No. 11-2281

In The United States Court of Appeals For The First Circuit

STACEY HIGHTOWER,

Plaintiff-Appellant,

v.

CITY OF BOSTON; EDWARD DAVIS, Boston Police Commissioner; AND COMMONWEALTH OF MASSACHUSETTS,

Defendants-Appellees.

Appeal from a Judgment of the United States District Court for the District of Massachusetts, the Hon. Denise J. Casper (08-CV-11955-DJC)

REPLY BRIEF

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April 30, 2012

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Preliminary Statement

Defendants' survey of precedent applying the right to bear arms is incomplete. Three federal courts have just concluded that the Second Amendment secures the right of responsible, law-abiding individuals to carry handguns for self-defense—including the District of Maryland, which struck down that state's practically identical rationing scheme for handgun carry licenses.

And notably, the District of Massachusetts just confirmed that Second Amendment rights cannot be arbitrarily denied to non-dangerous people, striking down a law classifying aliens as unsuitable to possess firearms.

This Court should likewise ensure that firearm regulations comply with constitutional standards. Hightower's plea for objective licensing standards and due process should be fulfilled.

Unable to contest the historical scope of the right to bear arms, or the precedent requiring its enforcement, Defendants and *amicus* assert an untenable ripeness theory; an argument that allowing allegedly unprotected activities in conjunction with a right allows the

government to bar the right's exercise; a bewildering argument that in the Second Amendment, "keep" is a "core" right, but "bear" is not; and misstatements regarding the function of prior restraint and means-ends scrutiny.

Venturing far beyond the record and issues before the Court, the Commonwealth seeks to convert this case into one regarding so-called "large capacity" firearms, employing that term no fewer than forty times. Notwithstanding Hightower's testimony and extensive briefing, the Commonwealth falsely suggests Hightower desires concealed carrying specifically, and even intimates that her claim is equivalent to one for machine guns, such as M-16s.

Hightower leaves to others litigation over capacity restrictions, concealed carry, and machine guns. The issues she raised provide sufficient material for the Court's consideration.

Defendants do not apply objective standards in licensing the carrying of handguns—a fundamental right—nor do they afford adequate due process to licensees and applicants. The judgment should be reversed.

SUMMARY OF ARGUMENT

The number of constitutional injuries required to trigger an Article III "case or controversy" is one. Stacey Hightower's constitutional injury-in-fact—the seizure of her property and revocation of her license—did not require subsequent license applications to ripen.

Ripeness is partly a prudential doctrine. This controversy, emanating from a single, completed action, cannot be ripe with respect to Hightower's Fourteenth Amendment claim, as Defendants concede, yet not with respect to Hightower's Second Amendment claim, which Defendants would prefer avoiding. Ripeness describes injuries, not legal theories.

Moreover, this Court has recently rejected a ripeness claim identical to Defendants', based on prospective remedy. The contingent, hypothetical remedial event is unripe, not the injury.

Even if the prospects of future remedies unripened an otherwise ripe injury, black-letter law provides that no administrative or judicial remedies are required to sustain actions under 42 U.S.C. §1983. Defendants also fail to explain why an application is required to

challenge the constitutionality of licensing standards, or why ripeness requires multiple license applications.

Assuming Defendants could overcome these hurdles, their ripeness argument collapses on its facts—not the facts as Hightower asserts, but as Defendants admitted below. Apparently conceding that Hightower would never have received another unrestricted Class A license, Defendants claim Hightower should have applied for a *different* kind of license that would enable her to "carry" a handgun for self-defense. But this is semantics. Defendants' view of "carry" differs markedly from the Second Amendment's, and more critically for purposes of their argument, from Hightower's.

Defendants suggest that because an unrestricted Class A license allows for concealed carry and "large capacity" handguns, which are allegedly unprotected by the Second Amendment, Hightower has no claim to that license. The issue, however, is not what else a Class A license lets Hightower do, but which license allows her to engage in the desired, constitutionally-protected activity.

Contrary to Defendants' assertions, resolution of the Second Amendment issue here is not optional. And Hightower's arguments

respecting her right to bear arms have only strengthened since the filing of her opening brief, with court after court recognizing the right.

Defendants advance an irrationally binary, all-or-nothing approach to regulation. Requiring objective licensing standards would allegedly end all licensing, and affording gun owners due process would "[f]orc[e] the City to accept false or misleading information without consequence." City Br., 41. Reality is more nuanced. Of course Defendants may license handgun carrying, and obviously, there may be consequences for applicants providing false or misleading information. At issue here is the lack of objective licensing criteria and due process, both of which are required whenever fundamental rights are at stake.

Defendants' "suitability" standard fails both prior restraint and means-ends scrutiny. Even rational basis could not support Defendants' claim to clairvoyance as to who might "need" to exercise their *right* of self-defense. And intermediate scrutiny imposes upon Defendants the burden of proving Hightower unsuitable, and not the other way around—as does the Due Process Clause, because fundamental rights are at stake.

Apart from unhelpfully calling Hightower a liar—when Defendants made the same alleged mistake regarding the lack of "pending charges" against her, they had only "overlooked" the "inaccuracy," City Br., 15—Defendants suggest Hightower *could* safely carry a handgun. Which begs the question as to why it takes a federal lawsuit to resolve this dispute, when basic due process could have sufficed.

ARGUMENT

I. HIGHTOWER'S CLAIM IS RIPE.

A. A "Case or Controversy" Cannot Be Simultaneously Ripe and Unripe.

Ripeness doctrine references the constitutional injury-in-fact, not the theories that parties might advance in evaluating its legality. Here, the indisputable injury-in-fact stems from Defendants' revocation of Hightower's license and seizure of her gun. That singular event cannot be at once suitable and unsuitable for judicial review.

Defendants concede, as did the court below, that the case is ripe with respect to Hightower's Fourteenth Amendment claims. Commonwealth Br., 22; Add. 34. That should end the matter. After all, ripeness is partly a prudential doctrine, taking into account "the hardship to the

parties of withholding court consideration." *United States* v. *Puerto Rico*, 642 F.3d 103, 109 n.9 (1st Cir. 2011) (citation omitted). Since this Court must decide if Defendants violated Hightower's Fourteenth Amendment rights, it would be a waste of judicial resources, and pose substantial hardship to Hightower, to require duplicative litigation over Hightower's Second Amendment claims merely because Defendants speculate that they might someday remedy the injury to Hightower's Second Amendment rights.

B. Defendants' Theoretical Remedy, Not Hightower's Current Injury, is Speculative.

Defendants' ripeness argument is identical to that rejected in *Gastronomical Workers Union Local 610* v. *Dorado Beach Hotel Corp.*, 617 F.3d 54 (1st Cir. 2010). In *Gastronomical Workers*, pension fund trustees challenged an employer's funding deficiency. The employer pled unripeness, as the IRS has not yet acted on its exemption application. This Court rejected the plea:

> though couched as a claim of lack of ripeness, [the argument] is really something quite different. Fairly viewed, that claim does not suggest that the trustees have alleged a speculative injury, the existence of which depends upon future events that may or may not occur. Rather, the claim is that a future event may change the type

> of remedy available to redress an existing injury. Consequently, it is the future event, not the trustees' injury, that is speculative. Viewed in this light, [employer's] argument is not a ripeness argument at all.

Id. at 61-62 (citations omitted).

Here, just as in *Gastronomical Workers*, the injury has occurred, and Defendants suggest that the granting of a discretionary license might remedy that injury. Defendants' action on a future Hightower application is speculative, at best. Not speculative: today, Defendants hold Hightower's gun and license.

Defendants' ripeness argument is also disingenuous. Defendants allowed Hightower to carry a gun for years notwithstanding the alleged pendency of "charges," and offer no reason for disarming Hightower other than her controversial form GS-13, which they note she would not need to resubmit with another application. Nothing else having changed, Defendants could moot Hightower's Second Amendment claim by simply returning her gun and license. But they have no intention of allowing Hightower to carry a gun for self-defense.

C. Plaintiffs Need Not Apply for a License to Test the Constitutionality of Licensing Standards.

Appellant's Br., 21-22; *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 756 (1988). This point stands unrebutted.

D. Plaintiffs Need Not Exhaust State Administrative or Judicial Proceedings to Sustain a Section 1983 action.

The issue here is not whether Defendants afforded Hightower some administrative or judicial remedy to cure her injury, even if that prospective remedy held out some promise of relief, but whether Defendants violated Hightower's Second and Fourteenth Amendment rights in seizing her handgun and the license to carry it. Hightower cannot be required to exhaust state remedies prior to initiating a Section 1983 lawsuit. *Patsy* v. *Florida Board of Regents*, 457 U.S. 496 (1982). "[T]he existence of a state administrative remedy does not ordinarily foreclose resort to § 1983." *Wright* v. *Roanoke Redev't & Hous. Auth.*, 479 U.S. 418, 427-28 (1987).

> When federal claims are premised on 42 U. S. C. § 1983 and 28 U.S.C. § 1343(3)—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights.

Steffel v. *Thompson*, 415 U.S. 452, 472-73 (1974) (citations omitted).

E. Repetitive Adverse Licensing Decisions Are Not Required to Ripen A Controversy.

Defendants' ripeness arguments suggest that one letter from the police demanding the surrender of a gun and license does not make a ripe claim, absent subsequent license denials. No authority is submitted for this novel proposition.

F. Even Were Hightower Required to Apply for Another License Covering Her Claim, No Such Other License Exists.

Defendants may be erroneous in claiming that Hightower needed to re-apply for a different license to ripen her claim. Yet they acknowledge that their theory rests upon the assertion that other available licenses would have undone her injury: "for Hightower to have a ripe claim, she must show that she has been prevented from acquiring any other means of carrying her firearm." City Br., 22 (citations omitted).

Alas, nothing Defendants suggest here would afford Hightower "any other means of carrying her firearm." As Hightower discussed, Massachusetts' specific statutory definition of "carry" is quite different from the lay understanding of "carry" that the Supreme Court

employed in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). Appellant's Br., 8.

Hightower is interested in what the Supreme Court describes as "bearing," not in what Massachusetts law describes as "carrying." Telling Hightower to engage in the latter does not address her claim to the former. And regardless of whether the Second Amendment secures "carrying" handguns for self-defense, as that term is commonly understood, that is an activity Massachusetts allows only under an *unrestricted* Class A license.

Defendants and *amicus* take Hightower's counsel to task for allegedly inventing the fact, without any record support, that Class B licenses to openly carry handguns are not issued in the City of Boston. The criticism is unfounded. First, it is plain enough as to be within judicial notice that guns are not openly carried in Boston. *Cf. Bsharah* v. *United States*, 646 A.2d 993, 996 n.12 (D.C. 1994). More to the point, the record regarding this topic was made not by Hightower's counsel, but by the City's:

> [R]eceiving a firearm for sport and target and *for transportation* qualifies as carrying a handgun. You can't do it concealed under the

> restricted license, but you can certainly *openly carry it in a locked box unloaded*. So because she has not applied for the *restricted* class A license, because she has not applied for the *class B* license, her claim is not ripe here, it has not been definitively denied by the City of Boston.

Transcript, 6/24/2011, at 46, l. 5-10 (emphasis added). "[T]he revocation itself did not bar her from applying for a different type of license so that she could carry it *openly in a locked box*." *Id.* at l. 15-17 (emphasis added).

The revocation of Hightower's unrestricted Class A license also did not bar Hightower from applying for a Master Electrician or commercial airline pilot's license. But these have as much to do with Hightower's desire to carry a functional handgun for self-defense—not a locked box containing an unloaded handgun.[1]

Defendants only raise the "locked box" argument in the ripeness context, so Hightower's failure to apply for a locked-box license does not

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[1]For the first time on appeal, City Defendants suggest Hightower might obtain "a Class A license restricted to self defense." City Br., 28. *None of Boston's current Class A licenses fit this description*, City Br., 11, which also makes no sense, unless Defendants suggest they would allow Hightower to carry a loaded gun for self-defense, but bar her from range practice—a dangerous Second Amendment violation. *Ezell* v. *City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

bar her claim that the Second Amendment secures the carrying of an actual, useful handgun. But were Defendants to argue that carrying a locked box containing an unloaded handgun satisfies the traditional right to bear arms as historically understood in this country, the best that could be said for such an argument is that it is unsupported by history, or by common sense.

Historical practice informs the Court's understanding of Second Amendment rights. *United States* v. *Rene E*, 583 F.3d 8, 12-13 (1st Cir. 2009). Nowhere do Defendants or their *amicus* purport to offer *any* historical evidence that Americans have traditionally understood their right to bear arms to mean the right to carry locked boxes containing unloaded handguns, or that this has ever been an accepted mode of self-defense.

Were Stacey Hightower attacked by a rapist, would she be expected to defend herself with a *locked box* containing an *unloaded* handgun? This cannot be within the Supreme Court's description of "being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citations omitted).

II. MASSACHUSETTS' CHOICE TO BUNDLE MULTIPLE PERMISSIONS IN ONE LICENSE DOES NOT DIMINISH HIGHTOWER'S RIGHT TO BEAR ARMS.

Massachusetts' handgun licensing scheme bundles permission to carry handguns for self-defense with permission to carry them concealed, as well as permission to keep (but not necessarily bear) "large capacity" handguns.

Hightower's small revolver is, as Defendants concede, not a "large capacity" handgun, City Br. 21 n.78, and contrary to Defendants' suggestion, Hightower does not necessarily seek to conceal her gun:

> Q. You don't want your gun license if you can't carry it concealed?
>
> A. That's not necessarily true.

JA 276-77.

However, as discussed supra, carrying even a small revolver, in any manner suitable for self-defense (e.g., not unloaded in a locked box) requires an unrestricted Class A license.

Because there is no right to carry a handgun in any particular manner, and because Defendants allege that "large capacity" handguns are not protected by the Second Amendment, Defendants argue

Hightower has no right to an unrestricted Class A license—even if she otherwise has the right to carry her revolver for self-defense.

The argument is illogical. Suppose Boston allowed parade organizers to assist suicides; parading is classic First Amendment activity, *Hurley* v. *Irish American GLIB*, 515 U.S. 557 (1995), while assisting suicides is not constitutionally protected, *Washington* v. *Glucksberg*, 521 U.S. 702 (1997). The city could not compel paraders' viewpoints, avoiding First Amendment scrutiny because the permits also authorize unprotected assisted suicides.

Likewise, Defendants cannot deny Hightower a license to carry her handgun—a textually-enumerated Second Amendment right—because a license to bear arms would permit allegedly unprotected activities.

The Commonwealth's attempt to convert this into a case about so-called "large capacity" handguns is inappropriate. No such guns are at issue, and the record reveals nothing about whether such firearms are protected Second Amendment arms. The Commonwealth, certainly, presented *no evidence* as to whether "large capacity" handguns satisfy *Heller*'s common-use test for protected arms. The lower court did not,

and this Court cannot, opine on "common use" questions absent any *evidence*. *See, e.g. Wilson* v. *County of Cook*, 2012 Ill. LEXIS 337, at *32-*38, 2012 IL 112026 (Ill. Apr. 5, 2012).

Yet Hightower is constrained to note that Massachusetts' definition of "large capacity" handguns includes virtually all semi-automatic handguns, the overwhelming majority of handguns produced in the United States today. That much at least is a fact published in reliable government reports, and is hence subject to judicial notice. *See* http://www.atf.gov/statistics/download/afmer/2010-interim-firearms-manufacturing-export-report.pdf (last visited Apr. 27, 2012) (2010 domestic production: 2,227,871 pistols, 546,918 revolvers).

But the Commonwealth goes even further, abandoning all reason in analogizing common semi-automatic handguns to *machine guns*, and declaring both equally unprotected through misleading elliptical citation. The Commonwealth offers,

> "[D]angerous and unusual" weapons like an M-16 rifle and other high-capacity weapons "may be banned" without violating the Second Amendment.

Commonwealth Br., 19 (citing *Heller*, 554 U.S. at 627).

Heller nowhere addresses "high-capacity weapons"—that topic is inserted by the Commonwealth's attorneys—nor is there anything in the record suggesting Massachusetts' statutory definition of Class A handguns includes anything the common market would consider to be "high-capacity."[2]

The comparison to M-16s is especially inappropriate considering that *Heller* explains militia-service weapons were "the sorts of lawful weapons that [people] possessed at home." *Heller*, 554 U.S. at 627. Bostonians possess 3,798 "large capacity" licenses. JA 210. Defendants submitted no evidence that Bostonians possess M-16s in like numbers.

And yet the Commonwealth proceeds:

> Because firearms with "large capacity ammunition feeding devices" were not in common use in the eighteenth century, are unusually dangerous, and are typically not needed for lawful purposes, the Second Amendment does not protect possession or carrying of such weapons.

Commonwealth Br., 20 (footnote 59: "The Commonwealth does not argue that 'only those arms in existence in the 18th century are protected by the Second Amendment.' *See Heller*, 554 U.S. at 582.").

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[2]Massachusetts treats machine guns very differently than it does so-called Class A handguns. M.G.L. c. 140, §131(o).

Again, there is *no evidence* that so-called "large capacity" magazines holding over ten rounds—which are exceedingly common—are "unusually dangerous" or "typically not needed for lawful purposes." Within six months of the Second Amendment's ratification, Congress required citizens to supply muskets or flintlocks with twenty-four cartridges, or rifles with twenty balls; those on horseback would carry "a pair of pistols . . . and a cartouch-box, to contain twelve cartridges for pistols." Act of May 8, 1792, ch. XXXIII, 1 Stat. 271, §§ 1, 4. And of course, virtually all modern law enforcement agencies, including Defendants', "need" semi-automatic handguns capable of (and frequently) holding over ten rounds of ammunition.

In any event, the Commonwealth's irresponsible conjecture regarding the commonality, usage, or dangerousness of basic semi-automatic handguns, and its strained equation of these everyday firearms with machine guns, is irrelevant. Defendants seized Hightower's *revolver*, and it is that revolver that Hightower would like returned along with her license to carry it for self-defense.

III. THE COURT CANNOT AVOID THE SECOND AMENDMENT QUESTION.

Beyond their untenable ripeness theory, Defendants posit that this Court should simply avoid the Second Amendment question altogether, as attempting to enforce the Constitution's requirements is too dangerous. Defendants endorse Judge Wilkinson's statement that

> [t]his is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.

United States v. *Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). But errors may be made in either direction; miscalculating as to Second Amendment rights could leave Hightower vulnerable to "unspeakably tragic acts of mayhem" without adequate arms for her defense.

And *Masciandaro* conceded that courts should explore the Second Amendment's public reach, if "only upon necessity and only then by small degree." *Masciandaro*, 638 F.3d at 475. After all, "[t]he judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

Thus, notwithstanding *Masciandaro*, three Fourth Circuit courts last month alone upheld the Second Amendment right to carry guns in self-defense. *Woollard* v. *Sheridan*, No. L-10-2068, 2012 U.S. Dist. LEXIS 28498 (D. Md. Mar. 2, 2012), *appeal pending*, No. 12-1437 (4th Cir. filed Apr. 2, 2012); *Bateman* v. *Perdue*, No. 5:10-CV-265-H, 2012 U.S. Dist. LEXIS 47336 (E.D.N.C. Mar. 29, 2012); *United States* v. *Weaver*, No. 2:09-CR-00222, 2012 U.S. Dist. LEXIS 29613 (S.D. W. Va. Mar. 7, 2012).

IV. THE RIGHT TO BEAR ARMS EXTENDS BEYOND THE HOME.

Defendants claim *Heller* is limited to home possession of firearms. City Br., 31. The Supreme Court does not parse *Heller* that way:

> [I]n [*Heller*], we *held* that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, *and* we struck down a District of Columbia law that banned the possession of handguns in the home.

McDonald v. *City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (emphasis added).

Nor is it clear why "keep" would be within the Amendment's "core," but "bear" would not. Certainly, the Supreme Court never excluded "bear" from the status enjoyed by "keep." *Self-defense*, not home

possession, is the "*central component* of the right itself," *Rene E.*, 583 F.3d at 11 (quoting *Heller*, 554 U.S. at 599). The Supreme Court "read the [Second Amendment's] operative clause to 'guarantee the individual right to possess and carry weapons in case of confrontation.'" *Rene E.*, 583 F.3d at 11 (quoting *Heller*, 554 U.S. at 592). Self-defense is often exercised outside one's home, as by "bearing" arms.

Nor did *Heller* "expressly reject[] the concealed carrying of firearms as conduct falling within the purview of the Second Amendment," City Br., 28. Bearing arms includes carrying guns "in the clothing or in a pocket." *Heller*, 554 U.S. at 584. The Court merely held that restricting this manner of carry is presumptively lawful where open carrying remained permissible. Nor did *Heller* "deem[] restrictions on carrying firearms outside the home as 'presumptively lawful.'" City Br., 33-34 (citation omitted). Presumptions favoring *concealed* carry bans do not delete "bear" from the Second Amendment's text. Moreover, courts have held that at least *some* of *Heller*'s enumerated presumptions may be overcome in appropriate cases. *See, e.g. United States* v. *Moore*, 666

F.3d 313, 320 (4th Cir. 2012) (possible as-applied challenge to 18 U.S.C. §922(g)(1)).

Defendants and *amicus* fairly survey some recent lower court opinions that would limit *Heller* to its facts, pretend the Supreme Court did not define "bear arms" as it did, or even largely ignore *Heller* and *McDonald*. But as one court recently observed, "[t]he fact that courts may be reluctant to recognize the protection of the Second Amendment outside the home says more about the courts than the Second Amendment." *Weaver*, 2012 U.S. Dist. LEXIS 29613, at *14 n.7.

Indeed, the Supreme Court would not likely approve of opinions proclaiming that "[c]ompared to many of this country's constitutional protections, the scope of rights under the Second Amendment is ambiguous and no doubt subject to change and evolution over time," *Richards* v. *County of Yolo*, No. 2:09-CV-01235, 2011 U.S. Dist. LEXIS 51906, *20 (E.D. Cal. May 16, 2011), *appeal pending*, No. 11-16255 (9th Cir. filed May 16, 2011),[3] or that the Second Amendment right is unlike

[3] *Contra Heller*, 554 U.S. at 576 (Second Amendment interpreted according to its original public meaning); *id.* at 629 n.27 (Second Amendment treated like other enumerated rights); *McDonald*, 130 S. Ct. at 3045.

"all other constitutional rights" and warrants less judicial protection because it relates to firearms. *Piszczatoski* v. *Filko*, No. 10-CV-06110, 2012 U.S. Dist. LEXIS 4293, at *3 (D.N.J. Jan. 12, 2012), *appeal pending*, No. 12-1150 (3d Cir. Jan. 24, 2012).[4]

Nor will the Supreme Court likely endorse an opinion offering that *Heller*'s definition of "bear arms" is limited to the context of disproving a collectivist interpretation, but lacks any positive content defining what "bear arms" means—and then *rejecting Heller*'s interpretation. *Kachalsky* v. *Cacase*, No 7:10-CV-5413, 2011 U.S. Dist. LEXIS 99837, *70-*71 (S.D.N.Y. Sept. 2, 2011), *appeal pending*, No. 11-3642 (2d Cir. filed Sept. 7, 2012).[5]

Defendants do not address the historical and textual fact that the Second Amendment secures a right to carry guns for self-defense. They

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[4] *Contra McDonald*, 130 S. Ct. at 3045 (rejecting argument that "Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety"); *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values.").

[5] *See Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 174 n.18 (1978).

prove only what Hightower readily concedes: that the right to carry guns is subject to regulation, including regulation as to the manner in which guns are carried. Again, it is not Hightower's fault that Massachusetts' only arms bearing license allows for concealment. The legislature could decide tomorrow that handguns must be carried only openly, and it would not alter Hightower's claim to carry in whatever manner is allowed by law.

Directly on point, the District of Maryland held that handgun carry licensees cannot be required to demonstrate a "good and substantial reason" for carrying a handgun, as "the right to bear arms is not limited to the home." *Woollard*, 2012 U.S. Dist. LEXIS 28498, at *21 (citation omitted). Days later, the Southern District of West Virginia concluded that "the Second Amendment, as historically understood at the time of ratification, was not limited to the home." *Weaver*, at *13 (citation and footnote omitted). Later that month, the Eastern District of North Carolina struck down that state's laws forbidding the carrying or transportation of firearms and ammunition during declared "states of emergency."

> It cannot be seriously questioned that the emergency declaration laws at issue here burden conduct protected by the Second Amendment. Although considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home.

Bateman, 2012 U.S. Dist. LEXIS 47336 at *10-*11.

"[T]he Second Amendment right to keep and bear arms 'is not strictly limited to the home environment but extends in some form to wherever those activities or needs occur.'" *Id.* at *10 (citation omitted). "Under the laws at issue here, citizens are prohibited from engaging, outside their home, in any activities secured by the Second Amendment. They may not carry defensive weapons outside the home ..." *Id.* The challenged laws were declared unconstitutional as applied to law-abiding individuals.

Hightower plainly enjoys a right to carry her handgun for self-defense. The only question here is whether Defendants have gone too far in regulating that right. They have.

V. SECOND AMENDMENT PRIOR RESTRAINTS CANNOT ALLOW FOR UNBRIDLED DISCRETION.

The Commonwealth's statement that "Hightower cannot cite a single case that has applied the First Amendment prior restraint doctrine to

firearms claims under the Second Amendment," Commonwealth Br., 27, is technically true, yet misleading. *McDonald* was decided not two years ago. Reported appellate decisions in civil Second Amendment challenges to state laws are still rare.

But the Supreme Court's prior restraint doctrine is not limited to the First Amendment. *See, e.g. Kent* v. *Dulles*, 357 U.S. 116, 128-29 (1958) (Secretary of State lacks "unbridled discretion to grant or withhold a passport").[6] And cases do exist applying the doctrine to the right to bear arms. *Amicus* LCAV offers that prior restraint in a Second Amendment context is "so far off the mark that it is difficult to know where to begin." LCAV Br., 13-14. *Amicus* should begin next door, with Rhode Island's Supreme Court, which

> will not countenance any system of permitting under the Firearms Act that would be committed to the unfettered discretion of an

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[6]In passing, the Commonwealth erroneously asserts that overbreadth analysis is limited to the First Amendment, implying that ad hoc "suitability" determinations are permissible because some people may be disarmed. Commonwealth Br., 27. *But see, e.g., Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 895 (1992) (abortion restrictions imposing undue burdens "in a large fraction of the cases" facially unconstitutional). Indeed, *Heller* and *McDonald* struck down broad prohibitions on Second Amendment rights that could be validly applied to dangerous people.

> executive agency. . . One does not need to be an expert in American history to understand the fault inherent in a gun-permitting system that would allow a licensing body carte blanche authority to decide who is worthy of carrying a concealed weapon. The constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the basis of an unreviewable unrestricted licensing scheme.

Mosby v. *Devine*, 851 A.2d 1031, 1050 (R.I. 2004).

Rhode Island is not alone. "The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff." *People* v. *Zerillo*, 219 Mich. 635, 639, 189 N.W. 927, 928 (1922) (striking down Sheriff's discretion to license alien's gun possession).

Indiana's Court of Appeals rejected a handgun licensing official's claim that a statutory "proper reason" requirement afforded him "the power and duty to subjectively evaluate an assignment of 'self-defense' as a reason for desiring a license and the ability to grant or deny the license upon the basis of whether the applicant 'needed' to defend himself." *Schubert* v. *De Bard*, 398 N.E.2d 1339, 1341 (Ind. App. 1980).

> Such an approach contravenes the essential nature of the constitutional guarantee. It would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual citizen is involved.

Id. (footnote omitted); *see also Kellogg* v. *City of Gary*, 562 N.E.2d 685, 694 (Ind. 1990).

Woollard acknowledged "that courts have often looked to First Amendment law for guidance in navigating uncharted Second Amendment waters," and that "the First Amendment undoubtedly provides a useful framework for analysis of laws burdening Second Amendment rights," *Woollard,* at *24, but declined to apply an analytical framework to one right that it believed was designed too specifically for another. Yet Hightower would be hard-pressed to better encapsulate the prior restraint doctrine than *Woollard*'s declaration that "[a] citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs." *Woollard*, at *34.

Beyond ignoring the opinions of various courts that have applied prior restraint in the arms-bearing context, LCAV's attacks on prior restraint contain three fundamental errors. First, LCAV extolls the value of free speech, without acknowledging that "[t]he Second Amendment protects similarly intangible and unquantifiable interests."

Ezell, 651 F.3d at 699.[7]

Second, LCAV badly misrepresents both the prior restraint doctrine, and Hightower's position, caricatured as "no prior individualized judgments about suitability are allowed." LCAV Br., 14, and "give-out-gun-licenses-first-and-ask-questions-later." *Id.* at 15. LCAV even offers that under prior restraint, "no ... prior determination could be made" of whether applicants are "law-abiding, responsible citizens." *Id.* at 16. The Commonwealth repeats the error, describing prior restraint precedent as relating to "claims that the First Amendment allows one to engage in certain kinds of speech activities without a license." Commonwealth Br., 25.

That is false. Prior restraints against speech are common— parade and demonstration permits, broadcasting licenses, sign ordinances, to name a few—courts require only that licensing standards be objective, and that adequate due process be provided. Prior restraint doctrine does not prohibit licensing requirements, nor does Hightower challenge

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[7]Courts have analogized the First and Second Amendments since our nation's earliest days. *See Commonwealth* v. *Blanding*, 20 Mass. 304, 314 (1825); *Respublica* v. *Oswald*, 1 U.S. (1 Dall.) 319, 330 n.* (Pa. 1788).

licensing *per se*. She does not even challenge any specific licensing requirement, only the scheme's totally discretionary aspects and inadequate due process.

Finally, LCAV endorses the District of New Jersey's position that the Second Amendment is different because it relates to guns. LCAV Br., 14. Indeed, that is the essence of LCAV's argument: that unlike rights of which it approves, "the right to keep and bear arms begins with violence—or at least with potential violence." LCAV Br., 22. Gun laws, as opposed to other laws impacting fundamental rights, should receive lesser scrutiny because they are motivated by good intentions. LCAV Br., 21.[8] LCAV even offers that the First Amendment possesses "instrumental value in preserving self-government," while the Second Amendment does not. *Id.* This is not only historically ignorant, *e.g.* *McDonald*, 130 S. Ct. at 3037-38, but also ignores the Second Amendment text describing the right as "necessary to the security of a free state." U.S. Const. amend. II.

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[8]This is not only a naive view of some gun laws, rooted in Jim Crow, *McDonald*, 130 S. Ct. at 3038-42 & 3081-88 (Thomas, J.), but of political actors generally, who always assert their work, constitutional or not, serves the public interest.

LCAV's approach squarely violates *McDonald*'s admonition that courts may not treat the Second Amendment like a second-class right merely because it deals with firearms.

VI. MASSACHUSETTS' VERSION OF "SUITABILITY" AFFORDS OFFICIALS UNBRIDLED DISCRETION.

Defendants' definition of "suitable" is circular, bereft of any meaningful content: "A 'suitable person' is a person who is 'sufficiently responsible ... to be entrusted with a license to carry firearms.'" Commonwealth Br., 6 (citations omitted). Defendants identify one example that could, as in Connecticut and elsewhere, be restated as an objective disqualification standard—demonstrated history of irresponsible or violent behavior. But Massachusetts' "suitability" concept is far broader. Precedent describes no standards, reciting only that *applicants* have the burden of showing the denial was "arbitrary, capricious, or an abuse of discretion," and that the police chief has "considerable latitude." *Lizotte* v. *Chief of Police*, 2006 Mass. Super. LEXIS 171, at *3-*4 (2006).

Indeed, Defendants concede that "'[c]haracter is a necessary qualification' for being a suitable person who can be trusted with

carrying a firearm." Commonwealth Br., 33 (citation omitted); City Br., 38. Fundamental constitutional rights cannot be limited to those whom police determine have "suitable character," whatever that means. *See, e.g. Genusa* v. *Peoria*, 619 F.2d 1203, 1217 (7th Cir. 1980); *N.J. Envtl. Fed'n* v. *Wayne Twp.*, 310 F. Supp. 2d 681, 699 (D.N.J. 2004). Arguing that "police chiefs [have] expertise in recognizing and analyzing the risk that an individual might not handle a deadly weapon with appropriate care, or even use it to engage in unlawful, violent acts," Commonwealth Br., 38, is precisely the sort of amorphous voodoo that prior restraint doctrine proscribes.

Of course, there is *no evidence* that Hightower—an expert shot with a long military and police career—cannot handle handguns, or would engage in unlawful, violent actions. *Hightower was disarmed because she allegedly filled out a form incorrectly*. "It was not the pending charges against Hightower that resulted in the revocation." City Br., 44. Making errors on a form does not render highly-experienced police and military veterans "unsuitable" to responsibly handle firearms.[9]

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[9]Defendants' cited cases provide illuminating contrast. In *Kaplan* v. *Bd. of Registration in Pub. Accountancy*, 452 Mass. 1026, 897 N.E.2d

VII. "SUITABILITY" FAILS EVEN INTERMEDIATE SCRUTINY REVIEW.

Assuming Second Amendment carry rights merit only intermediate scrutiny, the "suitability" standard fails this level of review.

The common thread running through intermediate scrutiny cases is dangerousness. Courts expect the government carry its burden of showing the individuals being disarmed are dangerous, even when evaluating laws whose constitutionality, or at least vast constitutional application, is not seriously doubted. *See, e.g. United States* v. *Carter*, 669 F.3d 411, 418 (4th Cir. 2012) ("[t]o discharge its burden of establishing a reasonable fit between the important goal of reducing gun violence and the prohibition in [18 U.S.C.] §922(g)(3), the government may not rely upon mere 'anecdote and supposition.'") (citation omitted).

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67 (2008), an accountant knowingly failed to disclose a larceny conviction. In *Number Three Lounge, Inc.* v. *Alcoholic Beverages Control Commission*, 7 Mass. App. Ct. 301, 387 N.E.2d 181 (1979), a liquor licensee knowingly concealed an establishment's ownership interests. In both cases, unlike here, applicants unquestionably engaged in knowing deceit, and the matter being concealed would have led to adverse licensing action.

Bateman applied strict scrutiny in striking down North Carolina's various gun restrictions imposed during declared "states of emergency." Yet in doing so, the court indicated that the statutes could not survive time, place and manner analysis, ordinarily a level of intermediate scrutiny. The statutes

> do not target dangerous individuals or dangerous conduct. Nor do they seek to impose reasonable time, place and manner restrictions ... Rather, the statutes here excessively intrude upon plaintiffs' Second Amendment rights by effectively banning them (and the public at large) from engaging in conduct that is at the very core of the Second Amendment at a time when the need for self-defense may be at its very greatest...

Bateman, 2012 U.S. Dist. LEXIS 47336 at *18 (citation omitted).

Massachusetts' resident alien firearms ban was struck down because "[a]ny classification based on the assumption that lawful permanent residents are categorically dangerous and that all American citizens by contrast are trustworthy lacks even a reasonable basis." *Fletcher* v. *Haas*, No. 11-10644-DPW, 2012 U.S. Dist. LEXIS 44623, at *47 (D. Mass. Mar. 30, 2012).

And most saliently, *Woollard* found that rationing the right to carry handguns failed intermediate scrutiny review, offering Maryland's

similar provision

> does not even, as some other States' laws do, limit the carrying of handguns to persons deemed "suitable" by denying a permit to anyone "whose conduct indicates that he or she is potentially a danger to the public if entrusted with a handgun."

Woollard, at *30-*31 (citation omitted).[10]

Like Maryland's unconstitutional "good and substantial reason" law, Massachusetts' "suitability" analysis looks to Hightower's "needs and the interests of the Boston police department," JA 142, and places on Hightower the burden of proving suitability, or disproving any assertion of unsuitability, rather than looking to actual "conduct indicat[ing]" danger. After 30,926 words, all that Defendants and *amicus* can allege about this highly experienced yet "unsuitable" police officer and veteran is that she incorrectly filled out a form.

VIII. DEFENDANTS AFFORDED HIGHTOWER NO DUE PROCESS.

Defendants do not address the fact that because Massachusetts law proceeds from the assumption that no rights are at stake, a post-revocation hearing would not have afforded Hightower full procedural

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[10] *Woollard* did not challenge Maryland's provision for denying handgun carry licenses to those who have "exhibited a propensity for violence or instability." Md. Public Safety Code § 5-306(a)(5)(i).

protection. Appellant's Br., 67. This Court's understanding is different. *United States* v. *Rehlander*, 666 F.3d 45 (1st Cir. 2012).

A post-revocation hearing is not rendered constitutionally adequate by the fact it takes place at a courthouse. What matters is that notwithstanding the fact that fundamental rights are stake—rights tied to the interest in self-defense—the police would prevail merely by asserting that Hightower had bad "character," that her "needs" do not match police "interests," that they have special "expertise in recognizing" her lack of suitability—or that Hightower incorrectly filled a form. Hightower would then bear the impossible burden of proving that a police chief, of all people, lacked a valid reason to deny granting her a special dispensation to which she is not entitled as of right.

At an absolute minimum, if there is a *right* to have and carry handguns—and there is—*the police* must bear the burden of proving lack of suitability, not licensees. Due process requires that *the government* carry the burden of proof before impacting fundamental rights. *Speiser* v. *Randall*, 357 U.S. 513, 528-29 (1958); *Addington* v.

Texas, 441 U.S. 418, 427 (1979); *Santosky* v. *Kramer*, 455 U.S. 745, 764-65 (1982).

Moreover, Defendants' interest in accurate form-filling is not equivalent to their interest in disarming dangerous people. Satisfying the former interest, without more, is grounds for a hearing; only the latter is grounds for revocation. Defendants aver that emergency actions must be taken against dangerous people, and this Hightower does not contest. But Defendants concede Hightower's alleged "pending charges" were not disqualifying, City Br., 44, and they do not otherwise explain why she is dangerous. A simple pre-deprivation hearing would have sufficed.[11]

IX. DEFENDANTS DENIED HIGHTOWER EQUAL PROTECTION.

Hightower's opening brief argued extensively for means-ends scrutiny under both the Second Amendment and the Equal Protection

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[11]Defendants assert that "only about one percent of firearms license applications 'are denied on the basis of unsuitability,'" Commonwealth Br., 43 (citation omitted), reasoning that erroneous suitability denials are infrequent. But "suitability" also informs the imposition of *restrictions*. Forty-two percent of Boston's Class A licenses are restricted. City Br., 11. Granting applications as "restricted" is still a denial of the right to bear arms, and public knowledge of likely restrictions may suppress applications.

Clause. Appellants' Br., 53-60. Defendants may offend both provisions for the same reason, but that is hardly a waiver of the equal protection claim.

Moreover, the Commonwealth erroneously asserts

> [t]hat a constitutional right is deemed sufficiently important to be incorporated into the Fourteenth Amendment's Due Process Clause does not mean that a classification alleged to infringe that right is subject to "a standard of scrutiny stricter than the traditional rational-basis test" under the Equal Protection Clause.

Commonwealth Br., 51 (quoting *Johnson* v. *Robison*, 415 U.S. 361, 375 n.14 (1974)) (other citation omitted). This is wrong. The quoted clause fully reads: "*since we hold in Part III, infra, that the Act does not violate appellee's right of free exercise of religion*, we have no occasion to apply to the challenged classification a standard of scrutiny stricter than the traditional rational-basis test." *Johnson*, 415 U.S. at 375 n.14 (emphasis added).

Even were rational basis review applicable, it would not sanction wholly arbitrary determinations, divorced from any standards, that some people are "suitable" to have guns and others are not. An officer's unfettered say-so is not a "rational basis" for licensing.

CONCLUSION

The judgment below should be reversed.

Dated: April 30, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,995 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using WordPerfect X4 in 14 point Century Schoolbook font.

/s/ Alan Gura
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Dated: April 30, 2012

CERTIFICATE OF SERVICE

On this, the 30th day of April, 2012, I served the foregoing Brief by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. Accordingly, the following counsel were served electronically:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 30th day of April, 2012

/s/ Alan Gura
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