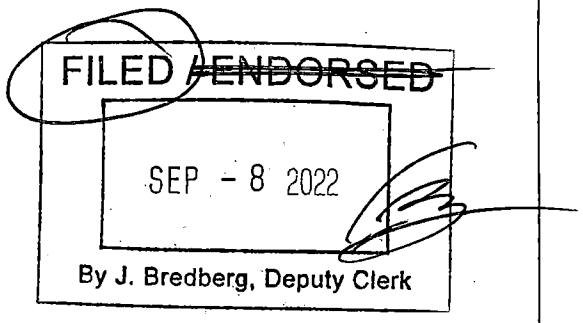

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

The People of the State of California, Plaintiff, v. **JOSIAH DAVIS,** **DEMETRIUS PERRY,** Defendants.	Case No. 21FE012297 Dept. 40 **ORDER SUSTAINING DEMURRERS**

The People charged each defendant with felony violations of Penal Code sections 25400 and 25850.[1][2] Each defendant demurs to the two charges, arguing sections 25400 and 25850 are no longer public offenses (§ 1004, subd. (4)) in light of the Supreme Court's recent decision in *New York State Rifle & Pistol Assoc., Inc. v. Bruen* (2022) 142 S.Ct. 2111 (*Bruen*). The Court agrees.

I. The Demurrers and the People's Opposition

Defendants argue (1) that *Bruen* invalidated California's "good cause" and "good moral character" requirements to obtain a public carry license (§ 26150) and (2) that "because the law that would otherwise make firearm possession in public legal is unconstitutional, a criminal defendant cannot be prosecuted for violating it." Defendants maintain they were not required to request a license in order to challenge the constitutionality of sections 25400 and 25850 and

[1] All future statutory references are to the Penal Code unless otherwise noted.

[2] Each charge contains an allegation that the defendant is not the registered owner of the firearm. (§§ 25400, subd. (c)(6), 25850, subd. (c)(6).)

cite multiple First Amendment cases for support. (*Shuttlesworth v. Birmingham* (1969) 394 U.S. 147 (*Shuttlesworth*); *Staub v. City of Baxley* (1958) 355 U.S. 313; *Aaron v. Municipal Court* (1977) 73 Cal.App.3d 596 (*Aaron*).) The People launch a multipronged attack on the defense positions.

The Court discerns six separate arguments by the People in their opposition brief:[3]

(1) Defendants do not have standing to challenge the "constitutionality of California's CCW licensing provisions." To support this position, the People cite two New York trial court opinions and two federal cases.

(2) *Bruen* only affects the "good cause" requirement. The People contend *Bruen* only invalidated one element of California's multi-requirement licensing scheme, leaving the other portions intact and enforceable. Further, the People maintain the "good cause" requirement can be severed from the constitutional portions; thereby, preserving the remainder of California's licensing scheme. To support this argument the People rely on several out-of-state cases.

(3) *Bruen* does not affect either section 25400 or section 25850. The People argue these sections are "precisely the type of acceptable regulation or statutory prohibition envisioned by *Bruen*." The People emphasize these sections "do not relate to or contain any language regarding a licensing scheme."

(4) Pre-*Bruen* caselaw has already determined sections 25400 and 25850 are constitutional. The People contend these cases are still good caselaw because they are based on *District of Columbia v. Heller* (2008) 554 U.S. 570 (*Heller*). According to the People, *Bruen* upheld and relied on *Heller*; therefore any case that also relied on *Heller* is good law.

(5) Sections 25400 and 25850 are not unconstitutional because they are not *complete* bans on public carry. The People point to multiple "exception" statutes that permit public carry under specified conditions.

(6) Defendants would not have been granted a public carry license either before or after *Bruen*.

[3] The People's opposition separates many related arguments under different headings. The Court combines these arguments as necessary to ease presentation of the People's position and the Court's discussion.

The Court finds *Bruen* wholly invalidated California's licensing scheme. The Court also finds the First Amendment cases presented by the defense applicable and concludes defendants were not required to apply for a license to challenge the constitutionality of sections 25400 and 25850.

III. California's Public Carry Laws

Section 25400 prohibits a person from carrying a firearm concealed within any vehicle or upon the person. Section 25850 prohibits from carrying a loaded firearm "in any public place or on any public street in an incorporate city or in any public place or on any public street in a prohibited area of unincorporated territory." Neither statute contains any exceptions to its rule. When considered in conjunction with section 26350 (openly carrying an unloaded firearm is prohibited), but for one narrow exception, these statutes represent a total ban on public carry of a firearm in California and subject anyone caught with a firearm in public to criminal prosecution. The exception is provided in sections 25655 and 26010: an individual may avoid prosecution for public carry by obtaining a license under section 26150 or section 26155.

Sections 26150 and 26155 outline the requirements for obtaining a concealed carry license.[4] The two statutes are essentially identical. One (§ 26150) applies when the sheriff is the licensing authority and the other (§ 26155) when the city chief of police is the licensing authority. For the remainder of this order the Court will refer to section 26150 as the relevant statute. To obtain a license an applicant must, at a minimum, meet four criteria:

(1) The applicant is of good moral character;

(2) Good cause exists for issuance of the license;

(3) The applicant is a resident of the county, or the applicant's principal place of employment is in the county and the applicant spends a substantial period of time in that place of employment;

(4) The applicant has completed a course of training as described in Section 26165.

[4] Sections 26150 and 26155 provide a narrow exception that allows open carry in counties with populations under 200,000 people. Other than this exception, open carry is prohibited in California.

Meeting the minimum requirements, however, does not guarantee the issuance of a license. Subdivision (a) of section 26150 states the "sheriff of a county *may* issue a license" upon proof of the four requirements outlined above. (Italics added.) Obtaining a license under section 26150 is the only legal means by which the majority of individuals can carry a firearm in public. [5]

IV. Bruen

Bruen holds that the "Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." (*Bruen, supra,* 142 S. Ct. at p. 2122.) The "Second Amendment's plain text [] presumptively guarantees" the right to " 'bear' arms in public for self-defense." (*Id.* at p. 2635.) The decision allows for objective regulations only if they are "consistent with the Nation's historical tradition of firearm regulation." (*Id.*)

Bruen addressed New York's concealed carry licensing law, which required an applicant to convince a licensing officer that he is "of good moral character" and that "proper cause" exists to issue the license. The two petitioners in *Bruen* each sought a license to carry a concealed weapon and each was denied. The petitioners sued for declaratory and injunctive relief, alleging New York's statute violated the Second Amendment by denying their license applications on the basis that they had failed to show "proper cause." (*Bruen, supra,* at pp. 2122-2126.) The Supreme Court agreed.

The Supreme Court held that to justify a regulation of the Second Amendment the state must demonstrate that the regulation "is consistent with this Nation's historical tradition." Only then, will the individual's conduct fall "outside the Second Amendment's 'unqualified command.' [Citation.]" (*Bruen, supra,* at p. 2126.) The Court then conducted a painstaking review of historical firearm regulations. At the end of their journey, the Court concluded New York did not meet "their burden to identify an American tradition justifying the State's

[5] Obtaining a license under section 26150 is not the *only* exemption from prosecution for carrying a concealed firearm. Other exemptions, however, depend on a person's place of employment, or the activity they are engaged in. For the vast majority of individuals, compliance with section 26150 is their only legal path to public carry. (See § 25620 [members of the Armed Forces permitted to public carry when on duty] § 25645 [transportation of unloaded firearms permitted for a person operating a licensed common carrier]; § 25640 [licensed hunters and fishermen permitted to carry concealed weapon while engaged in hunting or fishing]; § 25630 [exemption for any guard or messenger of any common carrier, bank, or other financial institution].)

proper-cause requirement." (*Id.* at p. 2156.) The Court stated, "we know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need." (*Id.*) Though it struck down New York's licensing statute, the Court made it clear that regulations consistent with historical precedent are permitted.

The Court approved of "shall issue" licensing regulations where the "government issues licenses to carry based on objective criteria." (*Bruen, supra,* 142 S.Ct. at p. 2122.) The Court specifically endorsed "shall issue" regimes that "require applicants to undergo a background check or pass a firearms safety course, are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.' [Citation]." (*Id.* at p. 2138, fn. 9.) These statutes pass muster because they "contain only 'narrow, objective, and definite standards' guiding licensing officials, *Shuttlesworth v. Birmingham,* 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969), rather than requiring the 'appraisal of facts, the exercise of judgment, and the formation of an opinion,' [Citation]. " (*Ibid.*)

In his concurring opinion, Justice Kavanaugh reiterated that states "may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements" because those are objective requirements. (*Id.* at p. 2162 (conc. opn. of Kavanaugh, J.) Justice Kavanaugh also stated, "the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements *like those used by the 43 shall-issue States*." (*Id.,* italics added).)

V. Shuttlesworth

The Second Amendment is not the only constitutional right that is often subject to restriction and licensing requirements. For instance, "the freedom of speech in the First Amendment, to which *Heller* repeatedly compared the right to keep and bear arms," is routinely regulated by both state and federal governments. (*Bruen, supra,* 142 S.Ct. at p. 2122.) When those regulations are unconstitutional, the Supreme Court has held the defendant cannot be punished for engaging in the protected activity.

In *Shuttlesworth*, the petitioner was convicted of violating a city ordinance that prohibited participation in a "parade or procession or any other public demonstration" without first obtaining a permit. The defendant was sentenced to 90 days imprisonment at hard labor and fined. The Supreme Court reviewed the ordinance and determined it was unconstitutional.

Shuttlesworth held the ordinance was an unlawful prior restraint on the First Amendment because it "conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways." (*Shuttlesworth, supra,* 394 U.S. at p. 150.) Critically, the Court then stated:

> *And our decisions have made clear that a person faced with such 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.*

(*Id.* at p. 151 (Italics added).) At least one California appellate court has also held that individuals faced with an unconstitutional license requirement may exercise their right without fear of prosecution.

In *Aaron v. Municipal Court* (1977) 73 Cal.App.3d 596, the petitioners sought a writ of prohibition to prevent their prosecution for violation of a municipal ordinance that outlawed soliciting without a license. The petitioners argued the ordinance violated their First Amendment rights. Application for the writ was necessary because the trial court had overruled the petitioners' demurrers. The appellate court agreed, and reversed the judgment of the trial court and "remanded with directions to issue a peremptory writ of prohibition commanding the respondent municipal court to refrain from further proceedings in the actions specified in the petition, pending against petitioners, *other than to dismiss the same*." (*Id.* at p. 610, italics added.) Relying on *Shuttlesworth*, the court found "[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 he law purports to require a license, and he is not precluded from attacking its constitutionality because he has not applied for a permit." (*Id.* at p. 599, fn. 2.)

VI. Discussion

a. Bruen's Effect on California Law

Bruen invalidated California's licensing statute. *Bruen* identified California as one of the six states employing the equivalent of New York's "proper cause" requirement. (*Bruen, supra,* 142 S.Ct. at p. 2124.) As the People recognize in their opposition, California's Attorney General acknowledged that *Bruen* "renders California's 'good cause' standard to secure a permit to carry a concealed weapon in most public places unconstitutional." [6] But, *Bruen* does more than invalidate just one element of section 26150 – it invalidates the entire statute because California is a "may issue" state.

Bruen not only disapproved of New York's "proper cause" requirement; it held New York's "licensing *regime* violates the Constitution." (*Bruen, supra,* 142 S.Ct. at p. 2122, italics added.) The Court noted that "[i]n 43 States, the government issues licenses to carry based on objective criteria." (*Bruen, supra,* 142 at p. 2122.) In these "shall issue" states, "authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability." (*Id.* at pp. 2123-2124.) In Footnote 9, the Court explained that "shall issue" licensing regimes were permitted because they "appear to contain only 'narrow, objective, and definite standards' guiding licensing officials, [citation to *Shuttlesworth*], rather than requiring 'appraisal of facts, the exercise of judgment, and the formation of an opinion … .'" Justice Kavanaugh dedicated nearly his entire concurring opinion to explaining the constitutional problem with "may issue" regimes:

> The Court's decision addresses only the unusual discretionary licensing regimes, known as "may-issue" regimes, that are employed by 6 States including New York. As the Court explains, New York's outlier may-issue regime is constitutionally problematic because it grants open-ended discretion to licensing officials and authorizes licenses only for those applicants who can show some special need apart from self-defense. Those features of New York's regime—*the unchanneled discretion for licensing officials* and the special-need requirement—in effect deny the right to carry handguns for self-defense to many "ordinary,

[6] The Legal Alert can be found at https://oag.ca.gov/system/files/media/legal-alert-oag-2022-02.pdf

> law-abiding citizens." (Italics added.)
>
> ¶
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> By contrast, 43 States employ objective shall-issue licensing regimes. Those shall-issue regimes may require a license applicant to undergo fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force, among other possible requirements. Brief for Arizona et al. as Amici Curiae 7. Unlike New York's may-issue regime, those shall-issue regimes *do not grant open-ended discretion to licensing officials* and do not require a showing of some special need apart from self-defense. *As petitioners acknowledge, shall-issue licensing regimes are constitutionally permissible*, subject of course to an as-applied challenge if a shall-issue licensing regime does not operate in that manner in practice. Tr. of Oral Arg. 50–51. (Italics added.)
>
> Going forward, therefore, the 43 States that employ objective shall-issue licensing regimes for carrying handguns for self-defense may continue to do so. Likewise, the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense *so long as those States employ objective licensing requirements like those used by the 43 shall-issue States*. (Italics added.)

(*Bruen, supra,* 142 S.Ct. at p. 2161-2163 (conc. opn. of Kavanaugh, J.).) Both the majority opinion and Justice Kavanaugh's concurrence make it clear that the Supreme Court does not want "may issue" states to simply eliminate "proper cause" or "good cause" from their licensing statute. *Bruen* commands "may issue" states to become "shall issue" states. Licensing requirements must be based objective criteria and not left to the "the exercise of judgment, and the formation of an opinion" by the licensing authority. (*Id.* at p. 2138, fn. 9.)

If the Court accepted the People's argument to sever or excise the "good cause," requirement, section 26150 would still be unconstitutional. By its express terms, section 26150 would still read "the sheriff of a county *may* issue a license" if the minimum criteria are met (i.e. residency requirement (§ 26150, subd. (a)(3), safety course requirement (§ 26165), background check (§ 26185)). Because the statute does not *require* the sheriff to issue the license upon the satisfaction of objective criteria, issuance of a license would improperly depend on the licensing authority's unbridled discretion. Even before *Bruen*, similar "may issue" statutes have been regularly declared unconstitutional .

In *Dillon v. Municipal Court* (1971) 4 Cal.3d 860, the petitioners were charged

with violating a local ordinance that required a permit to participate in a parade. The petitioners filed demurrers, but they were overruled by the trial court. The petitioners then sought a writ of prohibition to enjoin further proceedings. The court was tasked with deciding whether the ordinance was unconstitutional on its face. (*Id.* at p. 866.)

The ordinance required a permit application to be filed "with some [unspecified] city department and thereafter submitted [] 'to the Police Department and the Fire Department for their approval.' " (*Id.* at p. 870.) The court determined "the glaring and fatal defect in the section [] is that it contains no standards whatsoever – let alone standards designed to be 'narrow, objective and definite' – to guide and govern city officials in their decisions to grant or deny permits." (*Id.* at p. 870.) Importantly, the court also found the ordinance was "not only devoid of all standards but, to make matters worse, contains no guarantee that a permit will issue even if the application meets all of the five conditions of the section. [] Assuming the conditions are met, the section states only that parades and demonstrations 'may be permitted.'" (*Id.*, italics in original.) The lack of clearly defined criteria and a requirement that the licensing official issue the license upon satisfaction of the criteria meant the licensing officials had an unconstitutional degree of discretion over the exercise of an individual's First Amendment rights.

In *Long Beach Lesbian &* Gay Pride, *Inc. v. City of Long Beach* (1993) 14 Cal.App.4th 312 (*Long Beach*), the plaintiffs challenged the constitutionality of a parade permit ordinance. The ordinance stated "[t]he city manager or his designee *may* issue a permit under this chapter if it is determined that the following criteria have been met: … ." (*Id.* at p. 325, italics in original.) The appellate court found that "notwithstanding its internal guidelines, [the ordinance] ultimately reposes in the city manager open-ended discretion whether or not to issue permits. It therefore was correctly held unconstitutional." (*Id.* at p. 326.) At least some members of the Legislature appear to recognize *Bruen*'s dictate.

Senate Bill 918 (2021-2022 Reg. Sess.) was the initial attempt to address *Bruen* in the Legislature. Rather than simply excising the "good cause" requirement, the bill would have amended section 26150, subdivision (a) to read, "When a person applies for a new license or license renewal to carry a pistol, revolver, or other firearm capable of being concealed upon

the person, *the sheriff of a county shall issue* or renew a license to that person upon proof of all of the following." (Italics added.) Senate Bill 918 would have made California a "shall issue" state, and fulfilled Justice Kavanaugh's observation that "the 6 states," including California, may continue to require concealed carry licenses "so long as those States employ objective licensing requirements like those used by the 43 shall-issue states." (*Bruen*, supra, 142 S.Ct. at p. 2162 (Conc. Opn. Kavanaugh, J.).) The bill was not ultimately passed by the Legislature, but it is an indication that some lawmakers understand *Bruen*'s effect on "may issue" licensing statutes.

Section 26150 states the sheriff "may" issue the license even if the applicant satisfies all the objective criteria, including the fingerprint requirement, residency requirement and safety course requirement. (*In re Richard E.* (1978) 21 Cal.3d 349, 354 ["The ordinary import of 'may' is a grant of discretion"].) The statute's failure to *require* the sheriff to issue the license upon the satisfaction of objective criteria means section 26150 "is a barefaced example of uncontrolled discretion" and is indistinguishable from the ordinances in *Shuttlesworth*, *Dillon,* and *Long Beach*. (*Dillon, supra,* 4 Cal.3d at p. 870.) Licensing procedures that subject applicants to interviews and committee decisions even after all objective criteria are satisfied improperly rely on the " 'appraisal of facts, the exercise of judgment, and the formation of an opinion' " of the licensing authority. (*Bruen, supra,* 142 S.Ct. at p. 2138, fn. 9.)

The invalidation of section 26150 has a substantial effect on sections 25400 and 25850. *Bruen* resolutely declared public carry "presumptively legal." This means states must provide a legal, constitutional, path to public carry. As mentioned above, sections 25400 and 25850, in and of themselves, represent a total ban on public carry. The People concede this fact in their opposition. (Peop. Opp. p. 5 ["Generally, however, the law forbids ordinary individuals from carrying firearms in the public spaces of cities or towns"].) Without an exception that makes public carry accessible to "ordinary citizens" and allows them to meaningfully exercise their right to self-defense, these sections are unconstitutional after *Bruen*. The validity of sections 25400 and 25850 depends on the validity of section 26150. With the only legal means to public carry declared unconstitutional, sections 25400 and 25850 stand-alone. On their own, the two sections violate *Bruen*.

b. Applicability of Shuttlesworth

Shuttlesworth and *Aaron* provide a powerful argument for finding defendant did not need to attempt to comply with an unconstitutional licensing requirement. *Shuttlesworth's* statement that individuals faced with an unconstitutional licensing scheme may "engage with impunity" in the exercise of the protected right was supported by six prior Supreme Court decisions. (*Lovell v. City of Griffin, Ga.* (1938) 303 U.S. 444, 448 ["appellant did not apply for a permit"]; *Schneider v. State of New Jersey, Town of Irvington* (1939) 308 U.S. 147, 159 [petitioner "did not apply for , or obtain, a permit pursuant to the ordinance"]; *Largent v. State of Tex.* (1943) 318 U.S. 418, 419 ["A complaint [] charged [] the appellant with violating this ordinance by unlawfully offering books for sale without making application for a permit"]; *Jones v. City of Opelika* (1942) 316 U.S. 584, 602 ["Nor is any palliative afforded by the assertion that the defendant's failure to apply for a license deprives him of standing to challenge the ordinance" ¶ "It is of no significant that the defendant did not apply for a license"]; *Staub v. City of Baxley* (1958) 355 U.S. 313, 319 ["The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitutional does not preclude review in this Court of a judgment of conviction under such an ordinance"]; *Freedman v. State of Md.* (1965) 380 U.S. 51, 56 ["it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office, whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license"].). The People contend this First Amendment caselaw does not apply to the Second Amendment.

The People cite *People v. Fogelson* (1978) 21 Cal.3d 158 and *Dombrowski v. Pfister* (1965) 380 U.S. 479, for the proposition that allowing an individual to ignore an unconstitutional license requirement is limited to First Amendment cases. Review of those cases reveals they do not support the People's position. Both cases acknowledge relaxed rules regarding standing in First Amendment cases, but neither case holds a facially unconstitutional limitation on the Second Amendment cannot be similarly ignored.

There is no obvious reason to conclude the reasoning of the First Amendment cases cited above do not apply here. Those cases addressed the same issue raised in *Bruen*, whether and

to what extent a state can require a license before an individual may exercise a constitutional right. As noted in *Bruen*, *Heller* repeatedly compared the Second Amendment to the First Amendment and *Bruen* itself concluded "[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.' [Citation.]" (Bruen, supra, 142 S. Ct. at p. 2156, italics added.)

> We know of no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense.

(*Id.*) The most likely reason the above cases have not been applied to the Second Amendment is simply because "the question did not present itself." (*Heller, supra,* 554 U.S. at p. 626.) Before *Heller*, the "predominant – nearly sole – question for Second Amendment law and scholarship was whether the right to keep and bear arms extends beyond the organized militia. ¶ In the decade since *Heller,* Second Amendment law, scholarship, and advocacy have moved on to new battlefields." (Ruben & Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to keep and Bear Arms After Heller* (2018) 67 Duke L.J. 1433.)

The Supreme Court could not be more clear – the Second Amendment enjoys the same level of protection as every other constitutional right. If an individual can ignore an unconstitutional licensing scheme and engage in their First Amendment right with impunity, then there is no obvious reason they cannot do the same with respect to the Second Amendment.

c. The People's Arguments

i. Standing

The People contend neither defendant can challenge California's public carry licensing statute because they never applied for a license. The People cite multiple cases holding "to establish standing to challenge an allegedly unconstitutional policy, as a general matter a plaintiff

must submit to the challenged policy." (*Ellison v. Conor* (5th Cir. 1998) 153 F.3d 247, 254-255 (*Ellison*); *United States v. Decastro* (2nd Cir. 2012) 682 F.3d 160, 164 (*Decastro*).) The People also cite two New York trial court cases, *People v. Rodriguez* (N.Y. Sup. Ct. 2022) 171 N.Y.S.3d 802 (*Rodriguez*) and *People v. Williams* (N.Y. Sup. Ct. 2022 – N.Y.S. 3d –, 2022 WL 3440484 (*Williams*)) for support. The Court finds *Ellison* and *Decastro* inapplicable and disagrees with *Rodriguez* and *Williams*.

In *Ellison*, the appellants appealed two adverse district court decisions involving the U.S. Corps of Engineers' refusal to issue permits allowing them to build camp-homes on a particular property. In *Decastro*, the appellant was convicted of transporting a firearm into New York that he purchased in Florida. The appellant argued, "New York City's restrictive licensing requirements were tantamount to a ban [on firearms]".) The court found that "the premise of Decastro's argument is that New York's licensing scheme is itself constitutionally defective; his argument is therefore tantamount to a challenge to that scheme." (*Decastro, supra,* 682 F.3d at p. 164.) The *Decastro* court determined the appellant "must submit to the challenged policy" in order to challenge the licensing scheme." (*Id.*)

Ellison and *Decastro* are easily distinguishable because the appellants in those cases challenged the licensing statute directly. Here, defendants are not challenging constitutionality of the licensing scheme – that work has already been done. The demurrers are directed at the criminal statutes whose constitutionality relied on a valid licensing scheme. Demurrers are the proper procedural vehicle for arguing a statute is unconstitutional. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1091 fn. 10 ["We assume, and respondents do not contend otherwise, that if a statute under which a defendant is charged with a crime is invalid, the complaint is subject to demurrer under subdivisions 1, 4 and 5 of Penal Code section 1004 on the ground that the court lacks jurisdiction because the statute is invalid, the facts stated do not constitute a public offense, and the complaint contains matter which constitutes a legal bar to the prosecution"].)

In *Rodriguez*, the New York trial court found "having failed to seek a license, [the defendant] lacks standing to bring any challenge to the licensing regime [citation to *Decastro*]" and that "on that basis alone" the defendant's challenge must fail. (*Rodriguez, supra,* 171 N.Y.S.

3d at p. 804-805.) The court then recognized that "defendant does not ultimately seek to challenge New York's (former) licensing regime. That regime has already been challenged and found wanting. Instead, defendant's quarrel lies not with the licensing scheme, but with the statutes criminalizing unlicensed possession." (*Id.*)

The Court finds *Rodriguez*'s analysis of the need to apply for a license before challenging criminal charges wanting. *Rodriguez* rests its conclusion on a single case (*Decastro*) that involved a direct challenge to a licensing scheme rather than a challenge to the criminal statute itself. The court did not examine the potential applicability of *Shuttlesworth* and did not examine *Bruen*'s effect on "may issue" statutes beyond invalidation of the "proper cause" requirement. This Court will not follow *Rodriguez*'s poorly supported finding. Likewise, this Court will not follow *Williams*.

In *Williams*, the defendant argued *Bruen* invalidated both the New York licensing scheme and the "Penal Law sections criminalizing possession of a firearm without a license." Like defendants here, the defendant in *Williams* relied on *Shuttlesworth* and other First Amendment cases. Before addressing *Shuttlesworth,* the court held that because "only that part of the New York licensing statute that requires a finding of 'proper cause' was struck down, and a constitutionally permissible licensing provision remains, the Penal Law sections criminalizing the possession of firearms without a license remains constitutional." The court then held the First Amendment cases are distinguishable because they "involved ordinances that were unconstitutional on their face," and concluded, "[i]t was in this context that the *Shuttlesworth* Court stated that 'a person faced with such 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' [citation.] Defendant's reliance on this statement, out of context, is misplaced."

Again, this Court finds *Williams* analysis wanting. The New York trial court declares *Shuttlesworth* is distinguishable, but does not adequately explain why. In *Shuttlesworth,* the permit application included numerous objective requirements. Applicants were required to state the probable number of persons expected to participate in the parade, name the streets the parade would use and the purpose of the parade. However, even if an applicant provided this

information, issuance of the license depended on the "judgment" of the licensing authority. (*Shuttlesworth, supra,* 394 U.S. at p. 149.) Despite the presence of objective criteria, the Supreme Court declared this ordinance unconstitutional on its face. The Court fails to see why a "may issue" licensing statute that includes some objective criteria, but ultimately rests on the judgment of the licensing authority is facially different than the ordinance in *Shuttlesworth. Williams* does not attempt to explain this difference. Likewise, *Williams* does not address *Dillon's* point that a "may issue" license statute does not require the licensing authority to issue a license even if the objective criteria are satisfied. Further, *Williams* found *Bruen* only invalidated the "proper cause" requirement, not the entire licensing statute. For the reasons stated above, this Court disagrees with that conclusion.

The Court finds defendants have standing to challenge the constitutionality of the statues they are charged with violating and that a demurrer is the proper means of doing so.

ii. Argument 1

The People's first argument is that *Bruen* does not affect the other elements of the licensing scheme and that the "good cause" requirement is severable. As explained above, *Bruen* did much more than invalidate the "good cause" requirement. It struck down "may issue" licensing schemes entirely. The improper "may issue" language is at the very heart of section 26150 and is not " 'grammatically, functionally, and volitionally separable'" from the remainder of the statute. (*Cal. Redevelopment Ass 'n v. Matosantos* (2011) 53 Cal.4th 231, 271.) The Legislature's failure to pass Senate Bill 918 also makes it impossible to guess what the Legislature would have wanted if a portion of section 26150 were declared unconstitutional. As of today, it appears the Legislature prefers to forego a license requirement.

The Court also questions whether severance, even if it were grammatically possible and the Legislature's preference clear, is a viable path to preserve the criminal charges. If the Court accepted the People's argument, then the Court would remove the unconstitutional portions from section 26150, then retroactively apply its remaining requirements to defendants. Doing this would subject defendants to prosecution for violating a licensing statute that did not actually exist when the offense occurred.

The Court acknowledges other courts have found *Bruen* did not affect the criminal statutes connected with the licensing statute. The Court disagrees with those cases. In *Rodriguez*, the court held that *Bruen* "sought to vindicate the rights of 'law-abiding, responsible citizens' who wish to obtain a license in compliance with a fairly administered law based on 'narrow, objective and definite' criteria … ." (*Rodriguez, supra,* at p. 805.) *Rodriguez* misinterprets *Bruen*. The Supreme Court did not intend to vindicate only the rights of people "who wish to obtain a license." It declared that public carry is *presumptively legal* for ordinary citizens. *Bruen* allows, but does not require, states to impose a licensing scheme, so *Rodriguez*'s finding that *Bruen* only protects those who "wish to obtain a license" is unfounded. Further, *Rodriguez*'s failure to distinguish *Shuttlesworth* makes its conclusion that the defendant was required to seek a license unavailing.

iii. Argument 2

The People's second argument is that *Bruen* does not affect sections 25400 and 25850. This argument reflects a misunderstanding of *Bruen* and the interdependence of the criminal statutes and the licensing statute. The People's contention that sections 25400 and 25850 are "precisely the type of acceptable regulation or statutory prohibition envisioned by *Bruen*" is an incredible assertion in light of their total ban on public carry. As explained above, sections 25400 and 25850 are only valid if there is a constitutional exception to their prohibition of carrying a firearm in public.

iv. Argument 3

The People's third argument is that pre-*Bruen* caselaw holding sections 25400 and 25850 constitutional are still binding because they are based on *Heller*. (*People v. Yarbrough* (2008) 169 Cal.App.4th 303 (*Yarbrough*); *People v. Flores* (2008) 169 Cal.App.4th 568 (*Flores*).) According to the People, "if *Bruen* did not undermine *Heller*, then *Heller* is still good law. If *Heller* is still good law, then reliance upon *Heller* by the courts in *Flores* and *Yarbrough* is sound. If *Flores* and *Yarbrough* are sound, Penal Code sections 25400 and 25850 are constitutional and Defendant's demurrer should be overruled." (Peop. Opp. at p. 17.) The People's position fails upon reading *Heller*, *Yarbrough*, and *Flores*.

In *Heller*, the Supreme Court addressed a District of Columbia law that

"generally prohibit[ed] the possession of handguns," even inside the home. (*Heller, supra,* 554 U.S. at p. 574.) A D.C. police officer applied for a "registration certificate" for a handgun he wished to keep at home. D.C. officials refused to issue certificate. The Court held "the District's ban on handgun possession in the home violates the Second Amendment … ." (*Id.* at p. 635.) In dicta, the Court explained that "the right secured by the Second Amendment is not unlimited" and that "[f]or example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." (*Heller, supra,* 554 U.S. at p. 626.)

Heller was not wrong, and *Bruen* does not contradict *Heller*'s conclusion. Some states did ban concealed carry, and those states could still do so today. However, because there must be a pathway to public carry, a state that bans concealed carry must allow open carry. (*Bruen, supra,* 142 S.Ct. at p. 2146 ["In fact, however, the history reveals a consensus that States could *not* ban public carry altogether. Respondents' cited opinions agreed that concealed-carry prohibitions were constitutional only if they did not similarly prohibit *open* carry"].)

In *Yarbrough*, the defendant was convicted of carrying a concealed and loaded firearm (fmr. §§ 12025 (now § 25400), 12031 (now § 25850)). The defendant argued these convictions violated the Second Amendment. Relying on *Heller*, the court held the two statutes do "not broadly prohibit or even regulate the possession of a gun in the home for lawful purposes of confrontation or self-defense, as did the law declared constitutionally infirmed in *Heller.*" (*Id.* at p. 313.) The court also found that "carrying a firearm concealed on the person or in a vehicle in violation of section 12025, subdivision (a), is not in the nature of a common use of a gun for lawful purposes which the court declared to be protected by the Second Amendment in *Heller.*" (*Id.* at p. 313-314.) The court's finding that sections 25400 and 25850 do not apply to possession of a gun in the home is an attempt to distinguish *Heller*, not use it as a basis to uphold the statutes. Further, *Yarbrough*'s determination that concealed carry is "not in the nature or common use of a gun," a statement unsupported by *Heller*, is clearly at odds with *Bruen.* Finally, *Yarbrough* did not review sections 25400 and 25850 in light of an unconstitutional licensing scheme, which renders its analysis of little value.

In *Flores*, the defendant was convicted of being a felon in possession of a firearm, carrying a concealed firearm and carrying a loaded firearm in a public place. The defendant argued the convictions violated his Second Amendment rights under *Heller*. The court found that "[g]iven [*Heller's*] implicit approval of concealed firearm prohibitions, we cannot read *Heller* to have altered the courts' longstanding understanding that such prohibitions are constitutional." (*Flores, supra,* 169 Cal.App.4th at p. 575.) *Flores* was correct that *Heller* stated there is historical precedent for concealed carry bans, but *Heller* did not endorse total bans on public carry. Further, like *Yarbrough*, *Flores* was decided in the context of a presumably valid licensing scheme.

In *Heller*, the Court addressed D.C.'s near total ban on gun ownership, specifically in the home. The issue of public carry, whether concealed or open, was not squarely before the Court as it was in *Bruen*. This Court has little doubt that *Bruen* would agree with *Heller*'s conclusion that states may ban concealed carry altogether. But, *Bruen* would undoubtedly add the caveat that if concealed carry is banned, then open carry must be legal. Because *Flores* and *Yarbrough* did not evaluate the constitutionality of sections 25400 and 25850 under *Bruen*, they are not controlling.

v. Argument 4

The People's fourth argument is that sections 25400 and 25850 are valid because they do not altogether prohibit the public carry of firearms. The People detail various exceptions to the two statutes. Included among the exceptions cited by the People are the right to transport a firearm in a locked box, transportation to or from a swap meet, transportation to and from a camping activity, and possession in an unincorporated area. According to the People, these exceptions mean sections 25400 and 25850 do not "rise to the level of a complete ban as contemplated by the *Bruen* court or its similar precedent." (Peop. Opp. at p. 14.)

The People acknowledge California's "law forbids ordinary individuals from carrying firearms in the public spaces of cities or towns." Nothing in *Bruen* suggests a general prohibition can be saved if the law allows someone to transport a firearm to and from a swap meet. Accepting the People's argument "would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense ..." (*Bruen, supra,* 142 S.Ct.

at p. 2134.) The Court also finds this argument reverses *Bruen*'s holding. *Bruen* calls for a general right to public carry. The right may be regulated, but the constitutional default is that people may publicly carry a firearm for self-defense. The People's position would create a general ban with only a few highly circumscribed exceptions that have little relevance to self-defense.

vi. Argument 5

The People's fifth argument is that other courts have rejected similar attempts to invalidate criminal statutes based on *Bruen*. One of those cases, *Rodriguez*, was discussed above. Another case the People rely on is *Fooks v. Maryland* (M.D. 2022) 278 A.3d 208 (*Fooks*).

In *Fooks,* the defendant was convicted of 13 counts of illegal possession of a firearm. The "criminal information alleged that a 2016 conviction of constructive criminal contempt disqualified Mr. Fooks from possessing firearms." (*Fooks, supra,* at p. 212.) Under Maryland law, "a person may not possess a regulated firearm if the person … has been convicted of a violation classified as a common law crime and received a term of imprisonment of more than 2 years." (*Id.*) The defendant challenged the convictions, arguing the only reason he "has been disqualified from possessing a firearm is a prior constructive criminal contempt conviction." (*Id.*) Based on *Bruen*'s endorsement of laws prohibiting firearm possession by "felons and the mentally," the appellate court found the criminal statutes were constitutional. (*Id.* at p. 220.)

Another case cited by the People is *United States v. Daniels* (S.D. Miss. 2022) – F.Supp.3d – (2022 WL 2654232, 2022 U.S.Dist.LEXIS 120556 (*Daniels*).) In *Daniels*, the defendant was under indictment for knowingly possessing a firearm while an unlawful user of a controlled substance. After *Bruen* was decided, the defendant filed a motion to dismiss the indictment. The district court found prohibiting "drug users and addicts" from possessing a firearm comported with *Heller* and *Bruen*. (*Daniels, supra.*)

Fooks and *Daniels* are distinguishable from the present case. In *Fooks*, the defendant was a prohibited person under Maryland law. The issue was whether the law making the defendant a prohibited person violated *Bruen.* Based on *Bruen*'s endorsement of regulations prohibiting convicted felons from possessing firearms, the court determined the defendant could still be convicted of possessing a firearm. The People do not allege either defendant in the present case

is prohibited from carrying a firearm (e.g. § 29800); therefore, the People's reliance on *Fooks* is misplaced. Likewise, the defendant in *Daniels* was charged with possession of a firearm by an unlawful user of a controlled substance. The district court was able to identify a historical basis for this limited prohibition, distinguishing it from the general prohibitions defendants face here.

vii. Argument 6

The People maintain the charges should not be dismissed because neither defendant would have been granted a public carry permit either before or after *Bruen*. The People neglect to explain why either defendant would not have been granted a public carry permit. The People do not allege defendants have disqualifying prior arrests or convictions or that they could not have passed a fingerprint check and attended a safety course. The Court finds this speculative argument unpersuasive.

V. Conclusion

Bruen invalidated the only legal means by which the vast majority of Californians could exercise their right to public carry. Without a constitutional avenue to public carry, sections 25400 and 25850 become unconstitutional due to their total ban on public carry. Further, *Shuttlesworth* and other First Amendment cases have repeatedly held that an individual faced with an unconstitutional licensing scheme may engage in the protected behavior *with impunity*. States continue to retain the right to ban a particular form of public carry (i.e. either open or concealed) and may regulate the remaining form. But, those regulations most be rooted in our nation's historical regulation of firearms and not grant the licensing authority unlimited authority. The statutes challenged here are not limited regulations along the lines of those addressed in *Fooks* and *Daniels*. Sections 25400 and 25850 completely prohibit a person from exercising their Second Amendment right; therefore, they violate *Bruen*.

VI. Disposition

Both demurrers are SUSTAINED. The Court will permit the People to attempt to remedy the complaint by filing an amended complaint within ten calendar days of the issuance of this order. (§ 1007.) If an amended complaint is not timely filed, then the case will be dismissed. (§ 1008.)

DATED: 9/2022

HON. STEVE WHITE
JUDGE OF THE SUPERIOR COURT