1 North San Antonio Road
Los Altos, California 94022-3087

# M E M O R A N D U M

**DATE:** **4/11/23**

**TO:** **Councilmembers**

**FROM:** **City Manager's Office**

**SUBJECT: COUNCIL Q&A FOR APRIL 11, 2023, CITY COUNCIL REGULAR MEETING**

**Item 1. Minutes**
**Question**: See pdf attachment sent with corrections
**Answer**: Noted

**Question:** Item 7, page 2 of minutes (pg. 6 of PDF), should say that the Item was removed by staff **and continued to the April 11, 2023 meeting**.
**Answer**: Noted

**Question:** Item 14, page 3 of minutes (pg. 7 of PDF), the term "**ex parte communication**" should be included in the description of "substantive communication or meeting" because that's what this is officially called.
**Answer**: Noted

**Question:** Item 15, page 4 (pg. 8 of PDF), speakers' names that are misspelled include Cindy **Sidaris**, Jacob **Sterling** Silver, Roberta **Phillips**. Also, it should be Captain **Krauss** throughout.
**Answer**: Noted.

**Question:** Item 17, page 5 (pg. 10 of PDF), corrections are underlined and bolded, "A motion by Mayor Meadows, seconded by **Councilmember** Lee Eng, to have the same rules for remote meeting participation that apply **to** Council **also** apply to Commissions with an assessment in 6 months, have staff recommend possible restrictions around application, and that the City will not **bear** any costs to enable remote participation.
**Answer**: Noted.

**Question:** Item 18 title, page 5 (pg. 10 of PDF), "Discuss and Provide Direction regarding the SB43**/SB 363** Letter of Support regarding Mental Health Reforms."
**Answer**: The item language must match the agenda item language. The Mention of SB 43/SB 363 was added to the motion.

**Question:** Council/Staff Reports, page 6, (pg. 11 of PDF), the last item should be "Mayor **Meadows** asked for a Council Travel Policy, …"
**Answer**: Noted.

**Item5. Prohibition on possession of firearms in sensitive places:**
**Question:** Please add to the packet and distribute to the Council a copy of "Public Safety and Individual Rights in the Age of Firearms," a copy of which is attached. This is a white paper distributed at one of the seminars at the CalCities convention last summer.
**Answer**: Attached

**Question** The text of section 7.30.020 of the proposed ordinance should refer to 7.30.030. (The draft refers to itself – 7.30.020.)
**Answer**: Noted

**Item 6. Outdoor Dining Program**
**Question:** Why are we reducing the distance from the center line from 15 feet to 13 feet on Main Street? What is the justification for this?
**Answer**: The City emailed the Fire Marshal after the initial Council study session and discussed additional changes to the centerline and if they would comply with Fire requirements. The Fire Marshal confirmed the reduced center line requirements would not impair public safety response and access was sufficient.

City staff believes the proposed requirement change will allow sufficient space for vehicular traffic, maintain the safety of the parklet space, and allow restaurants to have a little more space within their parklet. Restaurant owners on Main Street expressed concerns regarding the drastic contraction of their parklets so City staff adjusted to meet them halfway while still gaining four feet in the vehicular right of way.

**Question:** Has the fire department approved this proposal?
**Answer**: The Fire Department has provided direction on this proposal including the distance from centerline and propane heater requirements.

**Question:** How did you come up to the $3.00 per square feet fee? Where is the budget analysis that would justify this?
**Answer**: Per the staff report, "City staff has explored fee structures and options for parklet programs. Options include charging a fee on square footage or per parking stall. Staff recommend

establishing a square footage fee because there is no standard parking stall fee and some parklets will utilize angular parking stalls versus parallel parking stalls, which could create inequity in the fee structure. Neighboring cities that charge or plan to charge a square footage fee include Palo Alto, Mountain View, and Redwood City.

The average ground floor retail lease rate in Los Altos is roughly $46 per square foot. This rate is for built-out indoor spaces that fluctuate depending upon market conditions, quality of spaces, and individual agreements for tenant improvements.

Comparatively, here is the average cost for retail space for those cities which charge a square footage fee for their parklet program:

- Palo Alto – $61 per square foot
- Mountain View – $37 per square foot
- Redwood City – $44 per square foot

As Los Altos' average square footage cost for retail is similar to Mountain View and Redwood City, staff proposes to compare the Los Altos square footage cost with those two agencies, which is approximately $10 per square foot. Mountain View has not finalized this rate but is currently conducting outreach on this rate within their community.

Staff believes this rate is high as it would be 20% of the average indoor lease rate for these unfinished parking stalls that will still require significant investment to initially build and maintain parklets.

Staff therefore further recommends discounting from that rate to $3 per square foot to incentivize businesses to utilize funds that would otherwise have been applied to the fee to maintain and beautify their parklets."

**Question:** What is the justification for recommending a fee that is lower than Mountain View or Palo Alto?
**Answer**: As mentioned in the staff report, "staff believes this rate is high as it would be 20% of the average indoor lease rate for these unfinished parking stalls that will still require significant investment to initially build and maintain parklets.

Staff therefore further recommends discounting from that rate to $3 per square foot to incentivize businesses to utilize funds that would otherwise have been applied to the fee to maintain and beautify their parklets."

**Question:** Why did you increase the amount of allowable parking spaces to the restaurant parklets?

**Answer**: After hearing concerns from restaurants regarding the loss of sidewalk dining under the new Outdoor Dining Program, City staff proposed an additional parking stall in order to offset the loss of dining on the sidewalk. Restaurant owners who initially had concerns regarding either/or scenario expressed support for the additional parking stall as an alternative to allowing both sidewalk and parklet dining.

**Question:** What would justify the additional loss of parking spaces, please explain.
**Answer**: After hearing concerns from restaurants regarding the loss of sidewalk dining under the new Outdoor Dining Program, City staff proposed adding an additional parking stall in order to offset the loss of dining on the sidewalk. Restaurant owners who initially had concerns regarding either/or scenario expressed support for the additional parking stall as an alternative to allowing both sidewalk and parklet dining.

City staff have observed sufficient availability of parking in the adjacent parking plazas during peak hours.

**Question:** Your outreach was concentrated on restaurant owners. Can you share the feedback that you collected from the other businesses downtown and the community at large?
**Answer**: City staff met individually with retail and personal service business owners, local contractors, property owners, and community members to gather feedback on the program. At City Council direction, staff focused a large portion of their outreach on restaurants in order to properly understand how the amended program would be implemented.

**Question:** Why is this program not being implemented before summer if approved?
**Answer**: This program will be implemented after approval from City Council so restaurants would be able to build at any time. However, the intent is to allow restaurants sufficient time to come into compliance with the new program.

**Question:** Instead of encouraging that an Access specialist is encouraged, can we require this?
**Answer**: The City Attorney has indicated that highly encouraging them to hire an access specialist and signing an indemnification waiver from the city is adequate.

**Question:** If this request is not required and a lawsuit is filed, would the City be liable?
**Answer**: The City Attorney drafted the language for this program to indemnify the City regarding these issues.

**Question:** For those restaurants who want to install electric heating, are there any programs the City can offer to help subsidize or incentivize bringing electricity to the sidewalk or the street? If a restaurant brings electricity to the sidewalk or a parklet, is there an added benefit to the City?

**Answer**: The City does not have any programs at this time but could implement a program at the direction of City Council.

**Question:** Are any of the current parklets that have propane heating currently in compliance with CFC 605.5.2 – 605.5.2.3.4? For those parklets that are out of compliance, what do they need to do to become compliant?
**Answer**: City staff cannot confirm whether any propane heaters are in compliance with the applicable Fire Code as we have not researched this question. Restaurant owners can reach out to County Fire to confirm whether their propane heaters are in compliance with the regulations. The City issued permit requires parklets to be in compliance with all applicable laws and regulations, including Fire regulations.

**Question:** With respect to fees, the staff report says ". . . discounting from [$10] to $3 per square foot [will] incentivize businesses to utilize funds that would otherwise have been applied to the fee to maintain and beautify their parklets." *Staff report, top of page 7*. Suppose the Council decided that it prefers a policy that will ensure – not just incentivize –restaurateurs maintain and beautify their parklets. To accomplish that policy, rather than giving a 70% discount, the City were to charge $10 per square foot, but allow discounts or partial refunds *after* the restaurants take actions to maintain and beautify their parklets. Would such a policy be feasible? How would staff recommend that such a policy be structured and worded?
**Answer**: City staff could draft a program that requires restaurant owners to maintain and beautify their parklets with those additional dollars and provide proof the funds were spent at the end of the calendar year with their annual recertification. This could allow the City to effectively charge a $10 per square foot fee but subsidize $7 per square foot with proof of funds spent. Should a restaurant not spend that $7 per square foot on beautification throughout the year, staff could require those funds be included during the issuance of the annual permit.

**Question:** Why do staff propose an initial application fee substantially lower than Palo Alto and Redwood City (and slightly lower than that proposed in Mountain View)? What is this fee designed to cover/offset in terms of administrative costs?
**Answer**: The initial application fee is anticipated to cover the administrative review of the applications.

**Question:** Why is the proposed application fee for the sidewalk dining program ½ that of the parklet program?
**Answer**: The sidewalk dining fee is intended to cover the administrative review of the application and there are less elements to review, such as the deck structure, within this application as opposed to a new parklet application.

**Question:** One of the bullet points of the Parklet Design Specifications (Location) says that parklets "[s]hall not interfere with line of sight for neighboring businesses." Measured from what angle? A full 180 degrees from the store front? From a line perpendicular to the store front from the street? Something else?
**Answer**: This would be measured from the full parking spaces in front of any neighboring businesses.

**Question:** Will the permits require the restaurants to indemnify the City from any ADA, ABC, or other claims/lawsuits alleging a violation by the restaurant?
**Answer**: Yes.

**Question:** Will the restaurants be required to name the City as an additional insured on their insurance policies?
**Answer**: Yes.

**Question:** Are there currently any existing parklets that are in total compliance with the parklet requirements?
**Answer**: No.

**Question:** - Propane heaters were identified as a safety issue the last time this report was presented, what changed?
**Answer**: County Fire provided direction that they were okay with propane heaters as long as the applicants meet the applicable Fire Code sections. However, Propane Heaters are not permitted nearby combustible materials per Fire Code.

**Question:** - Please provide a photograph of an example of a parklet with the recommended screen and gutters. How did it fare from the rains we had this season?
**Answer**: We do not currently have any parklets that have the new screen and gutters. City staff believe that this new barrier would assist with proper drainage of stormwater.

**Question:** - Can we have a liability disclaimer in all guides of the programs offered. We have it in the Outdoor Display guide and not in the other guides.
**Answer**: Yes, we can make that edit. All applicants will need to sign a permit agreement as well.

**Question:** Page 7 of the staff report (pg. 130 of PDF), can you please revise the table to include a row also showing annual renewal fees, or at least say how much Redwood City charges for their annual renewal fee?
**Answer**: Redwood City charges $583 for an annual application renewal fee.

**Question:** Have you looked at increasing the rate of $3/sq ft after the first year when the investment in the permanent parklet is made?

**Answer**: The City Council can provide direction that the fee would escalate in a pre-determined period of time after the parklet has been built. Additionally, the City Council can review this fee annually if it is established within the Master Fee Schedule of the City.

**Question:** Is there any comparator data on other Sidewalk Dining programs?
**Answer**: City staff does not have that information at this time.

**Question:** Can you provide the official statement from ABC with regards to their requirement of a barrier or stanchion to separate dining areas from non-dining areas if alcohol is served?
**Answer**: Yes. Please see the email below.

**From:** Sembrano, Jason@ABC [redacted]
**Sent:** Thursday, February 2, 2023 2:55 PM
**To:** Anthony Carnesecca <aCarnesecca@losaltosca.gov>
**Subject:** Outdoor

Hi Anthony,

Per our conversation, if the applicant wants to utilize the outdoor area (Patio, Public sidewalk or Parklets) we notify the City Planning to confirm if the outdoor area is zone for alcohol (Section 23790BP), if the City approved the outdoor area- on the ABC 257 diagram applicant/licensee must include the dimension of the premises, we recommend/advised to put a barrier (Stanchion or Planters) so that the licensee have a control of Alcohol of their license premises and to make sure patron will not have an access to walk around at the public premises with an open container. Below is a sample of an ABC Conditions the we imposed for outdoor/Parklets.

****Sales and service of alcoholic beverages on said patio/terrace/other area shall be restricted to waiter/waitress service and only to patrons seated at a table.*

Thank you,

*Jason Sembrano-Licensing Representative II*
California Alcoholic Beverage Control
[redacted]

**Item 7. Reach Codes**

**Question:** Is it reasonable to set a dollar amount when an individual can spend $250k on one room? (E.g., a bathroom)
**Answer**: The cost a homeowner actually pays for the construction of a remodel or addition is different than the calculated building improvement valuation.

**Question:** Why not just leave it at a percentage which is easily measured and fair?
**Answer**: The building improvement valuation is calculated regardless because this is a standard part of the building permit process; it is calculated for every building permit issued in the City of Los Altos. The nexus of the percentage value is based upon if the cost to renovate is over a specific threshold that is reasonable as determined by cost effectiveness. Other jurisdictions in

California have adopted valuation thresholds as a trigger for building electrifications; the 250k threshold was determined by staff after review of previously issued permits here in the City of Los Altos.

**Question:** What is the worst-case cost of conversion for an older home to go all electric?
**Answer**: A conversion of an older home to all-electric would only be required if the 50% modification or addition threshold is met, or if a proposed project valuation exceeds $250,000. The estimated minimum cost of conversion for a 3500 SF home (assuming electrical infrastructure upgrades are required) is $95,000. This includes replacing interior gas appliances with electric alternatives, installing or replacing ductwork to support a central heat pump, upgrading the electrical panel, installing interior electrical infrastructure, and upgrading the main PG&E line to the home. The cost does not account for rebates and incentives for appliances and panel upgrades. Additionally, modification projects that trigger the 50% threshold may already contain electrical infrastructure upgrades or appliance upgrades that would already be factored into the cost of the remodel.

**Question:** Why are we making any requirements on conversions before BAAQMD rules start in 2027?
**Answer**: The updated BAAQMD rules will ban the sale and installation of NOx emitting water heaters in 2027, NOx emitting furnaces in 2029, and large commercial water heaters in 2031. The proposed reach codes do not require appliance conversions from gas to electric except in the case of a substantial (> 50%) addition or alteration, or a project valuation > $250,000. Currently, individual gas water heaters or gas furnaces are not required to be replaced with electric equivalents at their end of service life. OBJ

**Question:** With that assumption how much noxious gas would be prevented from entering the environment?
**Answer**: The CAAP is based on Greenhouse Gas (GHG) emission targets and does not individually measure NOx emissions. NOx emission reduction will occur as gas appliances are replaced with electric appliances. Understanding the magnitude of NOx emission reductions from proposed reach codes would require outside expertise and further research.

**Question:** has already made the most drastic requirements for converting appliances if your existing unit breaks?
**Answer**: Staff would like additional clarification on this question.

**Question:** How many 50% remodels might take place in the next four years when the BAAQMD rules start in 2027?
**Answer**: Based on an assumed number of projects that modified or added greater than 50% of the structure, approximately 63 projects would have met the 50% threshold in 2022. Under these assumptions, approximately 252 projects may meet the 50% threshold and be converted

to all-electric from 2023 through 2026. Electrifying approximately 252 homes will help the City advance CAAP Goal 2.2: Require All-electric New Buildings and Major Retrofits and CAAP Goal 2.3: Reduce or Eliminate Methane Gas Use in Existing Buildings by Increasing Fuel Switching.

**Question:** How much noxious gas would be prevented in the next four years?
**Answer**: The CAAP is based on Greenhouse Gas (GHG) emission targets and does not individually measure NOx emissions. NOx emission reduction will occur as gas appliances are replaced with electric appliances. Understanding the magnitude of NOx emission reductions from proposed reach codes would require outside expertise and further research.

**Question:** Why are we not recommending 75% of remodels as demonstrated in attachment 4 (Neighboring jurisdiction reach codes)?
**Answer**: Out of the neighboring jurisdictions that City Staff researched, three used a 75% remodel threshold to trigger all-electric requirements and eight used a 50% remodel threshold. Using a 50% threshold will align Los Altos with the majority of neighboring jurisdictions. The 50% threshold is also the rule included in the Bay Area Model Reach Code and recommended by Santa Clara County, San Mateo County Office of Sustainability, Alameda County, and local community choice aggregators (I.e., SVCE). Using a 50% threshold will also allow the City of Los Altos to electrify a greater number of existing buildings, which will help advance CAAP Goal 2.3: Reduce or Eliminate Methane Gas Use in Existing Buildings by Increasing Fuel Switching.

**Question:** With respect to EV charging, what is the difference between a parking space being "EV ready" vs. "EV capable?"?
**Answer**: **Electric Vehicle (EV) Capable** as defined in the Green Building code is as follows: A parking space linked to a listed electrical panel with sufficient capacity to provide at least 110/120 volts and 20 amperes to the parking space. Raceways linking the electrical panel and parking space only need to be installed in spaces that will be inaccessible in the future, either trenched underground or where penetrations to walls, floors, or other partitions would otherwise be required for future installation of branch circuits. Raceways must be at least 1" in diameter and may be sized for multiple circuits as allowed by the California Electrical Code. The panel circuit directory shall identify the overcurrent protective device space(s) reserved for EV charging as "EV CAPABLE." Construction documents shall indicate future completion of raceway from the panel to the parking space, via the installed inaccessible raceways.

**Electric Vehicle (EV) Ready** as defined by the Green Building is as follows: A parking space served by a complete electric circuit with 208/240 volt, 40-ampere capacity including electrical panel capacity, overprotection device, a minimum 1" diameter raceway that may include multiple circuits as allowed by the California Electrical Code, wiring, and either a) a receptacle labelled "Electric Vehicle Outlet" with at least a ½" font adjacent to the parking space, or b) electric vehicle supply equipment (EVSE) with a minimum output of 30 amperes.

An EV Capable space has enough electrical capacity to support future EV charging spaces (electrical panel capacity + branch circuit + raceway). EV Ready is EV capable plus the outlet.

**Question:** The proposed ordinance includes any addition and/or alteration "with a valuation of over $250,000" as new construction. *§ 12.22.020*. How is that valuation determined? Suppose a contractor wins a bid to alter an existing Los Altos home for $245,000. Later, when the project is almost finished, the property owner approves an add/alt adding another $10,000 to the cost. Is this now "new construction?"
**Answer**: A contractor will submit a valuation with the permit submittal. If a contractor submits a revision that increases the scope of work and valuation beyond $250,000, then yes, the project would be subject to all-electric requirements.

**Question:** In the "2022 Cost-Effectiveness Study: Single Family New Construction," the report says on page 1 (third bullet point):

> *Efficiency and electrification have symbiotic benefits and are both critical for decarbonization of buildings. As demand on the electric grid is increased through electrification, efficiency can reduce the negative impacts of additional electricity demand on the grid, reducing the need for increased generation and storage capacity, as well as the need to upgrade upstream transmission and distribution equipment.* ***The Reach Codes Team recommends that jurisdictions adopting an all-electric reach code for single family buildings also include an efficiency requirement with EDR2 margins consistent with the all-electric code minimum package.*** *[Emphasis added.]*

Do the proposed reach codes include an efficiency requirement with EDR2 margins consistent with the all-electric code minimum package?
**Answer**: Staff will research this question in more detail and come back to the council at the Council meeting tonight.

# Public Safety and Individual Rights in the Age of Firearms

**Friday, September 9, 2022**

**Kyle Brochard, Shareholder, Richards Watson & Gershon**
**T. Peter Pierce, Shareholder, Richards Watson & Gershon**

# Loaded Questions: Firearms Regulation After *New York State Rifle & Pistol Association, Inc. v. Bruen*

by T. Peter Pierce; Kyle H. Brochard; Natalie C. Kalbakian -- Richards, Watson & Gershon

## Introduction

The United States Supreme Court fired its own shot into Second Amendment case law with its recent decision in *New York State Rifle & Pistol Association, Inc. v. Bruen* (*Bruen*).[1] The high court did so in two parts. First, the court overhauled the analysis that courts must use to decide whether laws governing firearms infringe the Second Amendment. The new test is discussed below. Second, using its new test, the high court invalidated a New York state law requiring an applicant to show "proper cause" to carry a gun for self-defense in public.

*Bruen* affects the issuance of concealed carry licenses in California.[2] State law generally prohibits the carrying of firearms concealed on the person. (Penal Code § 25400.) But anyone who obtains a license to carry a firearm concealed on their person is exempt from the general prohibition. (Penal Code § 25655.) A police chief or other head of a city police department may issue a concealed carry license. (Penal Code § 26155.) Alternatively, a police chief or other department head may contract with the sheriff of the county in which the city is located for the sheriff to issue concealed carry licenses. (Penal Code § 26150, subd. (c)(1); § 26155, subd. (c).) Either way, *Bruen* significantly impacts the criteria that may be considered in issuing concealed carry licenses, as discussed below.

*Bruen* also forces an examination of other California firearms laws upon which cities frequently rely in discharging their duty to protect the public health, safety, and welfare. Those laws as well are discussed in this paper.

## The *Bruen* Decision

[1] *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) 142 S.Ct. 2111.
[2] *See id.* at pp. 2134-2124.

*Bruen* held unconstitutional the State of New York's law requiring applicants to show "proper cause" to obtain a license to carry a gun for self-defense in public.[3] Two residents challenged the law after New York denied each a license to carry a handgun in public because neither demonstrated a "special need" beyond general self-defense.[4]

The Court examined New York's law under the framework set out in *District of Columbia v. Heller*[5] and *McDonald v. Chicago*.[6]

At the outset, the court rejected the approach that almost all lower courts had used in evaluating Second Amendment claims under *Heller* and *McDonald*.[7] That approach involved two steps. The first required the government to show that a challenged law regulates activity outside the original scope of the Second Amendment.[8] If the government succeeded, the activity was categorically unprotected, and the law survived.[9] Otherwise, the analysis proceeded to step two -- how close the law came to the core of the Second Amendment right, and how severely the law burdened that right.[10] If the law burdened the core right, a court applied "strict scrutiny," almost certainly dooming the law.[11] Otherwise, a court applied "intermediate scrutiny," under which the vast majority of firearms laws survived.[12]

*Bruen* rejected this two-step framework.[13] Step two now no longer exists. The Court found that the traditional tiers of scrutiny -- used for decades to test the constitutionality of laws -- has no place in the Second Amendment calculus.[14]

The Court reformulated the remaining step into a new test based on constitutional text and history. When the Second Amendment's plain text encompasses a person's conduct, the Constitution presumptively protects that conduct.[15] The government must then justify its law by showing that the law

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[3] *Id.* at p. 2156.
[4] *Id.* at p. 2123.
[5] *District of Columbia v. Heller* (2008) 554 U.S. 570.
[6] *McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742.
[7] *New York State Rifle & Pistol Association, Inc. v. Bruen*, *supra*, 142 S.Ct. at p. 2127.
[8] *Id.* at p. 2126.
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Id.* at pp. 2127, 2129.
[14] *Id.* at pp. 2127-2129.
[15] *Id.* at pp. 2129-2130.

is consistent with the historical tradition of firearms regulation in the United States.[16] Only then does the regulated conduct fall outside of the Second Amendment's protections.[17]

The Court offered a few general guidelines to assist in unpacking its new framework. If the societal problem giving rise to a gun regulation existed around the time the Second Amendment was ratified in 1791, the lack of a similar regulation suggests the modern gun law is unconstitutional. If the societal problem was tackled through different means, it may also suggest the modern gun law violates the Second Amendment. If an analogue of the modern law was proposed during that period, and rejected out of constitutional concerns, this too provides evidence that the modern law cannot stand.[18]

In searching for a historical analogue to justify a current firearms law, the analogue must be well-established and "analogous enough," but need not be a twin to the proposed law. Only if a court concludes that the modern gun law and its historical analogue are "relevantly similar" will the court uphold the modern law.[19] Otherwise that law is unconstitutional.

Applying this framework to New York's law, the Court concluded that the Second Amendment's text does not draw a distinction between the home and public spaces with respect to keeping and bearing arms.[20] The text therefore encompasses a right to carry a firearm in public such that the Second Amendment presumptively protects that right.

The Court then canvassed firearms regulations dating from the late 1200s in England to the early 20th century in the United States.[21] After an exhaustive inventory, the Court found a lack of a broad tradition restricting the public carry of firearms.[22] New York's "proper cause" requirement for obtaining a license for public carry failed the Court's historical test, and was invalidated as unconstitutional.

Although *Bruen* finally articulated a framework for evaluating Second Amendment challenges, it remains uncertain what the precise contours of

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[16] *Id*. at pp. 2129-2130.
[17] *Id.* at pp. 2129-2130.
[18] *Id.* at p. 2131.
[19] *Id.* at p. 2133.
[20] *Id.* at pp. 2134-2135.
[21] *Id.* at pp. 2134-2156.
[22] *Id.* at p. 2156.

that framework are, and how they will apply to an ever-expanding body of firearms laws.

## Implication of *Bruen* for California municipalities

The *Bruen* decision has far-reaching consequences for the issuance of concealed carry licenses. This paper assumes a police chief will be the official issuing licenses under Penal Code section 26150, but the same analysis applies if a sheriff issues licenses under section 26155.

A police chief may issue a concealed carry license under section 26150 if the applicant satisfies four criteria:

1. The applicant is of good moral character;

2. The applicant shows good cause for issuing the license;

3. The applicant is a resident of the city, or has a principal place of employment or business in the city and spends substantial time in that place of employment or business; and

4. The applicant has completed training as described in Penal Code section 26165.

Criteria 3 and 4 are objective and *Bruen* has no impact on them.

Criteria 1 and 2, on the other hand, invite subjective evaluation. *Bruen* looms large over the "good moral character" requirement, and invalidates the "good cause" requirement altogether. We turn first to the "good cause" requirement.

## California's "Good Cause" Requirement Violates the Second Amendment

*Bruen* outright rejects "may issue" laws that require an applicant for a license to show a special need for protection.[23] *Bruen* cites California's "good cause," D.C.'s "proper reason," Hawaii's "exceptional case," Maryland's "good and substantial reason," Massachusetts' "good reason," and New Jersey's "justifiable need" requirements as inconsistent with the Second Amendment.[24] These laws impermissibly confer upon licensing officials "open-ended discretion" in deciding whether to issue concealed carry

[23] *See id.* at pp. 2122, 2138.
[24] *See id.* at pp. 2122-2124, fn. 2, 2161 (conc. opn. of Kavanaugh, B.).

licenses.[25] California may no longer impose a good cause requirement for issuance of a concealed carry license, and a police chief therefore may no longer require an applicant to show good cause to obtain that license.

## California's "Good Moral Character" Requirement Is on its Face Constitutional; the Potential Peril Lies in its Application

*Bruen* instructs governmental agencies to ensure that their concealed carry licensing requirements are based on "narrow, objective, and definite standards."[26] How that directive actually impacts the "good moral character" requirement is not definitive.

*Bruen* reinforces that government agencies may ensure that only "law-abiding, responsible citizens" obtain concealed carry licenses. Constitutionally permissible requirements are "designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'"[27]

Good moral character is surely one valid barometer of responsibility, and perhaps of tendency toward lawful behavior. The difficult task for a police chief lies in measuring good moral character within *Bruen's* "narrow, objective, and definite standards" command. *Bruen* provides examples of permissible criteria for assessing whether an applicant is law-abiding and responsible, and by analogy, of good moral character: "fingerprinting, a background check, a mental health records check, and training in firearms handling and in laws regarding the use of force."[28] Thus, a police chief may exclude from consideration for a concealed carry license mentally ill persons adjudicated as a danger to others, convicted felons, and other dangerous individuals. Obviously, this list is not exhaustive.

The California Attorney General recently advised local governments as to the permissible contours of the "good moral character" inquiry.[29] The Attorney General suggests evaluating personal characteristics such as "honesty,

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[25] *See id.* at pp. 2161-2162 (conc. opn. of Kavanaugh, B.).
[26] *See id.* at p. 2138, fn. 9 (discussing the permissible requirements in "shall-issue" states).
[27] *Ibid.*
[28] *Id.* at p. 2162 (conc. opn. of Kavanaugh, B.)
[29] *Office of the Attorney General's Legal Alert on U.S. Supreme Court Decision in New York State Rifle & Pistol Association v. Bruen, No. 20-843* (June 24, 2022)*, at* < https://oag.ca.gov/system/files/media/legal-alert-oag-2022-02.pdf>.

trustworthiness, diligence, reliability, respect for the law, integrity, candor, discretion, observance of fiduciary duty, respect for the rights of others, absence of hatred and racism, fiscal stability, profession-specific criteria such as pledging to honor the constitution and uphold the law, and the absence of [any] criminal conviction."[30] Consideration of these factors does not run afoul of *Bruen*. But *how* a police chief evaluates these factors will be closely watched by gun rights advocates to ensure a chief does not cross the still blurry line between allowable objective criteria and the "open-ended discretion" *Bruen* rejected.

Many cities and counties have adopted their own criteria to guide their police chief or sheriff in evaluating applications for concealed carry licenses. The criteria are simply too vast and varied to evaluate here. Nevertheless, a couple of general principles may be gleaned from an overview of those criteria in the wake of *Bruen*. Conviction of any crime is most likely a permissible disqualifying factor, with the understanding that the less serious the crime, the more likely an unsuccessful applicant will challenge the decision on the basis that the crime does not implicate whether the applicant can safely and responsibly handle a firearm. Armed robbery and failing to signal a lane change in traffic yield starkly different implications in this context. Perhaps anticipating this issue, some cities and counties -- in establishing disqualifying factors -- focus on crimes of violence, or crimes that involve significantly endangering the lives of others.

At the other end of the spectrum is the disqualifying factor that the applicant has been arrested, even if no charges are filed. Depending on the circumstances, using an arrest as a basis to deny a concealed carry license may reveal very little about an applicant's law abiding tendency, and thereby impermissibly infringe the Second Amendment. *Bruen* itself, in approving of Connecticut's "suitable person" licensing factor, observes that officials may deny a concealed carry license only to those whose "conduct has shown them to be lacking the essential character of temperament necessary to be entrusted with a weapon."[31] This suggests that not all interactions with law enforcement -- whether it be detainment, arrest, indictment, or even conviction in some cases -- will be sufficient to deny a concealed carry license.

[30] *Id.* at p. 3.

[31] *New York State Rifle & Pistol Association, Inc. v. Bruen*, *supra*, 142 S.Ct. at p. 2123, fn. 1.

Local officials involved in concealed carry licensing decisions should consult with their legal counsel to review any local criteria used in those decisions.

Assuming an applicant meets the objective criteria of residency and completion of a firearms training class, a police chief must issue a concealed carry license upon finding the applicant to be of good moral character. Penal Code section 26150 provides that a police chief "may issue" the license, but *Bruen* in practice requires a chief to issue the license.

## *Bruen's* Impact on Other Public Safety Laws upon which Cities Regularly Rely

Cities rely on a host of California laws regulating firearms possession. This section identifies historic analogues to some of those laws to aid cities that might be confronted with a *Bruen* challenge to their actions. Those laws are divided into two groups below: (1) laws regulating possession of firearms by mentally ill persons and convicted felons; and (2) "red flag" firearms laws related to domestic violence, workplace harassment, gun-related violence, and general harassment.

Before turning to those laws, it is helpful to note again that the initial inquiry under *Bruen* is whether the Second Amendment's plain text encompasses a person's conduct. If it does, the government must justify its law by showing it is consistent with the nation's historical tradition of firearms regulation. To do so, the government must identify a restriction -- existing around the time the Second Amendment was ratified in 1791, or the Fourteenth Amendment was ratified in 1868 -- that imposed a burden on the Second Amendment right analogous to that imposed by the challenged modern law. The court will uphold a modern-day regulation only if it is "relevantly similar" to a historical precursor.[32] A proper analogue need not be a "historical *twin*."[33]

### 1. Laws Prohibiting or Regulating Firearms Possession by Convicted Felons and Mentally Ill Individuals

The Supreme Court has found a "longstanding [tradition of] prohibition on the possession of firearms by felons[,] the mentally ill,[]" and arguably, other

[32] *New York State Rifle & Pistol Association, Inc. v. Bruen*, *supra*, 142 S.Ct. at p. 2132.
[33] *Id.* at p. 2133.

dangerous individuals.[34] The Court identifies this tradition without providing much historical support rooted in the 18th or 19th centuries. The Court has instead relied on 20th century legislation to uphold exclusions of felons and mentally ill persons from possessing firearms.

The categorical limits on firearms possession by convicted felons and mentally ill persons -- in the California Penal Code and Welfare and Institutions Code -- likely fall within this purported longstanding tradition. *Heller* found, the *McDonald* plurality reiterated, and Justice Kavanaugh in his *Bruen* concurrence agreed, that these limits are "presumptively lawful."[35]

This presumptive validity is enjoyed by California Penal Code section 29800, which categorically disqualifies convicted felons from purchasing, receiving, or possessing firearms. Also presumptively valid is Welfare and Institutions Code section 8103, which disqualifies persons adjudicated to be a "danger to others as a result of a mental disorder or mental illness, or who has been addicted to be a mentally disordered sex offender" from purchasing, receiving, or possessing firearms. The federal Gun Control Act[36] also excludes from access to firearms convicted felons and domestic violence misdemeanants, mentally ill persons, and those subject to restraining orders for exhibiting harmful behavior.

The origin of these types of safety regulations was disputed during the *Bruen* oral argument. Justice Kagan queried whether the historical understanding of the Second and Fourteenth Amendments should stop at the "original" meaning, considering that widely-accepted exclusion of felons and the mentally ill took form for the first time in the 20th century.[37] This argument, supported by much of the legal scholarship on this topic, was also presented in amicus briefs submitted in support of New York's law.[38] In response, the

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[34] *Id.* at p. 2162 (conc. opn. of Kavanaugh, B); *McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742, 786; *District of Columbia v. Heller* (2008) 554 U.S. 570.

[35] *New York State Rifle & Pistol Association, Inc. v. Bruen*, *supra*, 142 S.Ct. at p. 2162 (conc. opn. of Kavanaugh, B).

[36] 18 U.S.C.A. § 922, subdivision (g) prohibiting any person "who is an unlawful user of or addicted to any controlled substance" from possessing a firearm alone was held unconstitutionally vague by a Utah federal district court in *United States v. Morales-Lopez.*

[37] NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., et al., Petitioners, v. Kevin P. BRUEN, In His Official Capacity as Superintendent of New York State Police, et al., Respondents., 2021 WL 6051152 (U.S.), 9 (U.S.Oral.Arg.,2021).

[38] *Compare* Coleman Gay, "Red Flag" Laws: How Law Enforcement's Controversial New Tool to Reduce Mass Shootings Fits Within Current Second Amendment Jurisprudence (2020) 61 B.C. L. Rev. 1491, 1528–1529 ("[P]rohibitions on possession of firearms by individuals included in *Heller*'s presumptively lawful list--for example, the mentally ill--were practically nonexistent at the time of the Second Amendment's ratification and therefore are not "longstanding" relative to the Constitutional Convention. To the extent courts are true to the inquiry to be

New York Rifle & Pistol Association argued that these 20th century prohibitions were based on a "tradition from the beginning for keeping certain people outside of the group of people that were eligible for possession of firearms."[39]

Numerous historical documents, laws, and state constitutions support the argument that the right to bear arms was never intended to apply to *all* people. The author of *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?* posits: "Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded infants, idiots, lunatics, and felons [from possessing firearms]."[40] Further, the author cites several state constitutions which, between 1838 and 1845, limited the right to bear arms to "free" men, suggesting that the right excluded felons.[41]

In *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, the Fifth Circuit opined that the restrictions for suspect groups "may have been animated by a classical republican notion that only those with adequate civic 'virtue' could claim the right to arms," and that the historical conception of the right did not preclude "laws disarming the unvirtuous citizens (i.e., criminals) or those who, like children or the mentally imbalanced, are deemed incapable of virtue."[42]

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conducted at Step One, the absence of any such laws in 1791 prohibiting persons deemed mentally unstable by society from possessing firearms is a strong indication that such persons were thought to have Second Amendment rights. Moreover, the *Heller* majority repeatedly implied that the Second Amendment applies to *all* citizens, not just the subset of citizens deemed responsible or law-abiding.") *with U.S. v. Bena* (8th Cir. 2011) 664 F.3d 1180, 1183 (emphasis added) (quoting a Founding Father's view that the state may not "prohibit the people of the United States, who are *peaceable* citizens, from keeping their own arms").

[39] NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., et al., Petitioners, v. Kevin P. BRUEN, In His Official Capacity as Superintendent of New York State Police, et al., Respondents., 2021 WL 6051152 (U.S.), 9 (U.S.Oral.Arg.,2021).

[40] Robert Dowlut, The Right to Arms: Does the Constitution or the Predilection of Judges Reign?, 36 Okla. L. Rev. 65, 96 (1983).

[41] *Id.* at p. 96, fn. 147 (emphasis added); C. Kevin Marshall, Why Can't Martha Stewart Have A Gun? (2009) 32 Harv. J.L. & Pub. Pol'y 695, 709, fn.76.

[42] *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* (5th Cir. 2012) 700 F.3d 185, 200-201 ("[A]t the time of the founding, 'the right to arms was inextricably and multifariously linked to that of civic virtu (i.e., the virtuous citizenry)'…"); Don B. Kates & Clayton E. Cramer, Second Amendment Limitations and Criminological Considerations, 60 Hastings L.J. 1339, 1360 (2009) ("[F]rom time immemorial, various jurisdictions recognizing a right to arms have nevertheless taken the step of forbidding suspect groups from having arms. American legislators at the time of the Bill of Rights seem to have been aware of this tradition ...." (footnote omitted)).

The Uniform Firearms Act is frequently cited as the early 20th century precursor to modern laws prohibiting felons from obtaining firearms. The law was developed starting in 1923, then repeatedly amended in the late 1920s and 1930s. One iteration of the law prohibited "delivery of a pistol to any person of 'unsound' mind.'"[43] Another early law was the 1938 Federal Firearms Act (15 U.S.C. §§ 901–910, repealed, Pub.L. 90–351, June 19, 1968) which originally prohibited a narrower subset of the population from receiving a weapon.[44] The law prohibited a person convicted of a "crime of violence," defined as "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking, from owning or possessing a firearm."[45]

State laws established prior to the ratification of the Second Amendment -- such as 1779 Pa. Laws 193, An Act. . . for Disarming Persons Who Shall not Have Given Attestations of Allegiance and Fidelity to this State (§§ 4-5) -- disarmed political dissidents considered a threat to public safety.[46]

While historic analogues of modern laws preventing felons and mentally ill persons from possessing firearms were proposed in the 20th century, these types of laws were not unprecedented in American history. The Supreme Court considers this historical basis sufficiently "longstanding" to uphold such regulations. Therefore, laws which prohibit firearms possession by mentally ill persons and convicted felons still remain protected from Second Amendment challenge in the wake of *Bruen*.

2. "Red Flag" Laws Related to Domestic Violence, Workplace Harassment, Gun-Related Violence, and General Harassment

[43] *Mai v. United States* (9th Cir. 2020) 974 F.3d 1082, 1088–1089 (dissenting opinion); 1926 UFA §§ 1, 4; C. Kevin Marshall, Why Can't Martha Stewart Have A Gun? (2009) 32 Harv. J.L. & Pub. Pol'y 695, 701.
[44] C. Kevin Marshall, Why Can't Martha Stewart Have A Gun? (2009) 32 Harv. J.L. & Pub. Pol'y 695, 701.
[45] *U.S. v. Skoien* (7th Cir. 2010) 614 F.3d 638, 649, fn. 8 (dissenting opinion) (internal quotation marks omitted); C. Kevin Marshall, Why Can't Martha Stewart Have A Gun? (2009) 32 Harv. J.L. & Pub. Pol'y 695, 701.

[46] The law stated, in relevant part: "[A]ny person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state and against whom information on oath shall be given before any justice of the peace that such person is suspected to be disaffected to the independence of this state, and shall take from every such person any cannon, mortar, or other piece of ordinance, or any blunderbuss, wall piece, musket, fusee, carbine or pistols, or other fire arms, or any hand gun; and any sword, cutlass, bayonet, pike or other warlike weapon, out of any building, house or place belonging to such person."

Red flag laws are designed to prevent dangerous persons -- in addition to mentally ill persons and convicted felons -- from acquiring firearms, and to require them to forfeit their weapons.[47]

As of 2022, the District of Columbia and 28 states, including California, have passed "red flag," or "extreme risk protection" laws which "permit courts to order the seizure of firearms in an attempt to prevent their use for suicide or harm to others."[48] California's laws are rooted in the specific conduct of an individual which the state deems to be unsuitable for possessing arms.

Examples include the following laws:

Code of Civil Procedure section 527.6 -- governing civil harassment restraining orders -- provides that a person who has "suffered harassment . . . may seek a temporary restraining order and an order after hearing prohibiting harassment," and the person against whom the protective order is issued cannot own, possess, purchase, receive, or attempt to purchase or receive a firearm.

Code of Civil Procedure section 527.8 -- governing workplace violence restraining orders -- allows employees who have suffered "unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace" to seek temporary orders against individuals who similarly cannot "own, possess, purchase, receive, or attempt to purchase or receive, a firearm or ammunition while the protective order is in effect."

Code of Civil Procedure section 527.85 authorizes restraining orders to protect students suffering credible threats off campus.

Welfare & Institutions Code section 15657.03 prohibits gun possession or ownership by those subject to protective orders for elder abuse.[49]

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[47] In 1878, the Tennessee Supreme Court noted that a law criminalizing the act of giving a pistol to a minor was passed to "prevent crime" and suppress the "pernicious and dangerous practice of carrying arms," not abridge a constitutional right. *State v. Callicutt* (1878) 69 Tenn. 714, 716; *National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* (5th Cir. 2012) 700 F.3d 185, 203.

[48] Seizure and Retention of Firearm Under State "Red Flag" or Extreme Risk Protection Law, 75 A.L.R.7th Art. 7 (2022).

[49] Any intentional and knowing violation of the above-mentioned protective orders is punishable under Penal Code section 273.6. In addition, any individual who owns, possesses, purchases, or receives a firearm knowing it is in violation of the orders is punished under Penal Code section 29825.

Penal Code Section 136.2 prohibits firearms ownership or possession by those subject to protective orders based on a "good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur."

Similar protective orders for stalking (Penal Code section 646.91), domestic violence (Penal Code section 18250), and gun violence prevention (Penal Code sections 18100-18175) prohibit subjects from controlling, owning, purchasing, or receiving any firearms or ammunition while the order is in effect. In the case of gun violence restraining orders, those restrained must surrender their firearms.

Penal Code section 18400 in turn allows law enforcement agencies to delay the return of surrendered firearms if given "reasonable cause to believe that the return of a firearm or other deadly weapon seized under this division would be likely to result in endangering the victim or the person who reported the assault or threat."

Additionally, the Welfare & Institutions Code allows individuals apprehended for examination of their mental condition to have their weapons confiscated under section 8102, allowing a process for the safe return if the individual meets certain requirements.

Lastly, Welfare & Institutions Code section 8103 restricts access to firearms by those "adjudicated by a court of any state to be a danger to others as a result of a mental disorder or mental illness, or who ha[ve] been adjudicated to be . . . mentally disordered sex offender[s]," and by individuals found not guilty of a serious crime by reason of insanity.

Most of the above-mentioned red flag laws are temporary measures to ensure the safety of petitioners and the public at large, restricting firearms possession only during the time that the protective order is in effect.

The key question under *Bruen* is whether these laws are consistent with the historical tradition of firearms regulation in the U.S. We have already shown that to be the case for laws governing possession by mentally ill persons and convicted felons. The remainder of this paper provides evidence of a historical tradition that may be cited to support the red flag laws as applied to all others.

The U.S. government has long recognized the need to protect vulnerable populations from dangerous persons. In 1788, founding father Samuel Adams

proposed language disallowing Congress from preventing "the people of the United States, who are *peaceable* citizens, from keeping their own arms."[50] A year earlier, the "highly influential" Dissent of the Minority of the Convention of Pennsylvania of 1787 proposed that "no law shall be passed for disarming the people … unless for crimes committed, or real danger of public injury from individuals …."[51]

The examples below support the conclusion that our nation's historic traditions prevented violent or dangerous persons from possessing firearms, such that today's red flag laws are consistent with the Second Amendment.[52]

A common thread runs through most, if not all, of the laws below: The state is empowered to defend law-abiding citizens from those who have or are reasonably likely to spread "fear" or "terror" through the bearings of arms.[53]

- English Common Law

    - 1328 Statute of Northampton - English regulation prohibiting the use of weapons to cause "affray of the peace" which predates the existence of firearms.
        - *Sir John Knight's Cas*e, 3 Mod. 117, 87 Eng. Rep. 75, 76 (K. B.1686) - Justice Holt interpreted the "in Terrorem Populi" element to require evil intent instead of merely carrying a firearm in public to violate this law. This was the prevalent interpretation in the late 1600s and early 1700s.
    - Militia Act of 1662, 13 & 14 Car. 2, c. 3, section 13 (1662) - The law allowed for the government to disarm anyone adjudicated as "dangerous to the Peace of the Kingdom."
    - Common law cases applying the Northampton law allowed for the forfeiture of "armour" of people who terrified the King's subjects.
    - Discriminatory practices to deprive specific groups of rights:
        - The British government disarmed Catholics as they were deemed "untrustworthy" political threats by Protestants.[54]

[50] *U.S. v. Bena* (8th Cir. 2011) 664 F.3d 1180, 1183 (emphasis added).
[51] The state's dissent is identified as a "precursor" to the Second Amendment in *U.S. v. Skoien* (7th Cir. 2010) 614 F.3d 638, 639-640.
[52] *See New York State Rifle & Pistol Association, Inc. v. Brue*n (2022) 142 S.Ct. 2111, 2133.
[53] *Id.* at p. 2145 (identifying the through line between the late-18th and early-19th century Virginia, Massachusetts, and Tennessee statutes).
[54] Joyce Lee Malcolm, To Keep and Bear Arms 18-19, 122 (1994); Adam Winkler, Gunfight 115 (2011).

- "The English Declaration in 1689 recognized an arms right only for Protestant subjects …. [T]he exclusion is instructive as the closest thing in the historical record, before World War I, to direct support for disarming felons."[55]

- Colonial Period

  - Statute of Northampton was still "good law" in the 1700s. In 1 Pleas of the Crown 136 (treatise 1716), the law was interpreted: "no wearing of Arms is within the meaning of [the Statute of Northampton], unless it be accompanied with such Circumstances as are apt to terrify the People." "Persons of Quality" were in "no Danger of Offending against this Statute by wearing common Weapons" because it was clear there was no "Intention to commit any Act of Violence or Disturbance of the Peace."[56]
  - 1692 Mass. Acts and Laws no. 6, pp. 11-13 - The law modelled after the Statute of Northampton prohibited "go[ing] armed Offensively … in Fear or Affray."
  - In Colonial America, discriminatory controls similar to anti-Catholic regulations were passed depriving Native Americans and African-Americans from gun ownership, under the same pretense that the groups were similarly deemed "high-risk."[57]
  - A Virginia law in 1756 authorized the disarmament of all refusing a test of allegiance; the local governments seized guns from Catholics and those who were associated with "distrusted inhabitants" to avoid "social upheavals."[58] These groups were considered "threats to public safety and stability."[59]
  - During this time, many states also constitutionalized disarmament of slaves and Natives.[60]

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[55] C. Kevin Marshall, Why Can't Martha Stewart Have A Gun? (2009) 32 Harv. J.L. & Pub. Pol'y 695, 721.
[56] *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) 142 S.Ct. 2111, 2142.
[57] Alexander Deconde, Gun Violence In America 22 (2011).
[58] *Kanter v. Barr* (7th Cir. 2019) 919 F.3d 437, 457 (dis. opn. of Barrett, A.)
[59] *Id.* at p. 458.
[60] Eugene Volok, State Constitutional Rights to Keep and Bear Arms, 11 Tex. Rev. L & Pol at 208-209.

- "Founding-era legislatures categorically disarmed groups whom they judged to be a threat to the public safety."[61]

- Founding Period

  - 1776 Mass. Acts 31-36: The law disqualified British loyalists from possessing weapons for the same reason that minority groups were discriminatorily disarmed.
  - The 1776 Continental Congress recommended that local authorities "cause all persons to be disarmed within their respective colonies, who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies, against the hostile attempts of the British fleets and armies."[62]
  - 1786 Virginia statute codified the Northampton statute - Collection of All Such Acts of the General Assembly of Virginia ch. 21, p. 33 (1794) - "no man, great nor small, [shall] go nor ride armed by night nor by day, in fairs or markets, or in other places, in terror of the Country."
  - 1795 Mass. Acts and Laws ch. 2, p. 436, in Laws of the Commonwealth of Massachusetts - A similar statute mandated the arrest of "all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of the Commonwealth."
  - 1801 Tenn. Acts pp. 260–261 - Pursuant to this surety statute, any person who would "publicly ride or go armed to the terror of the people, or privately carry any dirk, large knife, pistol or any other dangerous weapon, to the fear or terror of any person" was required to post surety; otherwise, his continued violation of the law would be "punished as for a breach of the peace, or riot at common law."

- Antebellum Period

[61] *Kanter v. Barr* (7th Cir. 2019) 919 F. 3d 437, 456-458 (dis. opn. of Barrett, A.) (argued that historical practice did not support a categorical disarmament of felons because of their status as felons).
[62] C. Kevin Marshall, Why Can't Martha Stewart Have A Gun? (2009) 32 Harv. J.L. & Pub. Pol'y 695, 723–724.

- By then, established common law principle prohibiting the carrying of deadly weapons in a manner likely to terrorize others. Offenses of "affray" or going armed "to the terror of people" imposed some limits on carrying firearms in this period after the founding.
    - For example, the North Carolina Supreme Court in *State v. Huntly*, 25 N. C. 418, 421-422 (1843) recognized the codified common law offense was adopted as part of the state's law.[63] Furthermore, the court only criminalized carrying a gun for a "wicked purpose" with a "mischievous result …." p. 423.
    - In another example, an Alabama state court in *O'Neil v. State*, 16 Al. 65, 67 (1849) applied the common law to punish the carrying of a deadly weapon only "for the purpose of an affray, and in such a manner as to strike terror to the people."[64]
- 1856 Ala. Acts 17 - The state law disqualified children as they would not be responsible weapon owners.
- In the mid-19th century, many jurisdictions began adopting surety statutes that required individuals to post bond before carrying a weapon in public and targeted only those threatening to do harm.
    - Mass. Rev. Stat., ch. 134, section 16 (1836) and nine other jurisdictions between 1838 and 1871 adopted variations. The Commonwealth required "any person who was reasonably likely to 'breach the peace,' and who, standing accused, could not prove a special need for self-defense, to post a bond before publicly carrying a firearm."[65] These surety statutes "presumed that individuals had a right to public carry that could be burdened only if another could make out a specific showing of a 'reasonable cause to fear an injury, or breach of the peace.'"[66] Even with a showing of reasonable fear, the accused arms-bearer "could go on carrying without criminal penalty" if the accused individual

[63] *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022) 142 S.Ct. 2111, 2145.
[64] *Id.* at p. 2146.
[65] *Id.* at p. 2148.
[66] *Id.* at p. 2120.

"post[ed] money that would be forfeited if he breached the peace or injured others -- a requirement from which he was exempt if he needed self-defense."[67] A showing of special need was required "only *after* an individual was reasonably accused of intending to injure another or breach the peace. And even then, proving a special need simply avoided a fee rather than a ban …. [O]nly those reasonably accused were required to show a special need to avoid posting a bond."[68] The bond was not considered a huge burden or punishment like a prison sentence.

- Reconstruction Period

    - 1870 S.C. Acts p. 403, no. 288, section 4 -- The codified common law state allowed the arrest of "all who got armed offensively, to the terror of the people."

- 20th Century

    - Uniform Firearms Act - Established in the late-1920s and mid-1930s.
    - 1931 Pa. Laws 498, No. 158 - No person convicted of a crime of violence can own or possess a firearm.
    - Federal Firearms Act of 1938 - Arguably the first federal statute barring felons from possessing firearms; only covered a few violent offenses.
    - Gun Control Act of 1968 (codified in part at 18 U.S.C. § 922) - Federal limits on firearm "possession … [by] various classes of people, including convicted felons, fugitives, drug addicts and unlawful users of controlled substances, illegal and nonimmigrant aliens, persons dishonorably discharged from the American armed forces, individuals who have renounced their United States citizenship, persons subject to certain court orders associated with stalking, harassing, and other domestic-related

[67] *Id.* at p. 2148.
[68] *Id.* at pp. 2120, 2149.

actions, and those 'convicted in any court of a misdemeanor crime of domestic violence.'"[69]

## Conclusion

*Bruen* requires consideration of only objective criteria in processing an application for a concealed carry license. With California's "good cause" requirement now invalidated, licensing officials must be careful not to transform the separately surviving "good moral character" requirement into a freewheeling discretionary inquiry that runs afoul of *Bruen.*

Perhaps the better news is that *Bruen* reaffirms the principle from *Heller* and *McDonald* that presumptively lawful regulations include prohibitions of firearm possession by convicted felons and mentally ill persons. In order to "elevate[] above all other interests the right of *law-abiding, responsible* citizens to use arms in defense of hearth and home[,]"[70] local officials must be able to prevent those persons, and other dangerous persons from obtaining firearms. The list of presumptively lawful regulations -- purposefully denoted as "non-exhaustive"[71] in *Heller* -- leaves room to argue that California's red-flag laws are presumptively lawful.

But whether or not that presumption ultimately attaches to California's "red flag" laws, they nevertheless fall within the established American tradition of disarming groups deemed unfit to possess weapons. *Bruen* reaffirms the rights of law-abiding, responsible citizens to keep and bear arms for self-defense. Those who have committed violent crimes, or who pose a credible threat of violence to others are neither law-abiding nor responsible, and may be disarmed to the extent necessary to protect themselves and others. *Bruen* does not require "red flag" laws to be matched with twin historical analogues.

[69] Christopher M. Johnson, Second-Class: Heller, Age, and the Prodigal Amendment (2017) 117 Colum. L. Rev. 1585, 1593.
[70] *U.S. v. Skoien* (7th Cir. 2010) 614 F.3d 638, 639–640.
[71] *District of Columbia v. Heller* (2008) 554 U.S. 570, 627, fn. 26.