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June 29, 2022

Via Hand Delivery
Attorney General Rob Bonta
California Department of Justice
1300 I Street
Sacramento, CA 95814

Re: Legal Alert Issued to Local Carry-Licensing Agencies

Dear Attorney General Bonta:

We are writing on behalf of the Firearms Policy Coalition ("FPC") to express FPC's grave concerns over the unlawful course you have urged California counties and cities to pursue in the wake of the United States Supreme Court's decision last week in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 2022 WL 2251305 (2022). We are referring to your Legal Alert dated June 24, 2022, a copy of which is attached, where you encouraged local concealed-carry issuing agencies to use Penal Code § 26150(a)'s "good moral character" requirement to subvert *Bruen*. The path you advocate will cause issuing agencies to defend far more Second Amendment claims than they have ever faced.

Before reviewing the Legal Alert, however, it is important to observe up front that *Bruen*'s elaboration of the test for Second Amendment claims leaves no doubt that Section 26150(a)(1)'s "good moral character requirement" cannot survive a challenge, even without the distortions you advocate. "To justify its regulation, the government . . . must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, at *8. *Bruen* stressed throughout that the government bears the burden of identifying an historical analogue to "affirmatively prove that its firearm regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id*. at *9; *see id*. at *11 ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.").

But that showing would be impossible here, since there is no historical analogue from the Founding or the adoption of the Fourteenth Amendment that required an ordinary law-abiding citizen to establish their "good moral character" in order to exercise their right to carry a firearm.

And if local issuing authorities follow the advice in the Legal Alert, the violations of *Bruen* will multiply. First, the Legal Alert urges licensing authorities to exercise unbridled discretion in making a "good moral character" determination: It directs local officials to "ensur[e] that licenses are only issued to individuals who—by virtue of their character and temperament—can be trusted to abide by the law;" this "investigation," the Legal Alert directs, "is a distinct question that requires an independent determination." And it lauds the Riverside County Sheriff's policy that "[l]egal *judgments* of good moral character can include consideration of honesty, trustworthiness, diligence, reliability, respect for the law, integrity, candor, discretion, observance of fiduciary duty, respect for the rights of others, absence of hatred or racism, [and] fiscal stability…." (emphasis added).

Conditioning a carry license on a discretionary evaluation of an applicant's "good moral character" is patently inconsistent with *Bruen*'s repeated statements that the carry right may not be denied by *non-objective* criteria applied by a local government official. *Bruen* considered and rejected New York's "proper cause" requirement for a carry license, but it left no doubt that it was the *discretionary* aspect of the licensing regime—requiring citizens to convince a government official that they deserved a license based on their circumstances—that fell outside the historical tradition of permissible firearm regulation.

For example, the majority opinion contrasted New York's regime to "shall issue" states "where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, *without granting licensing officials discretion* to deny license based on a perceived lack of need or *suitability*." *Bruen,* at *6 (emphasis added). In "may issue" states like New York and California, however, "authorities ha[d before *Bruen*] discretion to deny concealed-carry licenses, even when the applicant satisfied statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license." *Id*. The Court pressed the issue in a footnote stressing that the constitutionality of shall-issue regimes should not be doubted so long as they rely on objective criteria similar to the way licensing officials issue permits for expressive activity under the First Amendment:

> [I]t appears that these shall-issue regimes, which often 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." And they likewise appear to contain only "*narrow, objective, and definite standards*" guiding licensing officials, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969), rather than requiring the "appraisal of facts, *the exercise of judgment, and the formation of an opinion*," *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940)—features that typify proper-cause standards like New York's. That said, because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or exorbitant fees deny ordinary citizens their right to public carry.

Id. at *18, n.9 (emphasis added) (cleaned up).

In *Shuttlesworth*, the permitting regime violated the First Amendment because it gave local officials "unbridled" discretion to deny a parade or demonstration permit based on their "judgment" whether "public welfare, peace, safety, . . . good order, [or] morals" convinced them that the speech activity should be denied. 394 U.S. at 149-50. In *Cantwell*, the state violated the Constitution by conditioning Jehovah's Witnesses from soliciting money pending review of an application to determine whether the solicitation really was for "religious" purposes: The "decision to issue or refuse [the approval] involves appraisal of facts, the exercise of judgment, and the formation of an opinion." 310 U.S. at 305. And so it is here, with the Legal Alert's encouragement that local licensing officials (1) require all citizens seeking a carry license to plead their case, (2) conduct "investigations" into the applicant's "moral character," and (3) make an "independent determination. This is no longer permissible after *Bruen*.

Lest there be any doubt, Justice Kavanaugh's concurrence further demonstrates why the approach advocated in the Legal Alert is a nonstarter:

> 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, law-abiding citizens." . . .
>
> . . . 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.
>
> 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*.

Bruen, at *38-39 (Kavanaugh, J., concurring) (emphasis added).

In short, the *Bruen* decision stands for the proposition that all citizens who are not prohibited from exercising their Second Amendment rights (under a constitutionally sound analysis) must be able to carry firearms in public for self-defense. When local issuing agencies

consider non-objective factors and exercise discretion in making a "good moral character" determination to deny an ordinary law-abiding citizen a carry license, they violate the Second Amendment. FPC is preparing to litigate this issue in every county that follows the Legal Alert in this manner.

The Legal Alert raises other distressing issues. It endorses Sacramento County's written policy of denying a carry license on "moral character" grounds if the applicant has had "[a]ny arrest in the last 5 years, regardless of the disposition." This cannot possibly survive a constitutional challenge. Innocent citizens get arrested mistakenly. Indeed, you have stated publicly your belief that black citizens are too often arrested on a discriminatory basis. Is it really the position of the California Attorney General's office that an innocent black citizen arrested on a discriminatory basis should be denied a carry permit? Please clarify for us.

Finally, for now, the Legal Alert improperly advocates that local issuing agencies consider whether applicants' First Amendment-protected expressive and associational activities might tip the scales against a finding of good moral character. The Legal Alert urges agencies to review applicants' "social media accounts" to review their "character." It endorses Riverside County's inquiry into whether an applicant can demonstrate the "absence of hatred." Yet in today's society, many people now consider any disagreement on public policy—or any involvement in groups with the "wrong" ideology—to be an expression of "hate." Infusing this into the carry-license process isn't just inconsistent with *Bruen*, it reeks of McCarthyism and resistance by the Jim Crow South to the exercise of associational rights that gave rise to decisions like *NAACP v. Alabama*, 371 U.S. 415 (1963).

The Supreme Court is telling state and local officials like yourself and local licensing agencies that the government can no longer hide behind black-box discretionary tests like "good moral character" to prevent ordinary law-abiding citizens from exercising their Second Amendment rights. FPC therefore urges you to revoke the Legal Alert and encourage local agencies to comply fully with the *Bruen* decision before we are forced to sue them (and possibly your office also) to protect the fundamental rights of carry license applicants and licensees.

Thank you for your attention to this important matter.

Sincerely,

Bradley A. Benbrook

cc: Firearms Policy Coalition

California Department of Justice OFFICE OF THE ATTORNEY GENERAL		Legal Alert	
Subject: U.S. Supreme Court's Decision in *New York State Rifle & Pistol Association v. Bruen*, No. 20-843		*No.* OAG-2022-02 *Date:* June 24, 2022	*Contact for information:* CCWinfo@doj.ca.gov

TO: All California District Attorneys, Police Chiefs, Sheriffs, County Counsels, and City Attorneys

On June 23, 2022, the United States Supreme Court issued its decision in *New York State Rifle & Pistol Association v. Bruen*, No. 20-843 (*Bruen*).[1] In that case, the Court concluded that the State of New York's requirement that "proper cause" be demonstrated in order to obtain a permit to carry a concealed weapon in most public places violates the Second and Fourteenth Amendments. Although *Bruen* concerns a New York law, the *Bruen* majority specifically identifies California as one of six States that has an analogue to New York's "proper cause" standard. *Bruen*, slip op. 5-6. Accordingly, it is the Attorney General's view that the Court's decision renders California's "good cause" standard to secure a permit to carry a concealed weapon in most public places unconstitutional. Permitting agencies may no longer require a demonstration of "good cause" in order to obtain a concealed carry permit. However, local officials can and should continue to apply and enforce all other aspects of California law with respect to issuing public-carry licenses. In particular, the requirement that a public-carry license applicant provide proof of "good moral character" remains constitutional. Law enforcement agencies that issue licenses to carry firearms in public should consult with their own counsel, carefully review the decision in *Bruen*, take the following guidance into account, and continue protecting public safety while complying with state law and the federal Constitution.

California law authorizes local law enforcement officials—sheriffs and chiefs of police—to issue licenses allowing license holders to "carry concealed a pistol, revolver, or other firearm capable of being concealed upon the person." Cal. Pen. Code §§ 26150, 26155. In counties where the population is less than 200,000, local officials are also authorized to issue licenses permitting open carry in only that jurisdiction. *Id*. §§ 26150(b)(2); 26155(b)(2). These licenses, whether for concealed carry or open carry, exempt the holder from many generally applicable restrictions on the carrying of firearms in public. Local officials are only authorized to issue such licenses, however, upon proof that (1) "the applicant is of good moral character," (2) "[g]ood cause exists for issuance of the license," (3) the applicant is a resident of the relevant county or city (or has their principal place of business or employment in that county or city), and (4) the applicant has completed a course of training. *Id*. §§ 26150(a), 26155(a).

Although California law was not directly at issue in the *Bruen* decision, the decision makes clear that "good cause" requirements such as those in California Penal Code sections 26150(a)(2) and 26155(a)(2) are inconsistent with the Second and Fourteenth Amendments. Under the Supremacy

[1] The decision is available at https://www.supremecourt.gov/opinions/21pdf/20-843_7j80.pdf.

Clause of the United States Constitution, state and local officials must comply with clearly established federal law.

In accordance with *Bruen*, the Attorney General now considers the "good cause" requirements set forth in California Penal Code sections 26150(a)(2) and 26155(a)(2) to be unconstitutional and unenforceable. The immediate implications for law enforcement agencies that issue public-carry licenses ("issuing authorities") are as follows:

First, effective immediately, issuing authorities should no longer require proof of good cause for the issuance of a public-carry license. Issuing authorities may still inquire into an applicant's reasons for desiring a license to the extent those reasons are relevant to other lawful considerations, but denial of a license for lack of "good cause" now violates the Second and Fourteenth Amendments under the Supreme Court's decision in *Bruen*.

Second, issuing authorities should continue to apply and enforce all other aspects of California law with respect to public-carry licenses and the carrying of firearms in public. Issuing authorities are still required to take an applicant's fingerprints and to wait for the results of the background check that is run by the California Department of Justice (DOJ). Licenses "shall not be issued if the [DOJ] determines that the person is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm." Cal. Pen. Code § 26195(a). Moreover, because the Court's decision in *Bruen* does not affect the other statutory requirements governing public-carry licenses, issuing authorities must still require proof that (1) "the applicant is of good moral character," (2) the applicant is a resident of the relevant county or city (or has their principal place of business or employment in that county or city), and (3) the applicant has completed a course of training. *Id.* §§ 26150(a), 26155(a). Issuing authorities may also still require psychological testing. *Id.* § 26190(f).

Bruen recognizes that States may ensure that those carrying firearms in their jurisdiction are "'law-abiding, responsible citizens.'" *Bruen*, slip op. p. 30 n.9; *see also id.* slip op. p. 2 (Kavanaugh, J., concurring) (States may "require a license applicant to undergo 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"). Accordingly, in assessing whether an applicant has established "good moral character," issuing authorities should recognize that *Bruen* does not eliminate the duty or authority of local officials to protect the communities that they know best by ensuring that licenses are only issued to individuals who—by virtue of their character and temperament—can be trusted to abide by the law and otherwise ensure the safety of themselves and others. The investigation into whether an applicant satisfies the "good moral character" requirement should go beyond the determination of whether any "firearms prohibiting categories" apply, such as a mental health prohibition or prior felony conviction. Those categories, which may be found to apply during the DOJ-conducted background check (including the many categories pertaining to an applicant's criminal history), simply determine whether the applicant is even eligible to own or possess firearms under state and federal law. When it comes to evaluating an applicant's moral character, however, the issue is not whether the applicant meets the minimum qualifications to own or possess firearms under other statutory criteria. "Good moral character" is a distinct question that requires an independent determination.

Existing public-carry policies of local law enforcement agencies across the state provide helpful examples of how to apply the "good moral character" requirement. The Sacramento County Sheriff's Office, for example, currently identifies several potential reasons why a public-carry license may be denied (or revoked), which include "[a]ny arrest in the last 5 years, regardless of the disposition" or

"[a]ny conviction in the last 7 years."[2] It is reasonable to consider such factors in evaluating an applicant's proof of the requisite moral character to safely carry firearms in public. *See, e.g., Bruen*, slip op. p. 63 (referencing "law-abiding citizens"). Other jurisdictions list the personal characteristics one reasonably expects of candidates for a public-carry license who do not pose a danger to themselves or others. The Riverside County Sheriff's Department's policy, for example, currently provides as follows: "Legal judgments of good moral character can include consideration of honesty, 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 criminal conviction."[3]

As a starting point for purposes of investigating an applicant's moral character, many issuing authorities require personal references and/or reference letters. Investigators may personally interview applicants and use the opportunity to gain further insight into the applicant's character. And they may search publicly-available information, including social media accounts, in assessing the applicant's character. Finally, we note that it remains reasonable—and constitutional—to ask applicants why they are interested in carrying their firearms in public. Although applicants do not need to demonstrate good cause for the issuance of a license, an applicant's reasons for seeking a license may alert authorities to a need for psychological testing, be considered as part of the "good moral character" requirement, or provide information relevant to other statutory requirements.

[2] Sacramento County Sheriff's Office, *CCW Application/Permit Denials/Revocations*, <https://www.sacsheriff.com /documents/ccw/REVO-DENIAL-REASONS.pdf> [last visited June 23, 2022].)
[3] Riverside County Sheriff's Department, *Riverside County Sheriff's Department Standards Manual (DSM)*, <https://www.riversidesheriff.org/DocumentCenter/View/6791/Department-Standars-Manual-5222> [last visited June 23, 2022].