rule applies. Furthermore, defendant

lacks standing to bring these claims. Although his arguments depend on the premise that New York had an unconstitutional licensing scheme, he never applied for a firearms license and, thus, never subjected himself to the requirements he now challenges. Defendant thus cannot show he was aggrieved by the proper cause requirement invalidated in *Bruen*. Moreover, he lacks standing to assert that New York's gun laws discriminate against him in violation of the Privileges and Immunities Clause, because he has failed to show that he was not a resident of New York.

Nor is there merit to defendant's assertion that *Bruen* invalidated New York's entire licensing scheme and laws criminalizing the unlicensed possession of firearms. *Bruen* struck down only a single, narrow provision of the licensing scheme and cast no doubt on New York's ability to impose licensing requirements and criminalize the unlicensed possession of firearms. Courts around the State and throughout the country have thus repeatedly rejected the same arguments defendant makes here. If this Court reaches the merits of defendant's constitutional challenge, it should do the same.

Finally, defendant's Privileges and Immunities claim also fails. Defendant fails to show that he is an out-of-state resident or that New York's firearms licensing statute in fact prohibits out-of-state residents from obtaining firearms licenses. In any event, any purported discrimination in New York's licensing scheme is closely related to the advancement of a substantial State interest—public safety.

QUESTIONS PRESENTED

(1) Are defendant's constitutional challenges preserved for appellate review?

(2) Does defendant have standing to bring his constitutional challenges?

(3) Did *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), render Penal Law § 265.03(3) unconstitutional?

(4) Does defendant's conviction violate the Privileges and Immunities Clause?

STATEMENT OF THE CASE

The Attorney General adopts the statement of facts in the respondent's brief and adds the following description of (i) the New York statutes that criminalize the possession of unlicensed firearms, insofar as they pertain to this case, and (ii) the licensing regime that existed in New York before and after *Bruen*, 142 S. Ct. 2111.

A. New York's Firearm Laws

1. New York prohibits the possession of a firearm without a license.

As relevant to this case, Criminal Possession of a Weapon in the Second Degree criminalizes the possession of a loaded firearm—a defined term that includes "any pistol or revolver," Penal Law § 265.00(3)(a)—either outside a person's home or place of business, *id.* § 265.03(3), or by a person who has been previously convicted of any crime, *id.* §§ 265.03(3), 265.02(1); *People v. Jones*, 22 N.Y.3d 53, 57 (2013). A separate provision, Penal Law § 265.20(a)(3), creates an exemption from this and other firearms possession laws for the

possession of a firearm by a person who has a license issued under Penal Law § 400.00.

Criminal Possession of a Weapon in the Second Degree is a class C violent felony. Penal Law § 70.02(1)(b). The sentence for a first-time offender, like defendant, is a determinate prison term of between 3½ and 15 years, Penal Law § 70.02(2)(a), (3)(b), to be followed by a period of post-release supervision in the range of 2½ to 5 years, Penal Law § 70.45(2)(f).

2. New York's licensing regime permits eligible individuals to possess and carry firearms.

Firearm licenses are issued under Penal Law § 400.00, which is "the exclusive statutory mechanism for the licensing of firearms in New York State." *O'Connor v. Scarpino*, 83 N.Y.2d 919, 920 (1994). To obtain a license, an applicant must submit to an investigation, and the licensing officer must find that "all statements in a proper application for a license are true." Penal Law § 400.00(1). Further, the applicant must demonstrate, among other

things, that he or she is of good moral character,[3] has not been convicted anywhere of a felony or other serious offense, has no outstanding warrant for a felony or other serious offense, is not a fugitive from justice, and has not had a firearms license revoked.

An eligible individual may apply for any of several types of licenses to possess or carry a firearm, including a pistol or revolver, other than an assault weapon or a disguised gun. The most basic license is a residence license, which authorizes a person to possess a firearm in his or her dwelling. Penal Law § 400.00(2)(a). A merchant or storekeeper may apply for a license to possess a firearm in his or her place of business. Penal Law § 400.00(2)(b). A person may also seek a license to carry a concealed firearm in public. Penal Law § 400.00(2)(f). In addition, the statute authorizes narrower types of concealed-carry licenses that are based on the applicant's employment, *see* Penal Law § 400.00(2)(c)-(e), and

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[3] The current legislation requires the applicant to submit information to support a finding of "good moral character"—including character references and "a list of former and current social media accounts of the applicant from the past three years"—and to "meet in person with the licensing officer for an interview." Penal Law § 400.00(1)(n).

licenses relating to the possession and carrying of antique pistols, Penal Law § 400.00(2)(g).

If the licensing officer denies the application, the applicant may seek judicial review under article 78 of the Civil Practice Law and Rules. New York courts will then review whether the denial was a "violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.[4] C.P.L.R. 7803(3); *DiPerna-Gillen v. Ryba*, 215 A.D.3d 1193, 1194 (3d Dep't 2023) (annulling determination that did not apply *Bruen* standard).

B. *Bruen* Invalidated New York's "Proper Cause" Requirement for a Public-Carry License.

Prior to *Bruen*, a person who wanted a license to carry a concealed firearm in public without regard to his or her employment—for example, for self-defense—was required to show "proper cause" for the issuance of such a license. Penal Law

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[4] In addition, the current statute allows for license-application denials to be administratively reviewed by an appeals board created by the Division of Criminal Justice Services and the Superintendent of State Police. Penal Law § 400.00(4-a); *see also* 9 N.Y.C.R.R. pt. 6059 (establishing appeals board to review determinations in jurisdictions, such as New York City, with non-judicial licensing officers).

§ 400.00(2)(f) (McKinney 2021). The licensing statute did not define "proper cause." But New York courts had held that an applicant showed proper cause only if he or she could "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *See*, *e.g.*, *Klenosky v. New York City Police Dep't*, 75 A.D.2d 793 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 685 (1981); *Bando v. Sullivan*, 290 A.D.2d 691, 693 (3d Dep't 2002).

In *Bruen*, the "proper cause" requirement was challenged by two individuals who wanted to carry concealed firearms in public for self-defense. At the time, the plaintiffs held restricted licenses permitting them to carry firearms in public only for hunting and target shooting. The plaintiffs applied for, but were denied, unrestricted concealed-carry licenses after the licensing officer found that they did not show "proper cause" to carry a firearm in public because they failed to demonstrate a special need for self-

defense that distinguished them from the general public.[5] *See New York State Rifle & Pistol Ass'n v. Beach*, 354 F. Supp. 3d 143, 146-47 (N.D.N.Y. 2018), *aff'd*, 818 F. App'x 99 (2d Cir. 2020), *rev'd sub nom. Bruen*, 142 S. Ct. 2111.

The two plaintiffs brought an action in federal district court for declaratory and injunctive relief under 42 U.S.C. § 1983, alleging that the denial of their applications for failure to show "proper cause" violated their Second Amendment rights.[6] The defendants—the Superintendent of the New York State Police and the Rensselaer County licensing officer—moved to dismiss the case on the basis of *Kachalsky v. County of Westchester*, 701 F.3d 81, 100 (2d Cir. 2012), in which the Second Circuit sustained New York's "proper cause" requirement after finding that it was "substantially related to the achievement of an important governmental interest," namely, public safety, *id.* at 96-97. *See Beach*, 354 F. Supp. 3d at

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[5] One of the plaintiffs subsequently got his license amended to permit him to carry a firearm for self-defense to and from work. *Bruen*, 142 S. Ct. at 2125.

[6] The New York State Rifle & Pistol Association, Inc., also was a plaintiff in the case.

145. The district court granted the defendants' motion and the Second Circuit affirmed.

The U.S. Supreme Court granted certiorari and reversed, finding that the "proper cause" requirement of Penal Law § 400.00(2)(f) prevented law-abiding citizens with ordinary self-defense needs from exercising their Second and Fourteenth Amendment right to keep and bear arms. *Id*. at 2156. The Court emphasized that "nothing in our analysis should be interpreted to suggest the unconstitutionality of" dozens of licensing regimes without a "proper cause" requirement. *Id.* at 2138 n.9. Justice Alito wrote separately to emphasize the limited nature of the holding, which decided "nothing" regarding "who may lawfully possess a firearm or the requirements that must be met to buy a gun" or the "restrictions that may be imposed on the possession or carrying of guns." *Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring). Justice Kavanaugh also concurred, adding that States may continue to require licenses for carrying handguns and may condition licenses on compliance with various criteria including background checks. *Id.* at 2161-62 (Kavanaugh, J., concurring).

New York complied with *Bruen* by removing the "proper cause" requirement from its licensing statute, and adding a provision that an unrestricted concealed-carry license is "subject to the restrictions of state and federal law." Penal Law § 400.00(2)(f). In addition, lawmakers added several new eligibility requirements for that type of license. Among other things, they expanded the list of disqualifying prior convictions, Penal Law § 400.00(1)(n), and required that applicants complete a training class, appear for an in-person interview with the licensing officer, submit at least four character references, and provide a list of current and former and social media accounts going back three years, Penal Law § 400.00(1)(o).

ARGUMENT

POINT I

THIS COURT HAS NO POWER TO REVIEW DEFENDANT'S UNPRESERVED CONSTITUTIONAL CHALLENGES

Defendant's constitutional challenges are beyond the jurisdiction of this Court. Defendant failed to preserve those challenges in the trial court and has failed to show that an exception to the preservation rule applies.

A. Defendant Failed to Preserve His Challenges in the Trial Court.

With narrow exceptions inapplicable here, this Court's jurisdiction is limited to questions of law. N.Y. Const. art. VI, § 3; *People v. Graham*, 25 N.Y.3d 994, 996 (2015).[7] If an issue was unpreserved in the trial court, there is generally no question of law for this Court to review, and the issue is beyond the Court's jurisdiction. *See Graham*, 25 N.Y.3d at 996-97; *People v. Turriago*,

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[7] This Court's jurisdiction extends beyond questions of law "where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered." N.Y. Const. art. VI, § 3(a).

90 N.Y.2d 77, 80 (1997). Indeed, in *People v. Hughes*, 22 N.Y.3d 44, 48 (2013), this Court held that it could not reach the merits of the defendant's unpreserved Second Amendment challenge to his conviction for third-degree weapon possession.

That rule bars this Court from reviewing defendant's constitutional challenges here. His claim that New York's gun laws violate the Second (and Fourteenth) Amendment right of an individual to keep and bear arms for self-defense and his claims under the Privileges and Immunities Clause were never presented to the trial court.

This Court has made clear that preservation is essential to the responsible adjudication of constitutional challenges. As the Court stated in *People v. Baumann & Sons Buses, Inc.*, a "challenge to the constitutionality of a statute must be preserved" and the requirement "is no mere formalism." 6 N.Y.3d 404, 408 (2006). Preservation of a constitutional challenge "ensures that the drastic step of striking duly enacted legislation will be taken not in a vacuum but only after the lower courts have had an opportunity to address the issue and the unconstitutionality of the challenged

provision has been established beyond a reasonable doubt." *Id.* (citing *Matter of Van Berkel v. Power*, 16 N.Y.2d 37, 40 (1965)). An appeal raising an unpreserved constitutional challenge to a statute therefore lies beyond this Court's jurisdiction and must be dismissed. *Id.* at 408-09; *see also* Arthur Karger, *The Powers of the New York Court of Appeals* § 1:3 & n.2 (3d ed. Aug. 2022 update) (Westlaw).

B. Defendant's Arguments that the Preservation Rule Should Not Apply Are Meritless.

Defendant makes two arguments that the preservation rule should not apply here. Neither is availing.

1. Defendant's "futility" argument fails.

Defendant argues that it would have been "futile, if not frivolous" for him to have raised Second Amendment challenges to New York's gun laws while his case was pending in the trial court, given the state of the law in New York prior to *Bruen*. (D. Br. 48.) Defendant, however, cites no authority from this or any other court holding that a litigant is excused from preserving a constitutional challenge for appellate review because of the claim's perceived or

actual weakness. And we are unaware of any authority supporting that proposition.

Indeed, this Court has explained in comparable circumstances that "[c]ourts are continually reconsidering old precedents and, if no objection or equivalent was required here, objection would never be necessary to raise a question of law where it is urged that some former decisional law be changed." *People v. Reynolds*, 25 N.Y.2d 489, 495 (1969) (quoting *People v. Friola*, 11 N.Y.2d 160 (1962) (Van Voorhis, J., concurring)). "That would not accord with the purposes of the rule requiring an objection, which is to apprise the court and the adversary of the position being taken when the ruling is made." *Id.* (quoting *Friola*, 11 N.Y.2d 160-61 (Van Voorhis, J., concurring)). "It is important to know at the time that rulings are being challenged so that additional evidence or argument may be presented and the point considered by the trial court with knowledge that the rule is being contested." *Id.* (quoting *Friola*, 11 N.Y.2d at 161 (Van Voorhis, J., concurring)).

The Appellate Division has not hesitated to apply this rule where, as here, the defendant raised a constitutional claim based

on *Bruen* for the first time on an appeal from a conviction for criminal possession of a weapon. In *People v. Adames*, the First Department rejected the defendant's argument that it would have been futile for him to raise a constitutional challenge before *Bruen* and that he "should not be penalized for his failure to anticipate the shape of things to come." *People v. Adames*, 216 A.D.3d 519, 519 (1st Dep't 2023) (quoting *Reynolds*, 25 N.Y.2d at 495). Although "*Bruen* had not yet been decided, and trial counsel may have reasonably declined to challenge the constitutionality of Penal Law § 265.03(3)," the First Department explained, the "defendant had the same opportunity to advocate for a change in the law as any other litigant." *Id.* (brackets omitted). The Second and Fourth Departments have adopted the same reasoning. *People v. Manners*, 2023 N.Y. Slip Op. 03017, at *2-3 (2d Dep't June 7, 2023); *People v. McWilliams*, 214 A.D.3d 1328, 1329-30 (4th Dep't 2023), *lv. denied with lv. to renew*, 2023 N.Y. Slip Op. 97531(U) (N.Y. May 10, 2023); *accord*, *e.g.*, *People v. Jacque-Crews*, 213 A.D.3d 1335, 1336 (4th Dep't 2023), *lv. denied*, 39 N.Y.3d 1111 (2023).

Defendant's claim that it would have been futile for him to raise a Second Amendment challenge prior to *Bruen* thus does not excuse his lack of preservation. In any event, that claim is undermined by the several decisions—some of which pre-date defendant's arrest—in which the U.S. Supreme Court and the lower federal courts showed their willingness to extend the reach of the Second Amendment. In *District of Columbia v. Heller*, the Supreme Court held for the first time that a law-abiding individual has a Second Amendment right to possess a firearm in the home for self-defense. 554 U.S. 570, 635-36 (2008). In *McDonald v. City of Chicago*, the Court held that the Second Amendment is fully applicable to the States. 561 U.S. 742, 750 (2010). And well before *Bruen* held that the Second Amendment includes the right to carry firearms for self-defense in public, a number of lower courts and judges already had expressed that view. *See*, *e.g.*, *Drake v. Filko*, 724 F.3d 426, 444-46 (3d Cir. 2013) (Hardiman, J., dissenting); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012); *Kachalsky*, 701 F.3d at 89 & n.10; *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (Niemeyer, J., concurring); *United States v.*

Marzzarella, 614 F.3d 85, 92 (3d Cir. 2010) (dictum). In light of those decisions, defendant cannot credibly argue that his pre-*Bruen* Second Amendment challenges would have been futile if not frivolous.

2. *Patterson* and *Baker* do not excuse defendant's lack of preservation.

Defendant mistakenly attempts to bolster his futility argument by citing *People v. Patterson*, 39 N.Y.2d 288 (1976), and *People v. Baker*, 23 N.Y.2d 307 (1968). (D. Br. 49.) According to defendant, those cases permit this Court to reach an unpreserved argument based on a U.S. Supreme Court precedent decided while a case is pending on direct appeal. But defendant is incorrect: his futility argument does not get any better just because *Bruen* was decided while his conviction was subject to direct appellate review. He had the chance to argue for a change in the law but failed to do so; he is not entitled to have that failure excused simply because other parties succeeded with different Second Amendment claims in separate litigation.

Patterson and *Baker* do not require a different conclusion. In *Patterson*, this Court reviewed an unpreserved claim under the "narrow, historical exception" to the preservation rule for a so-called "mode of proceedings" error—that is, an error so fundamental that it "irreparably tainted" the "entire trial" and undermined the "essential validity of the proceedings conducted below." *Patterson*, 39 N.Y.2d at 295-96. As this Court explained, such grave errors include trial by fewer than 12 members of a jury, and a prosecution of an "infamous crime" initiated by information rather than grand jury indictment. *Id.* at 295. Against this backdrop, the *Patterson* Court held that a challenge to the proper allocation of the burden of proof on the issue of extreme emotional disturbance raised a claim that the defendant's trial was "at a basic variance with the mandate of law," *id.* at 296—i.e., a "fundamental, nonwaivable defect in the mode of procedure," *id.* at 295.

Similarly, in *Baker*, this Court reached an unpreserved challenge where the government introduced statements made by some non-testifying defendants that inculpated other co-defendants, thus infringing the inculpated "defendants'

constitutional right to confront their accusers," as recognized in *Bruton v. United States*, 391 U.S. 123, 136 (1968), and given retroactive effect in *Roberts v. Russell*, 392 U.S. 293 (1968). *See* 23 N.Y.2d at 317. Such a constitutional error "present[ed] a serious risk that the issue of guilt or innocence may not have been reliably determined," *Roberts*, 392 U.S. at 295, due to the "[t]he powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant," being "deliberately spread before the jury in a joint trial," *Bruton*, 391 U.S. at 135-36. "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.* at 136. This Court held that such a grave error could not "be ignored upon the ground that no proper objection was made" or "disregarded as nonprejudicial," *Baker*, 23 N.Y.2d at 317-18.

Moreover, *Baker* was decided at a time when this Court understood that "where a particular change in Federal constitutional law is to be applied retroactively, a State may not through the use of procedural device, such as the requirement for

an exception, deprive a defendant of the benefit of the change." *People v. Bailey*, 21 N.Y.2d 588, 597-98 (1968). The U.S. Supreme Court subsequently clarified that States remain free to enforce procedural bars such as a failure to raise a timely objection even where a new Federal constitutional rule has been made fully retroactive. *Hankerson v. North Carolina*, 432 U.S. 233, 244 n.8 (1977).[8]

The present case is readily distinguishable from both *Patterson* and *Baker*. It involves no mode-of-proceedings error or other defect that affected the "essential validity" of the trial below. *Patterson*, 39 N.Y.2d at 295-96. Defendant raises no fundamental "deviation[] from mandated procedural, structural and process-oriented standards." *People v. Agramonte*, 87 N.Y.2d 765, 769-70 (1996). Rather, defendant merely claims that the statute under which he was convicted, Penal Law § 265.03(3), is unconstitutional in one particular respect. (*See* D. Br. 50-57.) But this Court has

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[8] Notably, this Court in *Baker* declined to review a *Miranda* challenge to confessions offered by certain defendants, noting that "[i]n New York, *Miranda* has not been applied retroactively." *Baker*, 23 N.Y.2d at 319.

repeatedly declined the invitation to excuse post-conviction constitutional challenges to a criminal statute from the preservation requirement; instead, it has confirmed that such claims "must be preserved." *Baumann & Sons Buses, Inc.*, 6 N.Y.3d at 408; *see*, *e.g.*, *People v. Cubero*, 34 N.Y.3d 976, 977 (2019) (constitutional challenge to statute creating special prosecutor unpreserved); *People v. Davidson*, 98 N.Y.2d 738, 39-40 (2002) (declining to review constitutional challenge to loitering statute).

Sound reasons support the distinction this Court has repeatedly drawn between mode-of-proceedings errors that do not require preservation and constitutional challenges to state legislation, which do. A mode-of-proceedings error is about ensuring an essentially fair process, which is indispensable to producing a reliable outcome in an individual case—a lack of preservation is excused because the error is so plain, and so fundamental, that the outcome cannot be trusted. A constitutional challenge to a clause in a penal statute differs in kind. Such a challenge has systemic consequences and requires this Court to invalidate an act of the Legislature, a co-equal branch of State Government. Requiring

such challenges to be raised in the lower courts first allows all pertinent legal and factual considerations to be aired, so "that the drastic step of striking duly enacted legislation will be taken not in a vacuum." *Baumann & Sons Buses, Inc.*, 6 N.Y.3d at 408.

Indeed, *Baumann & Sons Buses, Inc.* is instructive. In that case, a bus company was accused of violating an anti-noise ordinance when it "continuously operated approximately 50 bus engines for several hours beginning at 5:30 a.m." *Id.* at 406. The defendant's unpreserved claim was that the ordinance was unconstitutionally vague unless it required noise rising to the level of a public nuisance, an element that had not been charged. *Id.* at 408. This Court held that it lacked jurisdiction to review the constitutional issue, and further held that addressing the facial sufficiency of the accusatory instrument for failing to allege a public nuisance "would permit an end run around the parties' obligation to preserve constitutional claims before the trial court." *Id.*

The present matter likewise provides no reason to disregard that obligation. Here, as in *Baumann & Sons Buses, Inc.*, defendant attempts to raise an unpreserved challenge to an aspect of a

statutory scheme that might not even have applied to him. In that case, there was no question that the State could validly proscribe excessive engine noise; the defendant simply argued that the ordinance should have been limited to extreme noise amounting to a public nuisance—a requirement that the prosecution might have been able to meet. Here, there is no question that the State can validly proscribe unlicensed firearm possession, *see Bruen*, 142 S. Ct. at 2138 n.9; defendant simply argues that he should not have been required to demonstrate proper cause to obtain a firearms license had he applied for one. But as explained below (at 32-34), defendant fails to show that the proper cause requirement would have had any effect on his hypothetical license application. Thus here, as in *Baumann & Sons Buses, Inc.*, defendant falls well short of alleging a constitutional error so fundamental and so plain that preservation is not required. This case is entirely unlike the type of matter described in *People v. Mack*, 27 N.Y.3d 534, 543 (2016), where this Court observed that mode-of-proceedings errors are "not waivable" and "require reversal even if the defense affirmatively consents." The same is true of defendant's claim under the

Privileges and Immunities Clause: for the reasons explained below (at 36, 50-55), it is entirely possible that Penal Law § 400.00's alleged in-state residency requirement would not have affected him, either because he had a New York residence or no residency requirement exists.

New York appellate courts have rejected attempts like defendant's to shoehorn post-*Bruen* challenges to Penal Law § 265.03(3) into the narrow class of exceptional cases recognized in *Patterson* and *Baker*. *See Adames*, 216 A.D.3d at 519 (distinguishing *Patterson* as case dealing "in pertinent part, with retroactivity and mode of proceedings errors exempt from preservation"); *McWilliams*, 214 A.D.3d at 1329. These decisions rightly recognize that *Bruen* left intact the State's authority to require licenses to carry a firearm in public, and to impose criminal sanctions on those who, like defendant, flout that requirement. This Court should do the same.

POINT II

DEFENDANT LACKS STANDING TO BRING HIS CONSTITUTIONAL CHALLENGES

Defendant has no standing to argue that the statutes under which he was convicted of unlicensed firearm possession violate the Second and Fourteenth Amendments by virtue of requiring that an applicant for a license demonstrate "proper cause" to carry a firearm in public. Defendant never applied for a firearms license in New York and, thus, never submitted himself to the licensing regime that he challenges. He therefore cannot show that he was aggrieved by that regime. And he has failed to show that any exception applies that would give him standing to raise his challenge despite his failure to seek a license. Moreover, defendant lacks standing to assert that New York's statutes discriminate against him, an alleged non-resident, in violation of the Privileges

and Immunities Clause: he has failed to show that he was not a resident of New York at the time of his arrest.

A. Defendant's Failure to Apply for a Firearms License Deprives Him of Standing to Bring His Second Amendment Claim.

If a defendant has "failed to apply for a gun license in New York, he lacks standing to challenge the licensing laws of the state." *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012). That is because, "'[a]s a general matter, to establish standing to challenge an allegedly unconstitutional policy, a [person] must submit to the challenged policy.'" *Id.* (quoting *Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1096 (2d Cir. 1997), and citing *Allen v. Wright*, 468 U.S. 737, 746 (1984); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166-68 (1972)). Put another way, a defendant has no standing to challenge the constitutionality of a statute that had "no effect" on him. *People v. Nelson*, 69 N.Y.2d 302, 308 (1987).

This rule straightforwardly bars defendant from challenging his conviction based on any constitutional defect in former article 400 of the Penal Law. Indeed, defendant does not purport to have applied and been rejected for a firearm license under that statute.

Instead, he argues that he has standing under an exception to the general rule. But no exception applies.

1. The exception for challenges to facially void statutes does not apply here.

Defendant incorrectly argues that he was not required to seek a firearms license in order to make the claim that the New York firearm licensing scheme is unconstitutional on its face and need not be obeyed. (D. Br. 44.) The Supreme Court cases that defendant cites in support of that argument—*Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Lovell v. Griffin*, 303 U.S. 444 (1938); and *Smith v. Cahoon*, 283 U.S. 553 (1931)—are unlike the present case in important respects. Defendant's reliance on them is misplaced.

Shuttlesworth, *Staub*, and *Lovell* each involved a challenge to an ordinance that required a permit for activities protected by the First Amendment and gave local officials unqualified discretion to grant or deny the permit. *Smith* involved a challenge to a Florida law requiring the operator of a vehicle to obtain a certificate and pay a tax in order to transport people or property for compensation

on a public highway—even if the operator was a private carrier rather than a common carrier—a regulatory scheme the Court considered "manifestly beyond the power of the state." *Smith*, 283 U.S. at 563. In all four cases, the Supreme Court stated that where a licensing law is void on its face, a defendant can challenge the law without first seeking a license under it. *See Shuttlesworth*, 394 U.S. at 151; *Staub*, 355 U.S. at 319; *Lovell*, 303 U.S. at 452; *Smith*, 283 U.S. at 562. In the First Amendment context, the Court explained that a person faced with an unconstitutional licensing law "may ignore it and engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 151.[9]

The foregoing cases do not control the present case. Unlike in those cases, there is no colorable claim here that the entire licensing law at issue, Penal Law article 400, is unconstitutional. Defendant's claim is based on *Bruen*, which invalidated only a

[9] The Court's statements in *Shuttlesworth* were *dicta*, as the petitioner actually applied for, and was denied, a permit. *See Shuttlesworth*, 394 U.S. at 157-58.

single, narrow provision of New York's licensing law—the "proper cause" requirement of former Penal Law § 400.00(2)(f)—and left intact the State's other licensing requirements. *See Bruen*, 142 S. Ct. at 2138 n.9, 2156. Thus, even assuming that defendant was free to "ignore" the unconstitutional "proper cause" requirement, he was not free to ignore the provisions of New York's licensing and criminal weapon-possession laws that *Bruen* left undisturbed.

Yet defendant *did* ignore those provisions. He failed to apply for a firearms license under Penal Law § 400.00, which he was required to do under § 265.20(a)(3) to avoid criminal liability. And he possessed a loaded firearm in public, without a license, in violation of Penal Law § 265.03(3). Because defendant failed to submit to laws that unquestionably pass constitutional muster, he lacks standing to challenge those laws.

2. The "futility" exception to the license requirement does not apply here.

Nor is there merit to defendant's argument that submitting an application would have been "futile." (D. Br. 46.) To be sure, the Second Circuit observed in *Decastro* that the failure to apply for a

license does not preclude a constitutional challenge if the defendant makes a "'substantial showing'" that submitting an application "'would have been futile.'" *Decastro*, 682 F.3d at 164 (quoting *Jackson-Bey*, 115 F.3d at 1096). But to make that showing, the defendant must demonstrate that his application would have been denied *on the basis of the constitutionally defective provision in the licensing scheme*—in this case, the "proper cause" requirement in former Penal Law § 400.00(2)(f). *See People v. Williams*, 76 Misc. 3d 925, 929-31 (Sup. Ct. Kings County 2022); *People v. Caldwell*, 76 Misc. 3d 997, 1003 (Sup. Ct. Queens County 2022); *cf. Bach v. Pataki*, 408 F.3d 75, 77, 82-83 (2d Cir. 2005) (appellant told by State Police that non-residents were ineligible for New York firearms licenses had standing to challenge purported residency requirement), *abrogated in part on other grounds by McDonald*, 561 U.S. 742.

Defendant has failed to make the requisite showing. He contends that his application would have been denied under the "proper cause" provision (in addition to the purported in-state residency requirement, see *infra* at 50-55). (D. Br. 46.) But that

claim is speculative. Even if it is possible that the "proper cause" requirement would have prevented defendant from obtaining a public carry license in New York, licensing officials might have denied his application for entirely different and independent reasons. But because defendant never applied for such a license, the answer cannot be known.

In any event, the proper cause requirement would have applied only if petitioner had sought a license to carry a firearm in *public*. That requirement would not have applied to an application for a license to possess a firearm at defendant's dwelling or place of business. *See* Penal Law § 400.00(2)(a)-(b). That fact matters because if defendant had obtained *any* license under Penal Law § 400.00, then Penal Law §§ 265.20(a)(3) and 400.00(17) would have exempted him from prosecution for criminal possession of a weapon. This Court has recognized that "New York's criminal weapon possession laws prohibit only the *unlicensed* possession of handguns." *Hughes*, 22 N.Y.3d at 50 (emphasis in original). It has further held that a defendant who has a license to possess a firearm at a dwelling or business is exempt from prosecution for criminal

possession of a weapon, even if he or she possess the firearm with intent to use it unlawfully against another, *see People v. Parker*, 52 N.Y.2d 935 (1981), *rev'g for reasons stated in dissent below*, 70 A.D.2d 387, 391-94 (1st Dep't 1979), or in a place outside the scope of the license, *see People v. Serrano*, 52 N.Y.2d 936 (1981), *rev'g for reasons stated in dissent in People v. Parker*, 70 A.D.2d 387, 391-94 (1st Dep't 1979).

Relatedly, it is no argument that the "proper cause" requirement in former Penal Law § 400.00(2)(f) could have deterred defendant from pursuing a firearms license in the normal course. To establish standing under a deterrence theory, a defendant must undertake the "difficult task" of "proving that he would have applied for the [license] had it not been" for the "proper cause" requirement. *Intl. Bhd. of Teamsters v. United States*, 431 U.S. 324, 364, 368 (1977); *see also Bordell v. General Elec. Co.*, 922 F.2d 1057, 1061 (2d Cir. 1991) (requiring plaintiff to proffer "objective evidence to substantiate his claim that the challenged conduct has deterred him from engaging in protected activity"). But defendant does not suggest that he would have applied for a license but for the "proper

cause" requirement, let alone offer evidence to support such a contention. In fact, his claim that he was ineligible for a license based on his purported lack of a New York residence (D. Br. 47-48) undermines any suggestion that he was deterred by the proper cause requirement.

B. Defendant Lacks Standing to Assert a Privileges and Immunities Claim.

Defendant also has no standing to claim that New York's firearm laws discriminated against him in violation of the Privileges and Immunities Clause by making public carry licenses available only to New York residents and in-state workers. That is because even if New York's licensing statutes were read to impose such a requirement—and they should not be (see *infra* at 52-55)—defendant fails to show that he lacked a New York residence or workplace for purposes of applying for a firearms license. *See* Penal Law § 400.00(3)(a) (directing applicants to apply to the licensing officer in the city or county "where the applicant resides, is principally employed or has his or her principal place of business as merchant or storekeeper").

To the contrary, the record suggests he had a New York residence at the time of his arrest. Approximately one month before the police stopped his F-150 truck in Brooklyn, defendant had the truck and another vehicle shipped from Florida (where he had been sharing a home with a woman who was divorcing him) to New York. (T. 395-96, 404, 422-25, 672-82.) In addition, defendant used the truck to transport an enormous quantity of personal property to New York, including, among other things: 93 pairs of sneakers, 111 articles of clothing, multiple pieces of luggage, duffel bags, electronics, and jewelry. (T. 181-85, 218-19, 223-29.) Thus, defendant's contention that his "home" was in Florida at the time of his arrest (D. Br. 47) is belied by the record, which indicates that he had left Florida for New York one month earlier. In addition, on May 5, 2017, defendant deposited a check for more than $83,000 at a bank in Manhattan. (T. 765.) And, on the day that he was arrested, defendant was carrying a New York driver's license, albeit a suspended one (T. 181)—further suggesting residency in New York.

It is immaterial that defendant also had a Florida address and might have been *domiciled* in Florida at the time of his arrest (*see* D.Br.5 & n.2, 42). As this Court has held, Penal Law § 400.00(3)(a) allows a part-time New York resident with a permanent domicile in another state to apply for a New York firearm license. *Osterweil v. Bartlett*, 21 N.Y.3d 580, 584-87 (2013). Defendant's failure to establish his own non-residency leaves him without standing to assert a Privileges and Immunities claim based on asserted discrimination against non-residents.

POINT III

DEFENDANT'S CLAIM THAT PENAL LAW § 265.03(3) VIOLATES THE SECOND AMENDMENT IS MERITLESS

Defendant's Second Amendment challenge to his conviction would fail on the merits even if this Court had jurisdiction to reach it and he had standing to raise it. *Bruen* did not render Penal Law § 265.03(3) unconstitutional under the Second Amendment, on its face or as applied to defendant. Defendant's contrary claim rests on a fundamental misunderstanding of *Bruen*. According to defendant, *Bruen*'s limited holding—that the "proper cause" requirement of

New York's former licensing regime violated the Second Amendment—had the sweeping effect of invalidating Penal Law § 265.03(3), because the latter statute incorporated "unconstitutional licensing regulations." (D. Br. 41-42.) Defendant is incorrect. *Bruen* did not hold that New York's licensing regime as a whole violated the Second Amendment—let alone that its criminal weapon-possession laws did. Indeed, *Bruen* had no occasion to pass on any licensing requirements except the proper cause requirement for a public carry license. And *Bruen* did not even arguably cast doubt on laws that criminalize the *unlicensed* possession of firearms. *See Bruen*, 142 S. Ct. at 2138 n.9.

A. *Bruen* Has No Bearing on the Constitutionality of Penal Law § 265.03(3).

Contrary to defendant's arguments, *Bruen* dealt with a narrow facet of New York's firearm licensing scheme that is irrelevant to this case. The plaintiffs in *Bruen* never challenged Penal Law § 265.03(3) or any of New York's other laws criminalizing the unlicensed possession of a firearm. And the

Supreme Court said nothing to indicate that those laws were constitutionally infirm.

The *Bruen* plaintiffs were law-abiding residents of New York who held restricted licenses permitting them to carry firearms in public for hunting and target shooting. They applied for unrestricted licenses to carry concealed firearms in public for self-defense, but their applications were denied by licensing officials who determined that they failed to show "proper cause" under former Penal Law § 400.00(2)(f)—i.e., a special need for self-protection distinguishable from that of the general community. In an action under 42 U.S.C. § 1983, the plaintiffs asserted the narrow claim that the "proper cause" requirement violated their Second Amendment rights. They did not challenge any of the State's other licensing requirements. Nor did they challenge the provisions of Penal Law article 265 that criminalize the unlicensed possession of firearms. *See Bruen*, 142 S. Ct. at 2123, 2125.

The Supreme Court concluded that the "proper cause" requirement prevented law-abiding citizens with ordinary self-defense needs from exercising their constitutional right to keep and

bear arms and therefore implicated the Second Amendment.[10] *Id.* at 2156. The Court then concluded that the respondents had failed to meet their burden to identify sufficient historical analogues justifying the "proper cause" requirement. For that reason, the Court held that the "proper cause" requirement was unconstitutional. *Id.* at 2138, 2156.

Although *Bruen* invalidated New York's "proper cause" requirement, the decision did not, in any way, cast doubt on the power of the States to impose licensing requirements or to criminalize the unlicensed possession of firearms. Indeed, the Court noted that "the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms."[11] *Bruen*, 142 S. Ct. at 2138. Further, the Court approved of licensing

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[10] As a threshold issue, the proper cause requirement implicated the text of the Second Amendment.

[11] Defendant himself concedes that his right to carry a firearm in public is "subject to lawful regulation by the government" (D. Br. 38-39, 40.)

requirements—like the requirements that an applicant undergo a background check and pass a firearms safety course—that are designed to ensure that "those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Id.* at 2138 n.9 (quoting *Heller*, 554 U.S. at 635). As Justice Kavanaugh emphasized in a concurring opinion joined by the Chief Justice, "the Court's decision does not prohibit States from imposing licensing requirements for carrying a handgun for self-defense." *Id.* at 2161.

As one federal district court noted in the wake of *Bruen*, individuals "are still required under New York law to have a valid license before possessing handguns, which *Bruen* does not call into question." *Frey v. Bruen*, No. 21-cv-05334, 2022 WL 3996713, at *3 (S.D.N.Y. Sept. 1, 2022). *Id.*; *see also Giambalvo v. County of Suffolk*, No. 22-cv-4778, 2023 WL 2050803, at *4-5 (E.D.N.Y. Feb. 14, 2023), *interlocutory appeal docketed*, No. 23-208 (2d Cir. Feb. 16, 2023).

B. Following *Bruen*, Courts Have Uniformly Held that States May Continue to Impose Licensing Requirements and Criminalize the Unlicensed Possession of Firearms.

Courts have uniformly rejected defendant's reading of *Bruen*. We have identified no case in which a party has prevailed on a claim that *Bruen* invalidated New York's licensing scheme in its entirety and, by extension, the laws criminalizing the unlicensed possession of firearms. Rather, courts have consistently rejected such arguments, both in New York and in other jurisdictions with licensing regimes comparable to the one at issue in *Bruen*.

1. New York courts

Two recent decisions by the First Department and one from the Second Department contained alternate holdings rejecting claims like defendant's on the merits, the first appellate authority in New York on the subject. *See Adames*, 216 A.D.3d at 519; *People v. Artis*, 2023 N.Y. Slip Op. 02619, at *1 (1st Dep't May 16, 2023); *Manners*, 2023 N.Y. Slip Op. 03017, at *3. In both *Adames* and *Artis*, the First Department issued alternative holdings denying defendants' *Bruen*-based constitutional challenges on the merits, in

addition to holding those challenges unpreserved and declining to address them in the interest of justice. In *Manners*, the Second Department likewise held defendant's challenge based on *Bruen* unpreserved while also concluding that "[i]n any event, the defendant's contention is without merit." 2023 N.Y. Slip Op. 03017, at *3. "The ruling in *Bruen* had no impact on the constitutionality of New York State's criminal possession of a weapon statutes." *Id.*

These alternative holdings accord with trial court decisions throughout the State. Those courts have recognized that *Bruen* "did not magically de-criminalize the acts of individuals who chose to violate state law by arming themselves and carrying and concealing whatever firearms they wanted to conceal, whenever and wherever they wanted to do so, without bothering to apply for a license." *People v. Brown*, 2022 N.Y. Slip Op. 32290(U), at *5 (Sup. Ct. Bronx County July 15, 2022). In the midst of a national epidemic of mass shootings, including in Buffalo, New York; Uvalde, Texas; and Highland Park, Illinois—not to mention "the hundreds of other daily instances of gun violence that garner little attention"—defendant's reading of the Second Amendment "would turn New

York into the Wild West, placing its citizens at the mercy of criminals wielding unlicensed firearms, concealed from public view, in heavily populated areas." *People v. Rodriguez*, 76 Misc. 3d 494, 498-99 (Sup. Ct. New York County 2022). None of this is mandated: *Bruen* did not "eviscerat[e] the police powers of the State to address criminality" or extend Second Amendment protections "to anyone other than law-abiding citizens." *Id.* at 499. Because a defendant's failure to seek a license "before roaming the streets with a loaded firearm is not abiding by the law," no part of the Second Amendment "requires that it be tolerated." *Id.*

Similar decisions abound. In *Williams*, for instance, the court stated that it was joining "the chorus of other judges" who have held that *Bruen* does not preclude prosecutions for unlicensed firearm possession. 76 Misc. 3d at 927 (citing *People v. Brown*, 2022 N.Y. Slip Op. 32290(U); *Rodriguez*, 76 Misc. 3d at 494; *People v. Monroe*, Bronx Ind. No. 00232-21 (Sup. Ct. Bronx County, July 14, 2022)

(AG Supp. 6)).[12] In *Caldwell*, the court similarly observed that "several courts of coordinate jurisdiction have denied motions to dismiss, finding that *Bruen* does not preclude the prosecution of unlawful possession of a firearm." 76 Misc. 3d at 1000. It then joined other trial courts in holding that *Bruen* left intact New York's authority to impose a licensing scheme and criminalize the unlicensed possession of firearms. *Id*. at 1000, 1002-03 (citing *People v. Zampino*, Queens Ind. No. 71031/2021, at 2-5 (Sup. Ct. Queens County Aug. 1, 2022) (AG Supp. 8-11); *People v. Duszka*, Queens Ind. No. 70499/2021 (Sup. Ct. Queens County July 27, 2022) (AG Supp. 1-5)).[13]

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[12] Citations taking the form "AG Supp. __" refer to the Attorney General's separately filed Supplement of Selected Authorities.

[13] *See also People v. Frazzini*, 2023 N.Y. Slip Op. 50410(U) (Sup. Ct. Erie County May 3, 2023); *People v. Williams*, 2023 N.Y. Slip Op. 50158(U) (Sup. Ct. Erie County Feb. 27, 2023); *People v. Brundige*, 78 Misc. 3d 616, 624 (Sup. Ct. Erie County 2023).

2. Courts in other States

Recognizing that "[c]itizens are not free to act as if they possess an unrestricted permit simply because they may be eligible to obtain such a permit through proper channels," *State v. Reeves*, No. A-0921-20, 2023 WL 2358676, at *3 (N.J. Super. Ct. App. Div. Mar. 6, 2023), courts outside New York have reached the same conclusion in comparable cases, including appeals in California and New Jersey. In *People v. Velez*, a California case, the defendant was convicted of attempted murder, carrying a loaded firearm in public as an active participant in a criminal street gang, and other crimes. 302 Cal. Rptr. 3d 88, 91 (Cal. Ct. App. 2022), *review denied and op. ordered depublished*, No. S277985 (Cal. Mar. 1, 2023).[14] On appeal, the defendant argued that *Bruen* rendered unconstitutional California's entire firearms licensing scheme, including the requirement that a license applicant possess "good moral character." *Id.* at 91, 104. He further argued that the infirmity of

[14] "A Supreme Court order to depublish is not an expression of the court's opinion of the correctness of the result of the decision or of any law stated in the opinion." Cal. R. Ct. 8.1125(d).

the licensing scheme invalidated the statute that criminalized carrying a loaded firearm in public. *Id.* at 101. The Court of Appeal rejected those arguments, ruling that *Bruen* merely struck down New York's "proper cause" requirement; the court declined to expand *Bruen* in the manner urged by the defendant. *Id.* at 104-05.[15]

In the New Jersey case of *State v. Reeves*, the defendant was convicted of unlawful possession of a handgun for carrying a weapon in public beyond the scope of his carry permit. On appeal, he argued that *Bruen* rendered his conviction unconstitutional, an argument that the appellate court rejected. While acknowledging that *Bruen* invalidated New Jersey's "justifiable need" requirement—which was analogous to New York's "proper cause" requirement—the court ruled that *Bruen* did not prevent New Jersey from enforcing other components of its gun laws. *Reeves*, 2023 WL 2358676, at *3.

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[15] *See also People v. Alvarado*, No. F082048, 2022 WL 17369337, at *22-26 (Cal. Ct. App. Dec. 2, 2022) (rejecting post-*Bruen* challenge to defendant's conviction of carrying loaded firearm in public as active participant in criminal street gang).

In short, these decisions recognize that *Bruen* did not require states "to put on blinders as to the dangers posed generally by those who unlawfully carry a loaded firearm in public." *State v. Grady*, 2023 WL 3408779, at *5 (N.J. Super. Ct. App. Div. May 12, 2023). Nor did *Bruen* undermine the States' ability to proscribe and criminally punish unlicensed firearm possession, even if the State's licensing scheme contained a "proper cause" or similar requirement at the time of the offense. This Court should not become the first to reach a different conclusion.

POINT IV

THERE IS NO MERIT TO DEFENDANT'S CLAIM THAT HIS CONVICTION VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE

Finally, there is no merit to defendant's claim that New York's firearm licensing statutes violated his right to travel under the Privileges and Immunities Clause by supposedly making licenses available only to residents of New York and in-state workers. (D.Br. 46-48.) According to defendant, those laws forced him to choose between traveling to New York and exercising his Second Amendment rights. (D.Br. 47.) But defendant's as-applied

challenge fails for three reasons. First, defendant fails to show that he was an out-of-state resident at all. Second, he fails to show that New York's laws would have barred him from applying for a firearm license even if he had been out-of-state resident with no dwelling or place of business in New York. Finally, any discriminatory effect of New York's licensing laws is closely related to the advancement of a substantial State interest, *i.e.*, public safety, and therefore would pass constitutional muster.

A. The Privileges and Immunities Clause

The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. The clause protects one of the three components of the constitutional right to travel from one state to another, specifically, "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State."

Saenz v. Roe, 526 U.S. 489, 500 (1999).[16] A challenged restriction violates the Privileges and Immunities Clause if it: (1) prohibits non-residents from engaging in an activity that is "sufficiently basic to the livelihood of the Nation" to be deemed a protected privilege; and (2) "is not closely related to the advancement of a substantial state interest." *Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64-65 (1988) (internal quotation marks and citations omitted).

B. Defendant's Privileges and Immunities Claim Fails.

1. Defendant fails to show that he is an out-of-state resident

Defendant's as-applied Privileges and Immunities challenge fails for the threshold reason that it rests on a flawed premise. Defendant argues that New York's firearm statutes discriminated against him by making him ineligible to apply for a license because he lacked a New York residence. But as shown above (at 36), several

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[16] The other two components of the right to travel, neither of which is relevant here, are: (1) the right of a citizen of one state to physically enter and leave another state; and (2) for a traveler who elects to become a permanent resident of a particular state, the right to be treated like other citizens of that state. *Saenz*, 526 U.S. at 500.

facts indicate that defendant in fact had a residence in New York that could have allowed him to apply for a firearm license in all events. Approximately one month before his arrest, he had his truck and another vehicle shipped to New York (T. 395-99, 404-05, 422-25, 672-82), along with a large quantity of shoes, clothing, luggage, electronics, and jewelry. (T. 181-85, 213, 218-19, 223-29.) In addition, he had deposited a check for more than $83,000 at a bank in Manhattan (T. 765) and was carrying a suspended New York driver's license (T. 181).

These facts prevent defendant from prevailing on his Privileges and Immunities claim on the merits. Even if the record on defendant's residency is uncertain, a criminal defendant bears the burden of developing an adequate record to demonstrate error even where, unlike here, an issue does not require preservation. *People v. Kinchen*, 60 N.Y.2d 772, 773-74 (1983). Defendant failed to carry that burden.

2. New York's firearm licensing statutes do not categorically require in-state residency.

Defendant's Privileges and Immunities claim fails in any event because it relies on a reading of Penal Law § 400.00 that would deny eligibility for a firearm license to any individual who does not live or work in New York. This Court should decline his invitation to read the statute in that way.

Penal Law § 400.00(1) sets forth the eligibility requirements for firearms licenses in New York, and it contains no requirement that an applicant reside in New York State. Defendant, however, would read a residence requirement into the statute based on a different provision, § 400.00(3), that sets forth procedures for license applications. (D. Br. 42-43, 47-48.)

One part of that provision directs that license applications be made to the licensing officer in the city or county "where the applicant resides, is principally employed or has his or her principal place of business as merchant or storekeeper." Penal Law § 400.00(3)(a). Defendant is incorrect to suggest that this *procedural* instruction makes in-state residency a *substantive* eligibility requirement. The eligibility criteria are separately set

forth in stated § 400.00(1). The statutory context thus indicates that the quoted language of § 400.00(3)(a) is a venue requirement for license applications—that is, a procedural rule about where to file an application for a license rather than a limitation on who may acquire a license.[17]

The history of the quoted language of § 400.00(3)(a) further indicates that it was not intended to limit who may apply for a firearms license. Instead, the language was apparently introduced "to prevent New York City residents from obtaining handgun permits in counties where, at the time, investigations of applicants were much less thorough than in the city." *Osterweil*, 21 N.Y.3d at 586. Hence, this Court has concluded that the residency language was added "to discourage 'forum-shopping,' rather than to exclude certain applicants from qualifying at all." *Id.*

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[17] In *Osterweil*, 21 N.Y.3d at 587, this Court held that Penal Law § 400.00(3)(a) does not require an applicant for a firearms license to be domiciled in New York. That decision should not be read to hold that residency *is* required. The narrow question before the Court in *Osterweil* was whether domicile, as opposed to residency, was required. The question of whether residency was required was not before the Court.

Even if Penal Law § 400.00(3)(a) were ambiguous as to whether a person must have a New York residence or workplace to apply for a firearms license, the rules of statutory construction require this Court to construe the provision to allow applications from non-residents. "'Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results.'" *People v. Correa*, 15 N.Y.3d 213, 232 (2010) (quoting *Matter of Jacob*, 86 N.Y.2d 651, 667 (1995) (citations omitted)). "Faced with the choice between an interpretation that is consistent with the Constitution . . . and one that creates a potential constitutional infirmity, courts are to choose the former." *Id.* at 233. Thus, to the extent that construing § 400.00(3)(a) to exclude non-residents raises a potential inconsistency with the Privileges and Immunities Clause, then the provision should be construed to allow applicants to seek firearms licenses regardless of where they reside.

Further, Penal Law § 400.00(7) sets forth requirements for a license that is "issued to a noncitizen, or to a person not a citizen of and usually a resident in the state." This language explicitly

contemplates that a handgun may be issued to such person. It rebuts petitioner's notion that in-state residency is categorically required. *Osterweil*, 21 N.Y.3d at 586-87.

3. Defendant fails to show that any residency requirement in New York's firearm licensing statute would be unconstitutional.

In any event, defendant fails to show that a residency requirement in Penal Law § 400.00 would violate the Privileges and Immunities Clause. That Clause does not bar *all* state regulations that discriminate against out-of-state residents. Instead, regulations that discriminate against out-of-state residents with respect to privileges protected by the Clause are permissible where "(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Barnard v. Thorstenn*, 489 U.S. 546, 552 (1989).

Defendant's challenge does not meet these standards. Indeed, in *Bach*, a pre-*Bruen* decision, the Second Circuit rejected a Privileges and Immunities claim that was virtually identical to the claim asserted here. *See* 408 F.3d at 95. The court ruled that New

York's exclusion of Bach, a Virginia resident, from the State's licensing scheme was constitutional because New York has a "substantial and legitimate" public-safety interest in continually obtaining relevant behavioral information about people who apply for and possess firearms licenses. *Id.* at 91. And, because people who are neither residents nor in-state workers are more difficult to monitor—at least when they are outside of New York—the allegedly discriminatory licensing provision is "sufficiently related" to the State's monitoring interest to withstand a Privileges and Immunities challenge. *Id*. at 92-94.

Similarly, in *Culp v. Raoul*, 921 F.3d 646 (7th Cir. 2019), the Seventh Circuit ruled that a regulation limiting a certain type of firearms license to residents of Illinois and four other states with "substantially similar" regulatory schemes did not violate the Privileges and Immunities Clause. "To the extent the impact of this regulation works to disadvantage nonresidents," the Court explained, "such an effect is not the type of unjustifiable discrimination prohibited by the Clause." *Id*. at 657-58.

CONCLUSION

For the reasons stated above, defendant's constitutional challenges to Penal Law § 265.03(3) should be rejected.

Dated: June 30, 2023
New York, New York

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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Andrew W. Amend, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 9,429 words, which complies with the limitations stated in § 500.13(c)(1).

_____

Andrew W. Amend