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

BRIEF OF AMICUS CURIAE LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF DEFENDANTS-APPELLEES ADDRESSING SECOND AMENDMENT ISSUES AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT - FEDERAL R. APP. P. 26.1

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), the undersigned counsel states that Legal Community Against Violence is a nonprofit organization with no parent corporations or publicly held company owning 10% or more of its shares.

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STATEMENT OF INTEREST

Legal Community Against Violence ("LCAV") submits this *amicus curiae* brief under Rule 29 of the Federal Rules of Appellate Procedure in an effort to assist the Court in evaluating Appellant's Second Amendment arguments. LCAV is a national law center dedicated to preventing gun violence. The organization was founded by concerned lawyers after an assault-weapon massacre at a San Francisco law firm in 1993. Today, LCAV provides legal and technical assistance in support of gun violence prevention. LCAV tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws. As an amicus, LCAV has filed briefs and provided informed analysis in a variety of firearm-related cases, including those challenging the constitutionality of state and local laws under the Second Amendment. *See, e.g.*, *McDonald v. City of Chicago,* 130 S. Ct. 3020 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Nordyke v. King*, 644 F.3d 776, *rehearing en banc granted*, 664 F.3d 774 (2011). LCAV supports strong gun laws to reduce gun violence, including those regulating the carrying of handguns in public. To this end, LCAV publishes model laws, provides drafting assistance to federal, state, and local legislators, and testifies at public hearings.

AUTHORITY TO FILE

All of the parties have consented to the filing of this *amicus curiae* brief.

STATEMENT OF AUTHORSHIP

This brief was not authored in whole or in part by counsel for any party. No party or counsel for a party contributed money intended to fund preparation or submission of this brief. No person – other than Legal Community Against Violence, its members and its counsel – contributed money that was intended to fund preparation or submission of this brief.

ARGUMENT

I. SUMMARY.

In this putative Second Amendment challenge to Massachusetts' gun licensing law, Appellant Stacey Hightower ("Hightower") admits that the only handgun license she ever applied for was an unrestricted Class A license. She admits that unrestricted Class A licenses authorize holders to carry concealed, large-capacity handguns in public. She admits that her unrestricted Class A license was revoked when she was determined to be an "unsuitable person" (*i.e.*, "irresponsible" under Massachusetts law) for having made an untruthful statement on her license application.[1] The record is unambiguous that she chose not to challenge or appeal in Massachusetts Superior Court the suitability determination or the license revocation, and not to apply for a restricted license that would authorize the open or concealed carrying of a regular-capacity firearm.

[1] But she disputes whether the statement itself was false.

Hightower agrees that the carrying of concealed firearms is not protected by the Second Amendment and that "dangerous and unusual weapons" are not protected by the Second Amendment. She does not dispute that the large-capacity firearms authorized by unrestricted Class A licenses are dangerous and unusual. On this record, the Second Amendment does not apply and the dismissal of Hightower's claim should be affirmed.

Recognizing the disposition that awaits her claim, Hightower tries to stave off defeat with three arguments, one factual, the other two legal. None has support in the record or the law.

First, Hightower asserts that she only wants to carry a non-large capacity revolver but that she was forced to apply for an unrestricted Class A license because the Boston Police Commissioner does not issue restricted licenses to carry for self-defense. On this ground, she contends that the Second Amendment applies. There are three large holes in her claim: (1) Hightower herself testified that the reason she did not seek a restricted license was because she really would feel more comfortable with an unrestricted Class A license, (2) there is no evidence in the record to support that such a restricted license cannot be obtained in Boston, and (3) there is no question under Massachusetts law that a police commissioner may issue restricted licenses to carry regular-capacity firearms openly or concealed.

Second, Hightower tries to make a facial attack on the "suitability" licensing standard under the Second Amendment on the ground that the standard vests "unbridled discretion" in the licensing authority. The problem with this argument is twofold. First, the "suitability" standard does not vest "unbridled discretion" in the licensing authority but rather comports precisely with the Supreme Court's holding in *District of Columbia v. Heller*, 554 U.S. 570 (2008) that the Second Amendment extends only to "responsible, law-abiding citizens." Second, the argument turns entirely on Hightower's request that the Court import into Second Amendment jurisprudence the First Amendment's "prior restraint" doctrine, under which pre-publication licensing structures that vest "unbridled discretion" in permit-issuing officials are invalid. But because the right to free speech and the right to have a handgun in the home for self defense (*Heller*'s holding) are wildly different things, First Amendment prior restraint principles have no place whatsoever in Second Amendment law. The Court should reject Hightower's request to import them.

Third, Hightower argues that even if the Court does not use prior restraint law, it nonetheless should apply strict scrutiny under the Second Amendment to evaluate the Massachusetts "suitability" standard, and then strike the statute. This argument, too, is empty, as it fails to explain how a presumption of unconstitutionality – the upshot of strict scrutiny – could apply to a bedrock public-

safety law regulating the carrying of handguns in public. Strict scrutiny is completely inconsistent with the nature of firearms. The Court should reject Hightower's request to apply it under the Second Amendment.

II. THE SECOND AMENDMENT DOES NOT APPLY TO THIS CASE.

Following the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Courts of Appeals have evaluated Second Amendment claims under a two-step analysis. First, courts determine whether the challenged law burdens conduct that falls within the scope of the Second Amendment right articulated in *Heller*. *E.g., United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (describing two-step analysis); *United States v. Rene E.*, 583 F.3d 8, 11-16 (1st Cir. 2009) (holding that federal ban on handgun possession by juveniles does not encroach upon any right protected by Second Amendment). Second, where there is an actual or arguable burden, courts evaluate the law under the appropriate level of scrutiny, which every Court of Appeals decision but one has found to be intermediate scrutiny. *E.g., Marzzarella*, 614 F.3d at 89; *Heller v. District of Columbia*, __ F.3d __, 2011 WL 4551558, *8-12 (D.C. Cir. 2011); *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680-82 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc). *But see Ezell v. City of Chicago*, 651 F.3d

684, 709 (7th Cir. 2011) (applying "more rigorous showing" than intermediate scrutiny "if not quite 'strict scrutiny'" to ordinance that requires firing-range time to qualify for license to keep handgun in home for self defense but bans firing ranges from within city limits).[2]

In *Heller*, the Court announced for the first time in 217 years that the Second Amendment protects an individual right to keep a handgun in the home for self-defense: "[T]he District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Heller*, 554 U.S. at 635. As explained by the First Circuit, however: "Though announcing a significant new understanding of the Second Amendment, the Court narrowly crafted *Heller*'s actual holding." *United States v. Booker*, 644 F.3d 12, 22 (1st Cir. 2011). The Court in *Heller* held that "the right secured by the Second Amendment is not unlimited" and plainly does not encompass "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. "Dangerous and unusual" weapons, therefore, are not protected by the Amendment. *Id.* at 627. Nor does the Amendment protect the concealed carrying

[2] At least two courts have applied rational basis scrutiny, finding intermediate scrutiny unwarranted or excessive, and at least two decisions in Utah have applied strict scrutiny. *See Legal Community Against Violence*, Updated Post-*Heller* Litigation Summary at 7-8 (Apr. 4, 2012), available at http://www.lcav.org/content/post-heller_summary.pdf.

of firearms: "[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* at 626. "[N]othing in [*Heller*] should be taken to cast doubt on" the following "presumptively lawful regulatory measures," which the Court identified not as an "exhaustive" list but as "examples only": (i) "longstanding prohibitions on the possession of firearms by felons and the mentally ill," (ii) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," and (iii) "laws imposing conditions and qualifications on the commercial sale of firearms." *Id.* at 626-27 & n.26.

In *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Court held that the Second Amendment is incorporated and applicable to the states by the Fourteenth Amendment.[3]

In cases where litigants have asserted Second Amendment rights broader than the right announced in *Heller*, courts have recognized the serious public safety issues that would accompany a broadening of the right and have moved with deliberate caution. *E.g., United States v. Masciandaro*, 638 F.3d 458, 474-76 (4th Cir. 2011) (declining to expand *Heller* outside the home because claim would fail under intermediate scrutiny if Second Amendment applied, and explaining that

[3] The Court also reiterated *Heller*'s limited holding and repeated *Heller*'s limitations on the right, including *Heller*'s examples of lawful firearms regulations left undisturbed by *Heller*. *McDonald*, 130 S. Ct. at 3036, 3047.

"[t]here may or may not be a Second Amendment right in some places beyond the home" but that this is "a vast *terra incognita* that courts should enter only upon necessity and only then by small degree"). As Judge Wilkinson has explained:

> There simply is no need in this litigation to break ground that our superiors have not tread. To the degree that we push the right beyond what the Supreme Court in *Heller* declared to be its origin, we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts we cannot foresee. This 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. It is not far-fetched to think the *Heller* Court wished to leave open the possibility that such a danger would rise exponentially as one moved the right from the home to the public square.

Masciandaro, 638 F.3d at 475-76.

A. There Is No Second Amendment Right To Carry Concealed, Large-Capacity Firearms.

The record in this case is clear and undisputed that the only permit Hightower sought was an unrestricted Class A license, which would allow her to carry concealed, large-capacity handguns and long guns. Jt. App. 91-92, 96-98, 114-117, 121.[4] As *Heller* explains and Hightower concedes (as she must), there is no Second Amendment right to carry a concealed firearm:

[4] We discuss the details of section 131's licensing structure in section IV, below.

> From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. See, *e.g., Sheldon,* in 5 Blume 346; Rawle 123; Pomeroy 152–153; Abbott 333. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. See, *e.g. State v. Chandler,* 5 La. Ann., at 489–490; *Nunn v. State,* 1 Ga., at 251; see generally 2 Kent *340, n. 2; The American Students' Blackstone 84, n. 11 (G. Chase ed. 1884).

Heller, 554 U.S. at 626; Hightower's Opening Br. at 36-40; *see also Robertson v. Baldwin,* 165 U.S. 275, 281-82 (1897) (stating that Second Amendment "is not infringed by laws prohibiting the carrying of concealed weapons").

Nor is there a Second Amendment right to carry dangerous and unusual weapons like the large-capacity firearms and ammunition clips authorized by the unrestricted Class A license for which Hightower applied. Under *Heller*, the Second Amendment was understood to protect only "lawful" weapons "in common use at the time" the amendment was ratified. *Heller,* 554 U.S. at 627. "[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Id.* at 625. There is no historical common-use analogue to the large-capacity firearms and ammunition clips at issue in Hightower's unrestricted Class A license application.

Because neither concealed-carry nor large-capacity firearms and ammunition clips are protected by the Second Amendment, the Massachusetts law regulating applications for licenses to carry concealed, large-capacity firearms does not burden Hightower's Second Amendment right.

B. Hightower Admits She Never Applied For a License To Carry an Unconcealed, Regular-Capacity Firearm.

Hightower admits (as she must) that after the Police Commissioner revoked her unrestricted Class A license for making an untruthful statement on her application, she did not apply for a restricted Class A license or a Class B license to carry a regular-capacity unconcealed firearm.[5] Nor did she appeal the revocation.[6] Accordingly, if this Court agrees that an unrestricted Class A license confers benefits that are not protected by the Second Amendment – *i.e.*, that carrying a concealed large-capacity firearm in public is beyond the scope of the Second Amendment – then Hightower's Second Amendment claims necessarily fail.

To try to escape this consequence, Hightower makes three arguments. First, she argues that "[a]n unrestricted Class A license is the only sort of license issued by Defendants that would allow Hightower to publicly carry, openly or concealed, any sort of handgun, including her [regular-capacity] revolver, period." Hightower

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[5] Hightower Opening Br. at 21-22.

[6] *See* Jt. App. at 106 (Hightower Depo.), 121 (¶ 5).

Opening Br. at 23; *see also id.* at 9 n.4 (to same effect), 20 (same). This is untrue. Under Massachusetts law, Hightower was and remains free to apply for a license that would allow her to carry a regular-capacity handgun in public, either concealed (restricted Class A) or openly (Class B). Mass. Gen. L. c. 140, § 131.

Hightower's reliance on Detective Harrington's affidavit to support her contention that the only form of restricted Class A license she could obtain would be a license restricted "to carry for sport and target and for home protection" is misplaced, at best, as she omits the critical qualifying language from the very same section of the detective's affidavit in which he clearly states that he is explaining what likely would happen if Hightower sought a Class A license for a "large-capacity" firearm. Hightower offers no record support whatsoever for her statement that "the Boston police apparently do not issue unrestricted Class B licenses to *openly* carry revolvers and other non-large capacity handguns." Hightower Opening Br. at 9 n.4 (emphasis in original). Assertions without record support carry no weight. *E.g.*, *United States v. Isabel*, 945 F.3d 1193, 1198-99 & nn. 11, 12 (1st Cir. 1991) (giving no weight to appellants' factual assertions that were unsupported by record citations); *Nieves v. University of Puerto Rico*, 7 F.3d 270, 280 (1st Cir. 1993) (holding that "[f]actual assertions by counsel" that are "undocumented and unsubstantiated" are "generally not sufficient to generate trialworthy issue").

Hightower's arguments also are contrary to what she herself testified she believed would happen if she applied for a lesser license: "Q: So you believe that because they revoked your license you'll be denied if you reapply? A: It's not my belief that I would be necessarily denied to car[ry] a firearm. It's my belief that I would be denied a Class A." Jt. App. 103. She further testified: "I would feel a lot more comfortable if I could have a Class A unrestricted license." *Id.* 104.

Hightower's second and third arguments are that she was not required to appeal the revocation of her license or make further application because section 131 either operates as an unlawful prior restraint on the exercise of Second Amendment rights or fails strict scrutiny. As explained in the next section below, neither prior restraint doctrine nor strict scrutiny has any place in Second Amendment law.

III. EVEN IF THE SECOND AMENDMENT WERE APPLICABLE, APPELLANT'S PRIOR RESTRAINT AND STRICT SCRUTINY THEORIES ARE INCOMPATIBLE WITH *HELLER* AND THE NATURE OF GUNS.

A. Prior Restraint Doctrine Is Inconsistent with *Heller* and with the Nature of Firearms.

Hightower relies on *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) and other First Amendment cases to argue that section 131 should be regarded as an unconstitutional prior restraint on the exercise of Second Amendment rights because, on its face, the law vests "unbridled discretion" in licensing officials.

Hightower Opening Br. at 45-53. Leaving aside for the moment the fact that section 131 does not vest unbridled discretion in licensing officials (an issue we address in section IV, below), Hightower's novel prior restraint argument is completely inapposite.

The rule against prior restraints is a doctrine entirely of the First Amendment, designed to prevent censorship from undermining the marketplace of ideas or chilling criticism of public officials. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Near v. Minnesota*, 283 U.S. 697, 716 (1931); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The doctrine predates the Constitution and is built upon the idea that subsequent punishment sufficiently deters the most egregious abuses of the right to free speech that the remaining abuses are an endurably small price to pay to preserve the free and unfettered exchange of ideas. *See* 2 Thomas M. Cooley, A Treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the Sates of the American Union 866 (W. Carrington ed., 1927); 4 William Blackstone, Commentaries on the Laws of England 151-52 (T. Cooley ed., 1884). Ultimately, good ideas will prevail over bad ones in the marketplace. *Abrams*, 250 U.S. at 630.

The notion that the rule against prior restraints has any place in Second Amendment doctrine is so far off the mark that it is difficult to know where to

begin. But two basic points demonstrate its complete incompatibility. First, a key pillar of prior restraint doctrine is that abuses of the right to free speech are in fact remediable after-the-fact, through the law of libel and related doctrines. *See Near v. Minnesota,* 283 U.S. at 716. Citizens are allowed to speak first and argue over the consequences later. But how exactly do Hightower and her counsel propose to make this approach work in the right-to-guns context? Their approach – no prior individualized judgments about suitability are allowed – unavoidably would result in public officials issuing licenses to individuals who are *not* responsible citizens and should not be trusted with firearms, and no doubt would result in entirely avoidable deaths at the hands of such individuals. Because death is final, there is no way to "remedy" such loss of life. As a district court judge recently wrote:

> At the outset, it is noted to any reader of this Opinion that this Court shall be careful – most careful – to ascertain the reach of the Second Amendment right that the plaintiffs advance. That privilege is unique among all other constitutional rights to the individual because it permits the user of a firearm to cause serious personal injury – including the ultimate injury, death – to other individuals, rightly or wrongly. In the protection of oneself and one's family in the home, it is a right use. In the deliberate or inadvertent use under other circumstances, it may well be a wrong use. A person wrongly killed cannot be compensated by resurrection.

Piszczatoski v. Filko, __ F. Supp. 2d __, 2012 WL 104917, *1 (D.N.J., Jan. 12, 2012). It is for this and similar reasons that several courts have expressly rejected

application of the prior restraint doctrine in the Second Amendment context, and none has adopted it. *See id.* at *1 (holding that the prior restraint doctrine does not apply in the Second Amendment context); *Kachalsky v. Cacace*, 2011 WL 3962550, *25 n.32 (S.D.N.Y. 2011) (same); *Richards v. County of Yolo*, 2011 WL 1885641, *4-5 (E.D. Cal. 2011) (same). Hightower's give-out-gun-licenses-first-and-ask-questions-later proposal is ill-considered and unsuited to the Second Amendment.

Second, the Supreme Court's 2008 *Heller* decision is inconsistent with the idea that prior restraint doctrine belongs in Second Amendment law. As an initial matter, Hightower's statement that *Heller* itself is "an example of these prior restraint principles applied in the Second Amendment context"[7] is demonstrably incorrect. According to Hightower: "The Supreme Court held that the city had no discretion to refuse issuance of the permit[:] 'Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home.' *Heller*, 554 U.S. at 635." Hightower Opening Br. at 49. Omitted from Hightower's discussion of the quoted statement on page 635 of the decision, however, is the critical preceding language on page 631 of the decision that places

[7] Hightower Opening Br. at 49.

the quoted statement in context and makes clear that the Court in fact specifically said it was *not* making any holding with respect to Heller's license.

Heller challenged the District of Columbia's licensing requirement to the extent it prohibited him from carrying an unlicensed firearm in the home. *See Heller*, 554 U.S. at 576. "[Heller] conceded at oral argument that he does not 'have a problem with ... licensing' and that the District's law is permissible so long as it is 'not enforced in an arbitrary and capricious manner.'" *Id.* at 631 (ellipses in original). The District of Columbia acknowledged that if the Court struck down its handgun law and Heller then registered a handgun "'he could obtain a license, assuming he is not otherwise disqualified,' by which they apparently mean if he is not a felon and is not insane." *Id.* The Supreme Court then stated: "We therefore assume that petitioners' issuance of a license will satisfy respondent's prayer for relief and do not address the licensing requirement." *Id.* at 631. It was only after the Court first explained the parties' concessions and specifically stated that it was "not "address[ing] the licensing requirement" that the Court then made the statement on page 635 of the opinion that Hightower quotes: "Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." Hightower Opening Br. at 49. Hightower's reliance on

Heller as an example of prior restraint principles at work in the Second Amendment context is misplaced.

Apart from not having applied prior restraint principles, *Heller* is inconsistent with prior restraint doctrine. *Heller* states that Second Amendment rights are limited to "law-abiding, responsible citizens,"[8] a concept that presupposes a determination of the existence of such qualities before the rights can be exercised. If the prior restraint doctrine were imported, no such prior determination could be made.

B. Strict Scrutiny Is Inconsistent with the Nature of Firearms.

Hightower argues that if section 131 is not struck as a facially invalid prior constraint, the Court should apply strict scrutiny and strike it on that basis. Hightower Opening Br. at 54. The Court should reject Hightower's call. If somehow the Court were to determine that the Second Amendment applies, it should review the statute under the same intermediate scrutiny standard the Court employed in *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011). In determining the appropriate scrutiny standard to apply in Second Amendment cases, the Court should consider guideposts that the Supreme Court left in *Heller* and *McDonald*.

[8] *See Heller*, 554 U.S. at 635; *id.* at 644 (Stevens, J., dissenting).

First, *Heller* suggests that rational-basis scrutiny is out, as that test only applies, and only makes sense to apply, when the conduct at issue is not protected by a fundamental right. *Heller*, 554 U.S. at 628-29 & n.27.

Second, the *Heller* majority appears unwilling to accept a non-traditional form of scrutiny that could be employed to do away with what the opinion identifies as the core right:

> Justice Breyer moves on to make a broad jurisprudential point: He criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions. He proposes, explicitly at least, *none* of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."
>
> * * *
>
> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.

Id. at 634.

Third, despite the Court's rejection of an "interest-balancing," disproportionate-"burden" test, it did not reject the use of burdensomeness as an element of testing: "Nothing about those fire-safety laws undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban

on handguns. Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents." *Id.* at 632. In other words, regulatory burdens so great that they actually defeat the protected right to have a handgun for self-defense in the home are necessarily invalid, but lesser regulatory burdens are not invalid unless they fail the requisite scrutiny test.

All of this suggests the Court may have had in mind a scrutiny structure of the sort used in other fundamental rights doctrines, such as the right to marry, free speech, free exercise of religion, and the right to privacy. The scrutiny test protecting each of those rights first asks whether the law creates a "direct" or "substantial" burden on the exercise of the right. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self Defense,* 56 U.C.L.A. L. Rev. 1443, 1454 (2009); Adam Winkler, *Scrutinizing the Second Amendment,* 105 Mich. L. Rev. 683, 698 (2007); Michael Dorf, *Incidental Burdens on Fundamental Rights,* 109 Harv. L. Rev. 1175, 1176-80 (1996); Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine,* 45 Hastings L.J. 867, 893-94 (1994). If it does, then heightened scrutiny applies; if it does not, rational-basis scrutiny or reasonableness scrutiny applies.

Under *Heller* and *McDonald,* and under the cases establishing that strict scrutiny governs certain fundamental rights, it is evident that strict scrutiny is not an appropriate test in Second Amendment law. As an initial matter, most

constitutionally enumerated rights do *not* trigger strict scrutiny. The rights governed by strict scrutiny are the First Amendment's protection of the right of free speech, free exercise of religion, and freedom of association, the Fifth Amendment's implicit equal protection guarantee, and substantive due process rights (other than the Bill of Rights) applied to the states through the Fourteenth Amendment. Winkler, *Scrutinizing the Second Amendment,* 105 Mich. L. Rev. at 694. "Strict scrutiny is not applied in any doctrines arising out of the Third Amendment, the Fourth Amendment, the Sixth Amendment, the Seventh Amendment, the Eighth Amendment, the Ninth Amendment or the Tenth Amendment." *Id.*

Nor are all "fundamental" rights governed by strict scrutiny. Many are not, and among those that are, strict scrutiny only occasionally applies. *Id.* At 697-98. For example, the right to free speech triggers strict scrutiny of content-based restrictions, but content-neutral time, place and manner restrictions receive intermediate scrutiny. *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010); *see generally* Volokh, *Implementing the Right,* 56 U.C.L.A. L. Rev. at 1454-55, 1460.

Moreover, the conditions that historically justified applying strict scrutiny to laws governing other rights simply are not present with guns. Strict scrutiny presumes the law is *un*constitutional, yet the two theories supporting that

presumption do not support extending it to the Second Amendment. The first is the invidious motive theory, which originated to tackle the problem of race discrimination. Many laws were "immediately suspect" because the motives behind them likely were "invidious" or improper. *See, e.g.*, *Adarand Constructors v. Pena*, 515 U.S. 200, 213-18 (1995) (tracing development of strict scrutiny standard and holding that *all* racial classifications are subject to strict scrutiny, even those ostensibly intended to help historically disadvantaged minorities, because race is not a valid proxy for disadvantage); Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. at 700-01 (citing, *inter alia*, *Korematsu v. United States*, 323 U.S. 214, 216 (1944) and *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). Gun control laws do not fit in this category, as they are motivated by the need to protect public safety, one of government's essential duties. *Id.* at 701-03.

The second main theory comes from the free speech cases and rests on the judgment that some interests have such intrinsic value, and such instrumental value in preserving self-government, that they must be protected from all but the most exigent and compelling governmental infringements. *Id.* at 703-04; *see also* Dorf, *Incidental Burdens*, 109 Harv. L. Rev. at 1239-40. This does not describe the Second Amendment or guns.

Speech and guns are at loggerheads where it matters most: the right to free speech ends where speech turns to violence. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Yet the right to keep and bear arms begins with violence – or at least with potential violence. If the presumption *against* regulating speech disappears when speech turns to violence, then a presumption *in favor* of regulating guns must accompany the right to keep and bear arms, where violence is inherent. Strict scrutiny – which assumes that regulation is improper – is simply incompatible with the Second Amendment. *Cf. City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442-43 (1985) (recognizing the "legitima[cy]" of legislation in the area of disability classifications and thus the absence of the "predicate" for heightened scrutiny).

IV. THE "SUITABLE PERSON" STANDARD EASILY WOULD SURVIVE INTERMEDIATE SCRUTINY.

If the Court were to determine that Hightower somehow properly had invoked the Second Amendment in this case, which she has not, then the suitability standard of section 131 would be evaluated under intermediate scrutiny. That test requires (1) that the asserted governmental interest be "important" and (2) that the fit between the challenged regulation and the proffered objective be "substantial." *Booker*, 644 F.3d at 25 (citing *Skoien*, 614 F.3d at 641); *see also Marzzarella*, 614 F.3d at 89. Section 131 readily survives constitutional scrutiny.

There is no genuine doubt that Massachusetts has an "important" – indeed, a *compelling* – interest in protecting the physical safety of its citizens by ensuring that firearms are kept out of the hands of irresponsible individuals. See *Dupont v. Chief of Police of Pepperell,* 57 Mass. App. Ct. 690, 693, 786 N.E.2d 396, 399 (2003); *MacNutt v. Police Commissioner of Boston,* 30 Mass. App. Ct. 632, 635, 572 N.E.2d 577, 579 (1991); *Police Commissioner of Boston v. Robinson,* 47 Mass. App. Ct. 767, 771, 716 N.E.2d 652, 655 (1999). *See also* Hightower Opening Br. at 60 (acknowledging state's interest in "ensur[ing] that only law-abiding, responsible people have and carry guns, and that they do so safely"). Acting to protect the safety of the public is one of the most basic functions of government.

Nor should there be any genuine doubt that the suitability requirement under section 131 bears a "substantial relationship" to the state's compelling interest in keeping firearms out of the hands of irresponsible individuals. The suitability standard in fact is well-tailored to achieve this goal and does not, as Hightower asserts, grant licensing officials "unbridled discretion." *Id*. at 45-53.

Under Massachusetts law, a "suitable person" is someone who is "sufficiently responsible . . . to be entrusted with a license to carry firearms." *Wetherbee v. Costerus*, 13 Mass. L. Rptr. 159, 2001 WL 716915, at *7 (Mass. Super. Ct. 2001); *see also Howard v. Chief of Police of Wakefield*, 59 Mass. App.

Ct. 901, 901, 794 N.E.2d 604, 606 (2003) (denying license to applicant who was subject to restraining orders that demonstrated he was not someone who could "be safely entrusted with firearms" and thus not a suitable person); *Ruggiero v. Police Commissioner of Boston*, 18 Mass. App. Ct. 256, 258, 464 N.E.2d 104, 106 (1984) (holding that essential purpose of section 131 is "to limit access to deadly weapons by irresponsible persons"); *Stavis v. Carney*, 12 Mass. L. Rptr. 3, 2000 WL 1170090, at *4 (Mass. Super. Ct. 2000) (finding that the intent of the legislature was "to limit access to deadly weapons by irresponsible persons"). The suitability determination involves judgments about the applicant that are "reasonably related to effectuating the purposes of [§ 131]," *MacNutt*, 30 Mass. App. Ct. at 635, 572 N.E.2d 577, and determining whether the applicant has the necessary "character" to be trusted with a firearm, *DeLuca v. Chief of Police of Newton*, 415 Mass. 155, 159-60, 612 N.E.2d 628, 630 (1993). The cases thus establish that a suitable person is someone who is responsible and skilled enough with firearms that he or she will not pose a danger to public safety.

While section 131 contains categorical disqualifications for gun licenses with respect to individuals who are subject to domestic violence restraining orders or outstanding arrest warrants, or who have been convicted of violent crimes involving the use or possession of a deadly weapon,[9] the legislature filled the gaps

[9] Mass. Gen. L. c. 140, § 131 (d)(i), (iv), (v).

around these categorical exclusions with the suitability determinations that licensing officials are to make. This was entirely appropriate. *See Kuck v. Danaher*, 2011 WL 4537976 (D. Conn. 2011) (finding with respect to Connecticut's very similar "suitable person" statute that "it is impossible for the legislature to conceive in advance each and every circumstance in which a person could pose an unacceptable danger to the public if entrusted with a firearm").

Contrary to Hightower's claims, the statutory scheme does not leave licensing officials with unfettered discretion to decide whether to issue a license. If an official denies the application, he or she must articulate reasonable grounds for the decision, in writing, which then is subject to judicial review under a reasonableness standard. Mass. Gen. L. c. 140, § 131 (e), (f); *Howard*, 59 Mass. App. Ct. at 902; *Chief of Police of Shelburne v. Moyer*, 16 Mass. App. Ct. 543, 546, 453 N.E.2d 461, 464 (1983); *Lizotte v. Chief of Police of Fitchburn*, 2006 WL 1075596, at *2 (Mass. Super. Ct. 2006).

The "suitability" standard thus is specifically directed at keeping firearms out of the hands of irresponsible individuals who pose a danger to public safety. The touchstone is whether the applicant is "responsible," the same quality the Supreme Court in *Heller* indicated is necessary before the Second Amendment right attaches. Section 131 initially gives the job of making licensing determinations to police officials, who, as public safety officers, are best

positioned to make such determinations. It then provides for judicial review to protect against abuse. The suitability standard not only bears a "substantial relationship" to the government's compelling interest in keeping guns out of the hands of individuals who pose a danger to public safety, it achieves the state's interest in a narrowly tailored and thoughtful manner.

CONCLUSION

Hightower never pursued her state law rights following the revocation of her unrestricted Class A license to carry concealed, large-capacity handguns in public. She instead tries to use this federal lawsuit to tear down the state's bedrock firearm public-safety law, which, to the extent it touches on any Second Amendment right at all, easily survives constitutional scrutiny under *Heller* and later cases. She would do so by having this Court inject doctrines into Second Amendment law from other bodies that never were designed with the regulation of firearms in mind and which would be dangerous and ill-suited for that purpose under the Second Amendment. The Court should reject Hightower's arguments and affirm the District Court's judgment dismissing her claims.

Respectfully submitted,

Dated: April 19, 2012

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

I hereby certify that the forgoing brief complies with Rule 32(a) of the Federal Rules of Appellate Procedure. The brief uses a proportionally spaced font and contains 6051 words (excluding parts of the brief identified in Rule 32(a)(7)(B)(iii)).

I further certify that this brief complies with the type-face requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6), because this brief has been prepared in a proportionally spaced 14-point Times New Roman font using Microsoft Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system on April 19, 2012.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Steven Simon