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)

APPELLANT'S PETITION FOR REHEARING EN BANC

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September 13, 2012

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STATEMENT PURSUANT TO FED. R. APP. P. 35(B)(1)

Plaintiff-Appellant Stacey Hightower hereby petitions for rehearing *en banc* pursuant to Fed. R. App. P. 35.

Hightower respectfully submits that the panel opinion is contrary to various decisions of the Supreme Court, this Court, and other United States Courts of Appeals. The case is of utmost importance, as it raises basic questions regarding application of a fundamental constitutional right essential to the preservation of human life. Among others, each of the following issues suffices to warrant rehearing this case *en banc*:

- In holding that Second Amendment facial challenges are governed by standards lower than those securing other constitutional rights, the panel opinion contradicts *District of Columbia* v. *Heller*, 554 U.S. 570 (2008); *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010) and *Sabri* v. *United States*, 541 U.S. 600 (2004);
- In declining to consider whether Hightower has a right to carry handguns for self-defense, and then deciding the case as though no such right exists, the panel opinion contradicts *Heller*;

- To the extent it holds that Second Amendment rights can be withheld upon licensing officials' unbridled discretion to assess an individual's "suitability," the panel opinion contradicts *Staub* v. *City of Baxley*, 355 U.S. 313 (1958) and its many progeny;
- In holding that individuals may be forced to bear the burden of proof in actions to secure Second Amendment rights, the panel opinion contradicts *Heller*; *McDonald*; *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Addington* v. *Texas*, 441 U.S. 418 (1979); and *Santosky* v. *Kramer*, 455 U.S. 745 (1982); and
- In holding that Hightower was required to exhaust state remedies prior to seeking federal civil rights relief against licensing standards, the panel opinion contradicts, inter alia, *Patsy* v. *Fl. Bd. of Regents*, 457 U.S. 496 (1982) and *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

STATEMENT OF THE CASE

In America, individuals are not required to prove their "suitability" to speak, to have an abortion, to enjoy freedom from unreasonable searches and seizures, or to demand a jury trial. Likewise, the fundamental right to bear arms cannot be treated like a mere

administrative privilege. Second Amendment rights must receive protection equal to that afforded other fundamental rights and, where litigants bring Second Amendment claims before federal courts, ordinary standards governing fundamental rights claims should apply.

Stacey Hightower reasonably fears criminal violence, as might any of her Dorchester neighbors. She is further concerned for her safety owing to her many years of service as a police officer. Hightower thus owns a small revolver that she kept and carried for self-defense under an "unrestricted Class A License to Carry," issued per Defendant Davis's absolute discretion to so license those deemed "suitable." M.G.L., c. 140, §131(a). Davis revoked Hightower's license and seized her gun and ammunition upon deciding that Hightower was untruthful in applying for a license renewal, an allegation Hightower strongly disputes.[1] This litigation ensued, challenging the "suitability" standard

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[1]The District Court was not called upon to, and did not resolve, the dispute concerning Hightower's license application. Defendants claimed that in renewing her license, Hightower falsely stated no "charges" were "pending" against her. Nearly three years earlier, a letter advised Hightower that an investigation was "completed," and that it was "determined" that allegations against her were "sustained," JA 150—three past-tense concepts indicating no active allegation. Hightower's ability to carry guns was never implicated, and she did not understand that any "charges" were "pending" against her—a fact she

for licensing the carrying of handguns, and the lack of due process afforded to those determined to be "unsuitable."

On cross-motions for summary judgment, the District Court held Hightower's Second Amendment claims unripe, and rejected her Fourteenth Amendment claims. Add. 11-52. The panel reversed as to ripeness but otherwise affirmed on the merits.

ARGUMENT

I. The Second Amendment Cannot Be Adjudicated Utilizing Standards Lower Than Those Afforded Other Fundamental Rights.

To the extent Hightower's challenge is facial, the panel opinion correctly held that to be constitutional, the challenged law must have a "plainly legitimate sweep." Slip Op. at 31 & 32 n.13 (citations omitted). This standard was misapplied. But in rejecting entirely the alternative facial standard of overbreadth, holding that "a law may be overturned as impermissibly overbroad because a 'substantial number' of its

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also denied, with the confirmation of her immediate supervisor and Defendant Davis, in resigning her job. JA 37, 38, 45, 81, 127.

Defendants conceded the alleged "pendency" of "charges" had no bearing on Hightower's fitness to keep and carry arms. City Def. Br. 44. When Defendants repeatedly made the same alleged error, endorsing Hightower's lack of "charges pending," they had only "overlooked" *their* "inaccuracy," *id*. at 15, and suffered no apparent repercussions.

applications are unconstitutional, 'judged in relation to the statute's plainly legitimate sweep,'" *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 450 n.6 (2008) (citation omitted); Slip Op. at 40, the panel contravened Supreme Court precedent.

The panel opinion quoted at length, and based its rejection of overbreadth, on *Sabri* v. *United States*, 541 U.S. 600 (2004), wherein the Supreme Court offered that overbreadth challenges are disfavored and thus limited to "relatively few settings, and, generally, on the strength of specific reasons weighty enough to overcome our well-founded reticence." Slip Op. at 41 (quoting *Sabri*, 541 U.S. at 609-10). Examples of such settings were then offered, including "free speech, right to travel, abortion [and] legislation under § 5 of the Fourteenth Amendment.... Outside these limited settings, and absent a good reason, we do not extend an invitation to bring overbreadth claims." *Id.* (citations and internal parentheses omitted).

The "good reason" for extending overbreadth protection to the Second Amendment is now obvious: it is a fundamental right. To the extent the panel explicitly and without discussion held that the Second Amendment is to receive less favorable treatment than other

fundamental rights, including rights that are not even enumerated, it contradicts *McDonald*. *See* 130 S. Ct. at 3045; *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.").

The panel's claim that its rejection of Second Amendment overbreadth is "joined by every court to have expressly considered the issue," Slip Op. at 42, may be overstated. The court's first two citations are to *United States* v. *Decastro*, 682 F.3d 160 (2d Cir. 2012) and the case it followed on overbreadth, *United States* v. *Masciandaro*, 638 F.3d 458 (4th Cir. 2011). But *Masciandaro* offered that it denied the overbreadth claim "[w]ithout entertaining the novel notion that an overbreath challenge could be recognized 'outside the limited context of the First Amendment,'" *Masciandaro*, at 474—a notion that, per *Sabri*, is not novel at all—because the law was properly applied to the defendant in that case. *Decastro* followed, referencing its earlier decision that the law properly applied to Mr. Decastro.

Hightower's claim does not turn on use of the overbreadth standard, because the "suitability" standard also lacks a plainly legitimate sweep

and, in any event, was not properly applied to her nor could it be properly applied in the future. But if the Second Amendment secures fundamental rights, it should also receive the protections extended to speech, abortion, travel, and other rights.

II. Declining to Consider the Right to Bear Arms, then Deciding the Case As Though No Right Were At Issue, Contradicted *Heller*.

The panel correctly agreed with Hightower's assertion that there is no right, as such, to carry a concealed handgun. But this was never at issue. Rather, Hightower claimed she has the right, *generally*, to carry handguns for self-defense, subject to constitutionally-adequate regulation, including regulation as to of time, place, and manner. Hightower *did not* seek the right to carry her handgun, specifically, concealed. JA 276-77. Nor did Hightower assert any interest in "large capacity" firearms, as her handgun is a revolver. JA 207.

It is not correct that "Hightower must prove that denial of the additional benefits granted by an unrestricted Class A license," Slip Op. at 19—carrying concealed, and carrying "large capacity" firearms—violates the Second Amendment. *Compare* M.G.L. c. 140, § 131(a) and (b). An unrestricted Class A license might allow for these "benefits," but

it is also the only license under Massachusetts law that permits the public carrying of Hightower's revolver for self-defense, the right she *does* claim. Yet the panel refused to consider whether the Second Amendment secures the right Hightower claimed, Slip Op. at 22 n.8, while faulting Hightower for not pursuing other licenses that do not permit the public carrying of handguns for self-defense, and for not proving that the other, extraneous features of a Class A license, not at issue, are constitutionally protected.

Respectfully, the opinion might have turned out differently had it focused less on the rights Hightower did not claim, but considered her Second Amendment interest in the revoked permit—as confirmed by the Supreme Court. "At the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 554 U.S. at 584 (citations omitted).

> To "bear arms," as used in the Second Amendment, is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person."

Id. (citations omitted). A full exposition of this right filled some twenty pages of Hightower's opening brief and it should have been addressed, as it was the central issue in the litigation.

There is no question that under Massachusetts law, Hightower's only option to carry a gun "for the purpose of being armed and ready in case of confrontation with another person" is exclusively located in an unrestricted Class A license. "Carrying" under Massachusetts law has a vastly broader meaning than that verb colloquially enjoys. "'[C]arrying' a firearm occurs when [an individual] knowingly has more than momentary possession of a working firearm and moves it from one place to another." *Commonwealth* v. *Seay*, 376 Mass. 735, 737, 383 N.E.2d 828, 830 (1978) (citations omitted). And all Class A and Class B licenses are issued "subject to such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper . . ." M.G.L. c. 140, § 131(a) and (b).

Thus, a "restricted" license to "carry" is, essentially, a license to possess a firearm in one's home or business, or to use a gun at a range. To publicly carry a loaded handgun for self-defense—the right Hightower claims—an individual must have an "unrestricted" license to carry. More specifically, an unrestricted Class A license, as Defendants once offered, JA 141, provides Hightower's only available outlet because Massachusetts does not allow the open carrying of a revolver

on a Class B permit. As City Defendants' explained, in criticizing Hightower for not seeking a restricted Class A, or Class B license,

> [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*.

T., 6/24/2011, at 46, l. 3-6 (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).

Hightower has no interest in openly carrying a locked box containing an unloaded gun, and submits this is not what the Framers had in mind in 1791, nor what the Supreme Court imagined in *Heller*.

III. Constitutionally-Guaranteed Freedoms Cannot Be Left to a Licensing Official's Unbridled Discretion.

> It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Staub, 355 U.S. at 322 (citations omitted). The Second Amendment is a "freedom which the Constitution guarantees." Contrary to the panel opinion, prior restraint analysis is not limited to the First Amendment.

See, e.g. Kent v. *Dulles*, 357 U.S. 116, 128-29 (1958) (per international travel right, Secretary of State lacks "unbridled discretion to grant or withhold a passport"). Various courts have acknowledged prior restraint concepts in the context of the right to bear arms. *Mosby* v. *Devine*, 851 A.2d 1031, 1050 (R.I. 2004) (court "will not countenance any system of permitting under the Firearms Act that would be committed to the unfettered discretion of an executive agency"); *Schubert* v. *De Bard*, 398 N.E.2d 1339, 1341 (Ind. App. 1980); *People* v. *Zerillo*, 219 Mich. 635, 639, 189 N.W. 927, 928 (1922). In any event, courts have analogized the First and Second Amendments since our nation's earliest days, *Commonwealth* v. *Blanding*, 20 Mass. 304, 314 (1825); *Respublica* v. *Oswald*, 1 U.S. (1 Dall.) 319, 330 n.* (Pa. 1788), and every circuit to have considered the matter has acknowledged that First Amendment analytical frameworks should guide Second Amendment cases. *United States* v. *Marzzarella*, 614 F.3d 85, 89 n.4 (3d Cir. 2010) ("the structure of First Amendment doctrine should inform our analysis of the Second Amendment"); *Ezell* v. *City of Chicago*, 651 F.3d 684, 703 & 708 (7th Cir. 2011); *United States* v. *Chester*, 628 F.3d 673, 682 (4th Cir. 2010); *Parker* v. *District of*

Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007).

The issuance and continued possession of a Class A or B license, or of any restriction upon it, is entirely up to a police official's "suitability" determination. "A 'suitable person' is a person who is 'sufficiently responsible ... to be entrusted with a license to carry firearms.'" Commonwealth Br. 6 (citations omitted). Police enjoy "considerable latitude" to find an individual "suitable," *Howard* v. *Chief of Police*, 59 Mass. App. Ct. 901, 902, 794 N.E.2d 604, 606 (2003) (citation omitted). Contesting an adverse decision, "[t]he burden is upon the applicant to produce substantial evidence that he is a proper person to hold a license to carry a firearm." *Chief of Police of Shelburne* v. *Moyer*, 16 Mass. App. Ct. 543, 546, 453 N.E.2d 461, 464 (1983). At least as a matter of state law, there is no right to carry a firearm, "nor is there any question of a property right or deprivation of liberty involved in the statutory procedures for obtaining a license to carry firearms." *Id.*, 16 Mass. App. Ct. at 547, 453 N.E.2d at 464. Aggrieved applicants must demonstrate an abuse of discretion to deny that to which the applicants have no right. *Godfrey* v. *Chief of Police*, 35 Mass. App. Ct. 42, 44-45, 616 N.E.2d 485, 487 (1993).

The "suitability" test is the very definition of an unconstitutional prior restraint, subjecting the exercise of rights to official whim, without any meaningful review. To the extent the panel asserted that "suitability" was properly applied to Hightower, because allegedly false answers rendered her unsuitable, it accepted the *Defendants'* disputed allegations, notwithstanding that the facts and inferences to be drawn from them should be interpreted in the light most favorable to the non-moving party. Slip Op. at 15.

But even were the "suitability" standard properly applied to Hightower's revocation, as a measure protecting the integrity of the application process, this does not answer the fact that Defendants (and now, the panel) have invited Hightower to re-apply, and Hightower also challenges the standard as it would apply to any future application that would not require her to fill out the disputed form, as she is no longer a police officer. On this score, Defendants confirmed that were Hightower to reapply, she "would receive a Class A *restricted* license to carry for sport and target and for home protection." JA 142 (emphasis added). "If she desired a Class A unrestricted license to carry [in public for self-defense]," a Lieutenant Detective would "make a determination based

on her needs and the interests of the Boston police department." *Id.* In other words, Defendants can confirm that Hightower would only receive a license to *keep* but not *bear* a handgun. Her right to carry would be subject to the police's unbridled discretion—but alas, the panel declined to address whether such a right exists.

IV. Individuals Cannot Bear the Burden of Proof In Seeking to Exercise Fundamental Rights.

Whether a brief sufficiently develops an argument is somewhat subjective, depending in part upon the argument's complexity. Hightower indeed briefed the notion that the state may not force those wishing to exercise fundamental rights to carry the burden of proof in that regard. Appellant's Br. 10, 51, 53, 60, 67. The proposition is well-established. *Speiser*, 357 U.S. at 528-29; *Addington*, 441 U.S. at 427; *Santosky*, 455 U.S. at 764-65; *cf. United States* v. *Rehlander*, 666 F.3d 45 (1st Cir. 2012). It would appear inherent in the concept of rights.

V. Hightower Was Not Required to Exhaust State Remedies.

The panel opinion criticized Hightower for not re-applying, or not applying for licenses irrelevant to the right to bear arms it would not examine, and for not seeking a new post-*McDonald* "suitability"

reinterpretation from the state high court. But the Supreme Court requires neither judicial nor administrative exhaustion to present federal civil rights claims. *See, e.g. Patsy*, 457 U.S. 496. Neither *Heller* nor *McDonald* addressed the concept of "suitability," a creature of state law fully explored by state courts. And "[t]he Constitution can hardly be thought to deny to one subjected to the restraints of [a licensing law] the right to attack its constitutionality, because he has not yielded to its demands," *City of Lakewood*, 486 U.S. at 756 (citations omitted), an exercise that would be particularly futile here considering Defendants' pronouncements that Hightower could expect only a *restricted* license.

CONCLUSION

Appellant respectfully submits the case should be reheard en banc.

Dated: September 13, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this, the 13th day of September, 2012, I served the foregoing Petition for Rehearing En Banc 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 13th day of September, 2012

/s/ Alan Gura
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