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;
COMMONWEALTH OF MASSACHUSETTS
Defendants-Appellees

BRIEF OF THE CITY OF BOSTON AND EDWARD DAVIS

Respectfully submitted,
DEFENDANTS-APPELLEES, CITY OF BOSTON and BOSTON POLICE COMMISSIONER EDWARD DAVIS

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1. Whether the District Court properly held that Hightower's Second Amendment claim was not ripe on the grounds that she was not deprived of her Second Amendment right to bear arms because she failed to reapply for an unrestricted Class A license, apply for a restricted Class A license, or apply for a Class B license to carry a firearm.

2. Whether the District Court correctly applied intermediate scrutiny to the revocation of Hightower's unrestricted Class A license because it impacted conduct which falls outside Hightower's "core" Second Amendment rights.

3. Whether the District Court properly held that the statutory post-deprivation due process afforded Hightower was constitutionally adequate.

4. Whether Hightower's failure to raise her substantive due process and equal protection claims on appeal deems those claims waived.

STATEMENT OF THE CASE

In a six-year span, 1,876 shootings occurred in the City of Boston; more than half of which occurred in three of the City's twelve districts.[1] Of those 1,876 shootings, 301 were fatal.[2]

In an effort to reduce gun violence, the City of Boston maintains a Licensing Unit at the Boston Police Department, which issues and monitors firearm licenses.[3] The Licensing Unit is administered by a Boston Police Department Lieutenant Detective who oversees the licensing of firearms within the City of Boston.[4] As of March 1, 2011, 3,788 individuals held a license to publicly carry a firearm in some manner, in the City of Boston.

In August 2008, former Boston Police Officer Stacey Hightower possessed an unrestricted Class A firearm license which allowed her to carry a large-capacity firearm, concealed, for any lawful purpose.[5] On August 20, 2008, Boston Police Commissioner Edward Davis revoked Hightower's firearm license after he determined that she had been untruthful on an

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1 Joint Appendix ("Appx.") 224; *see also* M.G.L. c. 140, § 121 (authorizing police chief to administer Massachusetts firearm licensing statute).

2 *Id.*

3 Appx. 140, ¶¶ 2, 3

4 Appx. 140, ¶¶ 2, 3

5 Appx. 212 (August 18, 2008 Personnel Order)

internal firearm license renewal form.[6] The firearm license renewal form inquired to all Boston Police Officers whether they had internal affairs charges pending against them at the time of the application or renewal.[7] Hightower answered "no" to the question even though internal disciplinary proceedings had been ongoing against her for years.[8]

As a result of her untruthful response, the Commissioner sent Hightower a letter revoking her license and directed her to surrender her firearm license and her firearm to her local police station without delay.[9] In that same letter, Hightower was notified of her ninety day right to appeal the revocation to the district court.[10] Hightower complied and surrendered her license and firearm.[11] Hightower, however, did not appeal and instead brought suit against the City of Boston and Commissioner Davis in the United States District Court, District of Massachusetts, seeking declaratory and injunctive relief under the Second Amendment for the revocation of her firearm.[12]

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6 Appx. 205

7 Appx. 99

8 Appx. 99 ("Form G-13-S" Worksheet); 190 (October 10, 2007 Letter); Appx. 212 (August 18, 2008 Personnel Order); 214 (Confidential IAD Assessment); 227 (Memorandum to Commissioner O'Toole).

9 Appx. 205 (August 28, 2008 revocation letter)

10 Appx. 205 (August 28, 2008 revocation letter)

11 Appx. 207 (August 29, 2008 incident report)

12 Appx. 3 (Docket Sheet for Case No. 2008-cv-11955-DJC)

Hightower challenges the City of Boston's revocation of her unrestricted Class A license under the Second Amendment.[13] Additionally, Hightower alleges that the City of Boston deprived her of her Fourteenth Amendment right to due process by failing to provide her with a pre-deprivation hearing to ascertain her "suitability" to possess an unrestricted Class A license.[14] Hightower also asserts that the Massachusetts firearms licensing statutes are unconstitutional on their face.[15] Hightower, however, has never sought, nor been denied, a more restrictive firearm license, one which, under Massachusetts law, permits individuals to carry a firearm outside the home for self defense.[16]

On January 31, 2011, Hightower moved for summary judgment.[17] Based on Hightower's challenge to the constitutionality of the Massachusetts firearm statute, Mass. Gen. L. c. 140, § 131, *et seq*., the Commonwealth intervened in the suit on February 11, 2011.[18] On April 21, 2011 the Commonwealth filed a cross-motion for summary judgment and on April 22, 2011, the City of Boston also filed a cross-motion for summary judgment.[19]

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13 Appx. 11 (First Amended Complaint)
14 *Id*.
15 *Id*.
16 Appx. 102-106 (Deposition of Plaintiff-Appellant)
17 Appx. 33-34 (Plaintiff's motion for summary judgment).
18 Appx. 7, docket No. 32.
19 Appx. 7, docket nos. 35, 39.

On September 29, 2011, the District Court denied Hightower's motion for summary judgment and granted the Commonwealth and City's motions for summary judgment.[20]

The District Court held that Hightower's Second Amendment claim was not ripe because Hightower had not been denied a firearm license that regulated conduct protected by the Second Amendment.[21] The District Court further rejected Hightower's procedural due process claim, holding that the post-deprivation judicial review afforded her under Massachusetts General Laws, Chapter 140, Section 131(f) satisfied due process.[22] The District Court also granted summary judgment in favor of the City and Commonwealth based on Hightower's substantive due process and equal protection claims because the firearm revocation did not shock the conscience and the Commonwealth's "suitable person" standard was rationally related to the state's legitimate interest in public safety.[23]

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20 Appx. 9, docket nos. 53, 54

21 Hightower's Addendum ("Add.") 27-34.

22 *Id.* at 35-40.

23 *Id.* at 40-51.

STATEMENT OF THE FACTS

1. The Massachusetts Firearm Licensing Scheme

Authority to administer the Massachusetts firearm licenses is vested in the police chief of the Commonwealth's cities and towns. *See* M.G.L. c. 140, § 121. The possession of firearms is regulated by Massachusetts General Laws, Chapter 140, Section 131, *et seq*. To carry a firearm in public, one must obtain either a Class A or Class B license. M.G.L. c. 140, § 131(a), and (b). Both Class A and Class B licenses may be issued without restrictions, allowing an individual to carry a firearm for "any lawful purpose," or issued with restrictions that are imposed by the city or town's licensing authority. *Id*. An unrestricted Class A license permits an individual to carry a large capacity firearm openly or concealed in public "for all lawful purpose." M.G.L., c. 140 § 131(a). In contrast, a Class B license permits an individual to carry a non-large capacity firearm openly, but not concealed, in public. M.G.L., c. 140 § 131(b).

The Massachusetts statute limits the issuance of Both Class A and Class B licenses to applicants who are "suitable," have "good reason to fear injury to his person or property, or for any other reason, including the carrying of firearms for use in sport or target practice only" subject to such restrictions the licensing authority "deems proper," unless the applicant (1) has been convicted of felony or misdemeanor punishable by imprisonment for more than two years; (2) has been

hospitalized for mental illness and is still disabled by such illess; (3) has suffered from drug or alcohol addiction and has not yet been rehabilitated; (4) is less than twenty-one years of age; (5) is an alien; (6) is the subject of an outstanding restraining order or has an outstanding arrest warrant. *See* M.G.L. c. 140, § 131 (d).

To simply possess a firearm in one's home for self defense, an individual needs only a Class A or B license with a home protection restriction, or a firearm identification card. M.G.L. c. 140, §§ 129B, 131. A firearm identification card does not allow for the possession of a large capacity firearm, a non-large capacity firearm, or large capacity rifle. M.G.L. c. 140, § 129B(6). In essence, a firearm identification card allows for the possession of a non-large capacity rifle or shotgun. M.G.L. c. 140, § 129B(2). A firearm identification card *shall issue* unless the applicant is statutorily disqualified by one of the exemptions listed *supra*. *See* M.G.L. c. 140, § 131(d). "Suitability" and "good reason to fear injury to his property or person" are not considerations.

To obtain a Class A or Class B license, an individual must apply for one within the jurisdiction of the licensing authority to which they reside or has a place of business. M.G.L., c. 140, § 131(a),(b). In the City of Boston, the licensing authority is the Boston Police Commissioner.[24] Within forty days of application, the licensing authority must approve or deny the application and, if such

[24] Appx. 142, ¶ 2, 3 (Harrington Declaration).

application is denied, the licensing authority must do so in writing. *Id*. Once a license is granted, that license may be revoked or suspended by the licensing authority "upon the occurrence of any event that would have disqualified the holder from being issued that license. . . or if the licensing authority determines that the license holder is no longer a "suitable person." M.G.L. c. 140 § 131(f).

2. Revocation and Hearing

A revocation of a firearm license must be done in writing and state the reasons for such revocation. M.G.L. c. 140 § 129D, 131(f). A revocation of a license requires the license holder to surrender his or her license and firarem "without delay" unless an appeal is pending. *Id*. Upon revocation of a firearm license, a licensee must surrender his or her license and firearm to his or her local police department. M.G.L. c. 140, § 129D.

If the licensing authority revokes a holder's license, the holder may, within ninety days, appeal to the district court having jurisdiction in the city or town where the license was granted. M.G.L. c. 140, § 131(f). The holder's license may be reinstated if the justice of that court finds that "there was no reasonable ground for denying, suspending or revoking such license and that the petitioner is not prohibited by law from possessing same." *Id*. The district court reviews license revocations to ensure the revocation was not arbitrary, capricious, or an abuse of discretion. *MacNutt v. Police Commissioner of Boston*, 572 N.E.2d 577, 580

(Mass.App.Ct. 1991). A decision is arbitrary and capricious if it "lacks any rational explanation that reasonable persons might support." *Cambridge v. Civil Service Commission*, 682 N.E.2d 923, 925 (Mass.App.Ct. 1997). An individual aggrieved by a decision of the district court can seek further judicial review in superior court in an action in the nature of certiorari, pursuant to Mass. Gen. Laws c. 249, § 4. *See Godfrey v. Chief of Police of Wellesley* 616 N.E.2d 485, 487 (Mass.App.Ct. 1993).

3. Licensing Of Firearms In The City of Boston

The City of Boston has established a Licensing Unit within the Boston Police Department to regulate the licensing of firearms.[25] The Boston Police Commissioner is the licensing authority, who at all relevant times, assigned a lieutenant detective to oversee the City's Licensing Unit.[26] Under Mass. Gen Laws, Chapter 140, Section 131, licensing authorities may impose restrictions "relative to the possession, use or carrying of such firearm as the licensing authority deems proper." M.G.L., c. 140, § 131(d). The City issues Class A unrestricted licenses if the applicant is not statutorily exempted, is "suitable," "has good reason to fear injury to person or property, or for any other reason, including

[25] Appx. 140, ¶¶ 2, 3 (Harrington Declaration).

[26] Appx. 140, ¶¶ 2, 3 (Harrington Declaration).

for sport and target practice," and by balancing the applicant's "stated need"[27] with "the interest of the Boston police department in regulating Class A unrestricted licenses." Appx. 142. [28]

In addition to the issuance of unrestricted Class A unrestricted, the City issues Class A licenses subject to restrictions. Some City-issued restrictions allow for an individual to carry a firearm for sport and target practice or for employment purposes. [29] A sport and target restriction typically requires an individual to carry his or her firearm in a locked box, and when necessary, in the trunk of his or her vehicle.[30] An employment restriction allows the individual to carry the weapon on their person while traveling to and from employment.[31] Because the City reviews an applicant's stated need for an unrestricted Class A license on a case by case basis, this list of restrictions is not exhaustive.[32]

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[27] The City's "stated need" consideration is derived from the statute's requirement that an unrestricted Class A license be issued only to "suitable" persons who have "good reason to fear injury to his person or property, or for any other reason, including the carrying of firearms for sport and target practice only. . ." M.G.L. c. 140, § 131(d).

[28] Appx. 142, ¶ 19 (Harrington Declaration).

[29] Appx. 141, ¶ 7 (Harrington Declaration).

[30] Appx. 141, ¶ 8 (Harrington Declaration).

[31] Appx. 141, ¶¶ 7, 8 (Harrington Declaration).

[32] Appx. 210 ¶ 8 (Guida Declaration) (other restrictions included home protection and film production/ theature use).

As of March 1, 2011, 3,798 City of Boston residents possessed Class A licenses.[33] Of those Class A licenses, 2,239 were issued without restrictions, 291 were issued for employment purposes, 1,257 were restricted to sporting activities, 10 were restricted to home protection, and 1 was restricted for film production/ theatre use.[34]

4. Application Forms

In Massachusetts, all firearms applicants must fill out a Massachusetts Firearm Application Form.[35] The form asks applicants a series of questions, and in particular, whether he or she has been hospitalized for a mental illness, been in treatment for drug addition, currently subject to any abuse or restraining orders, and requires the officer to submit to an interview and a criminal history check.[36] The information provided on the Massachusetts form is required to be answered "completely and accurately."[37] Knowingly providing false information is subject to a punishment of a fine of "not less than $500 nor more than $1,000 or by imprisonment for not less than 6 months nor more than 2 years in a house of

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33 Appx. 210, ¶ 8 (Guida Declaration).

34 Appx. 210, ¶ 8(b) (Guida Declaration).

35 Appx. 201-203 (Massachusetts Firearm License To Carry Application/Renewal Form).

36 Appx. 202.

37 Appx. 202.

correction," or both. Mass. Gen. Laws, c. 140, §§ 129B(8) and 131(h).[38] Applications are signed under the pains and penalties of perjury.[39]

In addition to the Massachusetts Firearm Application/Renewal Form, the City of Boston requires that Boston Police Department Sworn Personnel fill out a separate License to Carry Firearms Work Sheet ("Form G13-S") when applying or renewing a firearms license.[40] A sworn police officer does not need a firearm license to carry a department-issued firearm, but does need a firearm license in order to carry a personal firearm.[41] The "Form G13-S" requires information regarding the officer's rank, assignment, and date of appointment, and requires the officer to answer "yes" or "no" as to whether the officer has any "complaints or charges pending" against her.[42] Once submitted, the form is then reviewed by the internal affairs department and the license is either issued without restrictions, with restrictions, or denied by the licensing authority.[43]

The City's ability to accurately ensure that the individuals to whom it issues firearm licenses qualify under the statutory requirements, and will not pose a danger to themselves or others, depends largely on the information provided by the

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38 Appx. 203.
39 Appx. 203.
40 Appx. 142, ¶ 10 (Harrington Declaration); 199 (Form G13-S).
41 Appx. 142, ¶ 10 (Harrington Declaration).
42 Appx. 199 (Form G13-S)
43 Appx. 199 (Form G13-S); *See* Appx., 142, ¶ 4 (Harrington Declaration).

applicant.[44] To ensure the up-to-date accuracy of the information provided, the City reviews the Massachusetts Instant Record Checks System (MIRCS) on a daily basis.[45] The MIRCS database provides information to Massachusetts police departments regarding any disqualifying information, such as arraignments, indictments, warrants, or restraining orders.[46] If the City discovers that a license holder has been subject to one of the above, or is no longer a suitable person, the City will revoke the license.[47] If the City determines that an applicant has provided untruthful information on his or her application or renewal form, or a Form G13-S, the City will either deny the license, or in the event the untruthful information is discovered after issuance of a license, revoke the license.[48]

5. Stacey Hightower

The Plaintiff-Appellant, Stacey Hightower ("Hightower"), is a Boston resident and former Boston police officer.[49] From approximately 2000–2008, she possessed an unrestricted Class A firearm license.[50] In August 2008, Hightower resigned from the Boston Police Department.[51] In July 2008, shortly before her

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44 Appx. 199 (Form G13-S); *See* Appx., 142, ¶ 4 (Harrington Declaration).
45 Appx. 142, ¶ 4 (Harrington Declaration).
46 Appx. 142, ¶ 4 (Harrington Declaration).
47 Appx. 142, ¶ 15, 16 (Harrington Declaration).
48 Appx. 142, ¶ 15 (Harrington Declaration).
49 Appx. 12, ¶¶ 4, 10 (First Amended Complaint).
50 Appx. 197 (Firearm License History); 201 (Mass. Firearms Application/Renewal Form).
51 Appx. 212 (August 18, 2008 Personnel Order).

resignation, Hightower applied to renew her unrestricted Class A license which had expired four months earlier.[52] On the Massachusetts application form, Hightower listed her stated reason for requesting a license "for all lawful purposes."[53] As for the Form G13-S, Hightower answered "no" to the question of whether she had disciplinary charges pending against her.[54]

At the time she applied to renew her license, however, internal affairs charges had been pending against her since 2004.[55] In 2004, an arrestee complained to internal affairs that he had been assaulted at a police station after he was arrested.[56] Hightower had transported the complainant from the location of his arrest to the police station for booking.[57] Therefore, as part of the internal affairs investigation, Hightower was interviewed.[58] During her interview, the internal affairs investigators believed that Hightower had withheld information from the investigating officers and neglected her duty at the time of the incident.[59] As a result of the internal affairs investigation, Hightower was found to be in

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52 Appx. 201 (Mass. Firearms Application/Renewal Form).

53 Appx. 203 (Mass. Firearms Application/Renewal Form).

54 Appx. 199 (Form G13-S)

55 Appx. 148 (May 18, 2005 Memorandum); 150 (November 4, 2005 Memorandum); 214 (Confidential IAD Assessment); 190 (October 10, 2007 letter).

56 Appx. 138 (May 26, 2005 Interview Order); Appx. 145-46 (Fong Declaration); Appx. 150 (November 4, 2005 Disposition Notice); Appx. 171 (Hightower Deposition); Appx. 190 (October 10, 2007 letter)

57 Appx. 145-46 (Fong Declaration)

58 Appx. 145, ¶ 5 (Fong Declaration)

59 Appx. 150 (November 4, 2005 Disposition Notice).

violation of Boston police department rules 102, § 4 (neglect of duty); 102, § 27 (abuse of process – withholding evidence); 103A, § 28 (violation of patrol wagon duty). Hightower was notified of that finding on or about November 4, 2005.[60] Upon being notified of the finding, Hightower hired an attorney to negotiate the imposition of discipline by the BPD as a result of the finding that she had violated BPD rules.[61]

When Hightower applied to renew her firearm license in 2008 and filled out the Boston Police Department Form G13-S in 2008, negotiations between the BPD and her attorney regarding her discipline had been ongoing since 2005.[62] Because Hightower's discipline had yet to be imposed at the time she filled out the Form G13-S to renew her firearm license, the 2005 internal affairs investigation and subsequent finding of rules violations, were still pending against her.[63] Consequently, Hightower's answer of "no" to the Form G13-S question as to whether she had any "complaints or charges pending" against her was untrue.[64]

Although the Form G13-S was reviewed and approved by internal affairs, the inaccuracy in Hightower's application was initially overlooked.[65] When Hightower submitted her resignation from the police department in July 2008,

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60 Appx. 150 (November 4, 2005 Disposition Notice)
61 Appx. 163-172 (Hightower Deposition).
62 Appx. 163-172 (Hightower Deposition); Appx. 145-46 (Fong Declaration).
63 Appx. 145-46 (Fong Declaration).
64 Appx. 142, ¶ 14 (Harrington Declaration).
65 Appx. 199 (Form G13-S).

however, internal affairs alerted the Police Commissioner that she had resigned without resolving the charges stemming from the 2004 incident.[66] In response, the Commissioner issued a department-wide "Personnel Order" stating that Hightower had resigned with charges pending.[67] Upon viewing the Commissioner's Personnel Order, the Licensing Commander reviewed Plaintiff's Form G13-S again and discovered that she had failed to disclose the pending charges on her form.[68] The Licensing Commander then confirmed with internal affairs that Hightower indeed had charges pending against her when she submitted the Form G13-S in July 2008.[69]

Based on her untruthful response on the Form G13-S, the Licensing Commander revoked Hightower's license pursuant to M.G.L. c. 140 § 131(f) by mailing her a revocation letter instructing her to surrender her firearm and firearm license without delay.[70] Hightower surrendered her firearm license and firearm approximately one week after receiving the revocation letter.[71] Although Hightower had ninety days to appeal the revocation of her firearm license pursuant to M.G.L. c. 140, § 131(f), she did not exercise her right of appeal.[72]

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66 Appx. 212 (August 18, 2008 Personnel Order).
67 Appx. 212 (August 18, 2008 Personnel Order).
68 Appx. 142, ¶¶ 13 (Harrington Declaration)
69 Appx. 142, ¶¶ 12-14 (Harrington Declaration)
70 Appx. 205(August 20, 2008 revocation letter)
71 Appx. 207 (August 29, 2008 incident report)
72 Appx. 142 ¶ 17 (Harrington Declaration).

Additionally, Hightower did not reapply for an unrestricted Class A license as a civilian.[73] At the time her license was revoked, Hightower was no longer a Boston police officer and would not have had to fill out the Form G13-S again.[74] Thus, she would not have had to answer as to whether she had pending internal affairs charges against her since she still maintains that she did not.[75] Hightower has not reapplied for an unrestricted Class A license, a restricted Class A license, Class B license, or a firearm identification card.[76]

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[73] Appx. 182-186 (Hightower deposition)

[74] Appx. 142, ¶ 19 (Harrington Declaration); Appx. 27, ¶ 37 (Defendants' Answer to First Amended Complaint).

[75] Appx. 142, ¶ 19 (Harrington Declaration); Appx. 27, ¶ 37 (Defendants' Answer to First Amended Complaint).

[76] Appx. 142, ¶ 19 (Harrington Declaration).

SUMMARY OF THE ARGUMENT

1. Hightower's Second Amendment claim is not ripe as the revocation of her Class A unrestricted firearm license has not foreclosed her from obtaining a license to carry a firearm outside her home for the purpose of self defense. After her license was revoked, Hightower could have (1) appealed to the district court for judicial review of the revocation pursuant to Mass. Gen Laws, c. 140, § 131(f); (2) reapplied for an unrestricted Class A license as a civilian who would not have to fill out the Form G13-S and respond to whether charges were pending against her; (3) applied for a Class A license that was restricted to "self defense" only; or (4) applied for a Class B license. All of these options could have allowed Hightower to carry a firearm in public for the purpose of self defense. Hightower contends she would have been denied one of these licenses based on the earlier revocation. That contention is unsupported by the record. In fact, the District Court record demonstrates that her Second Amendment claim is based solely on her own speculation that she would be denied if she were to seek a different type of license. Consequently, her claim is not ripe for review.

2. Even if Hightower's Second Amendment claim was ripe, the revocation of her unrestricted Class A license did not infringe upon her Second Amendment rights. The revocation of her firearm simply restricted her from carrying a concealed firearm in public "for any lawful purpose." As the Supreme Court

stated in *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Second Amendment does not protect a right to carry a concealed weapon in public at any time, for any purpose, or for any confrontation. Nor has it been interpreted to extend beyond the home. Thus, the City's revocation of Hightower's unrestricted Class A license did not fall within the ambit of the Second Amendment.

3. Even if this Court were to interpret *Heller* as extending beyond the home, and Hightower could show that an unrestricted Class A license fell within the purview of the Second Amendment based on the City's licensing practice, the revocation was constitutionally sufficient under intermediate scrutiny review. The City has an important government interest in ensuring that applicants provide accurate and complete information on their firearm forms in order to prevent firearms from falling into the hands of irresponsible or dangerous people. Revoking the license of an individual who the City has determined to have provided false information on the application form is substantially related to achieving that interest.

4. The City did not deprive Hightower of due process as the post-deprivation due process that was available to her pursuant to Mass. Gen. Laws, c. 140, § 131(f) was constitutionally adequate.

5. Hightower has waived her equal protection and substantive due process claims as she has failed to raise those claims on appeal.

STANDARD OF REVIEW

A review of summary judgment is *de novo,* construing the record and all reasonable inferences drawn from it in the light most favorable to the nonmoving party. *See, e.g., Hernandez–Loring v. Universidad Metropolitana*, 233 F.3d 49, 51 (1st Cir. 2000). "Of course, the ground rules for summary judgment leave 'no room for credibility determinations, no room for the measured weighing of conflicting evidence such as the trial process entails, no room for the judge to superimpose his own ideas of probability and likelihood (no matter how reasonable those ideas may be)' on the cold pages of the record." *Rodriguez v. Municipality of San Juan*, 659 F.3d 168, 175 (1st Cir. 2011); (quoting *Greenburg v. Puerto Rico Mar. Shipping Auth.*, 835 F.2d 932, 936 (1st Cir.1987))

Although both the Commonwealth and City cross-moved for summary judgment, it does not alter the Court's review. *See, e.g., D & H Therapy Assocs., LLC v. Boston Mut. Life Ins. Co.,* 640 F.3d 27, 34 (1st Cir.2011) (each summary judgment motion must be assessed separately, drawing inferences against each moving party in turn, and that appellate review is still *de novo*). With this analytical framework in mind, this Court should affirm the District Court's denial of Hightower's motion for summary judgment and affirm the District Court's grant of summary judgment in favor of the City and Commonwealth.

ARGUMENT[77]

I. The District Court Properly Held That Hightower's Claim Is Not Ripe for Review.

Hightower challenges the revocation of her unrestricted Class A license under the Second Amendment. Her claim, however, is not ripe as the revocation of her unrestricted Class A firearm license did not prohibit her from obtaining a license to carry a firearm. The ripeness doctrine prevents courts from making "unnecessary constitutional decisions," and ensures that courts will not decide a case until it "is fully developed." *Doe v. Bush*, 323 F.3d 133, 138 (1st Cir. 2003). Hightower's case is not "fully developed" as she has never sought a firearm license in any other form than an unrestricted Class A.

Hightower's claim is not ripe because she could have reapplied as a civilian for an unrestricted Class A license, which would not require her to fill out the Boston Police Form G13-S and answer as to whether she had pending charges; she also could have applied for a Class A license to carry concealed with a restriction for "self defense;" or for a Class B license to carry openly.[78] Any one of these licenses could allow her to carry her revolver outside her home in some manner.

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[77] Pursuant to Fed. R. App. P. 28(i), the City hereby adopts and incorporates in its entirety, the Commonwealth's Brief.

[78] Hightower's personal revolver is a non-large capacity firearm that falls within the category of firearms permitted to be carried unconcealed under a Class B license. M.G.L. c. 140, § 131(b).

Hightower must do more than show that she was deprived from possessing one particular form of firearm license to establish a Second Amendment violation. Rather, for Hightower to have a ripe claim, she must show that she has been prevented from acquiring any other means of carrying her firearm. *Tirado v. Cruz*, 2012 WL 525450 at * 6 (D. P.R. February 16, 2012) (citing *See* Daniel E. Feld, J.D., *Federal constitutional right to bear arms*, 37 ALR Fed. 696 (1978); *and Gun Seizure Unconstitutional: not Violation of Second Amendment*, 29 No. 12 McQuillin Mun. Law Rep. 1 (2011)).

It is axiomatic that courts lack subject matter jurisdiction to consider unripe claims. *See Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 534 (1st Cir. 1995). Federal Courts utilize the ripeness doctrine to "ensure the integrity" of the justiciability principle that "federal courts may adjudicate only actual cases and controversies." *Gastronomical Workers Union Local 610 & Metropolitan Hotel Ass'n Pension Fund v. Dorado Beach Hotel Corp.*, 617 F.3d 54, 61 (1st Cir. 2010) (internal citations omitted).

"[T]he doctrine of ripeness. . . asks whether an injury that has not yet happened is sufficiently likely to happen to warrant judicial review." *Gun Owners' Action League, Inc v. Swift*, 284 F.3d 198, 205 (1st Cir. 2002) (internal quotation omitted). This doctrine is rooted in Article III, Section 2, of the United States Constitution. *Verizon New England, Inc., v. Int'l Bhd. of Elec.Workers, Local No.*

2322, 651 F.3d 176, 188 (1st Cir. 2011). Ripeness considerations include the need to prevent the courts "from entangling themselves in abstract disagreements," and that "by waiting until a case is fully developed before deciding it, courts benefit from a focus sharpened by particular facts." *Doe v. Bush*, 323 F.3d 133, 138 (1st Cir. 2003) (internal quotations omitted); *see also Mangual v. Rotger*, 317 F.3d 45, 59 (1st Cir. 2003) ("if elements of the case are uncertain, delay may see the dissipation of the legal dispute without need for decision").

Determining ripeness requires an assessment of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *McInnis-Misenor v. Maine Med. Ctr.*, 319 F.3d 63, 70 (1st Cir. 2003). "The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all." *Id*. at 70 (quoting *Ernst & Young*, 45 F.3d at 536). As for the question of hardship, courts must consider "whether the challenged action creates a 'direct and immediate' dilemma for the parties." *W.R. Grace & Co. v. United States Envtl. Prot. Agency*, 959 F.2d 360, 364 (1st Cir. 1992). "This inquiry encompasses the question of whether plaintiff is suffering any present injury from a future contemplated event." *McInnis-Misenor*, 319 F.3d at 70. "Both prongs of the test ordinarily must be satisfied in order to establish ripeness." *Ernst & Young*, 45 F.3d at 535.

The *coup de grace* of Hightower's Second Amendment claim is that she has not been categorically prohibited from obtaining a license to carry a firearm in public for self defense. Although her unrestricted Class A license was revoked, that license allowed her to carry a large-capacity firearm concealed, in public, for "any lawful purpose." Hightower could have, but did not, apply for a restricted Class A license that was more tailored to her stated need of self defense or apply for a Class B license, which statutorily permits the open carrying of revolvers and other non-large capacity firearms. M.G.L., c. 140, § 131(b). Simply put, Hightower does not need an unrestricted Class A license to carry her personal revolver in public for self defense as it is undisputed that the law allows for her to do so under a restricted Class A or Class B license. Mass. Gen. Laws, c. 140, § 131(a), (b).

Hightower acknowledges that a Class B license would allow her to openly carry her personal revolver.[79] Nonetheless, she has never even applied for one, stating only that the City "apparently do[es] not issue unrestricted Class B licenses to *openly* carry revolvers and other non-large capacity handguns."[80] (emphasis in original). That contention, however, is not supported by the record. Hightower's Second Amendment claim relies solely on her *assumption* that she would be denied an unrestricted Class A license as a civilian, a more tailored Class A license

[79] App. Brief, p. 9 n. 4.

[80] App. Brief, p. 9 n. 4.

with a self defense restriction, or a Class B license. This is a textbook example of a claim that is not ripe for review and, for that reason, the District Court's grant of summary judgment should be affirmed.

II. Even If Hightower's Claim Was Ripe, It Still Fails Because The Revocation Of Her License Did Not Restrict Activity Protected By The Second Amendment.

Hightower argues that the Second Amendment encompasses the right to carry a handgun in public for self defense. That contention, however, stretches the scope of the Supreme Court's decisions in both *Heller* and *McDonald* beyond their logical extreme. In the wake of *Heller* and *McDonald*, neither the United States Supreme Court nor any United States Court of Appeals has recognized such a broad right.

The Second Amendment states, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In *Heller v. District of Columbia*, 554 U.S. 570, 635 (2008), the United States Supreme Court held for the first time that the Second Amendment guarantees an individual's right to possess a handgun for the purpose of self-defense. *Id*. at 622. Under the Due Process Clause of the Fourteenth Amendment, this right is equally protected against infringement by the States. *See McDonald v. City of Chicago*, --- U.S. ----, 130 S.Ct. 3020, 3026 (2010).

In *Heller*, the Supreme Court struck down a District of Columbia law that "totally bann[ned] handgun possession in the home" and further "require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, render it inoperable." *Heller*, 554 U.S. at 628. Two years later, in *McDonald*, the Supreme Court struck down a similar Chicago law that "effectively bann[ed] handgun possession by almost all private citizens who reside in the City." *McDonald*, 130 S.Ct. at 3026. Thus, *Heller* and *McDonald* recognized an individual right to possess a handgun in the home for the purpose of self defense. *Heller*, 554 U.S. at 628 (striking down D.C.'s handgun ban because it "extend[ed]. . . to the home, where the need for defense of self, family, and property is most acute."); *see e.g. United States Masciandro*, 638 F.3d 458, 470 (4th Cir. 2010) ("firearm rights have always been more limited [outside the home] because public safety interests often outweigh individual interests in self-defense.").

The *Heller* Court cautioned that the Second Amendment, like most rights, "is not unlimited." *Heller* 554 U.S. at 571. "It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized the right to keep and bear arms is not 'a right to keep and carry any weapon whatsoever in any manner whatsoever for and for whatever purpose.'" *McDonald*, 130 S.Ct. at 3047 (quoting *Heller*, 554 U.S. at 626). In so limiting the right, the Supreme Court stated that "we do not read the Second Amendment to

protect the right of citizens to carry arms for a*ny sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." *Heller*, 554 U.S. at 595 (emphasis in original).

Endorsing further limitations on the right, the *Heller* Court stated that "long standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" were presumptively lawful, and that such restrictions were not "exhaustive." *Heller*, at 626-27. The *Heller* Court went even further to expressly sanction laws prohibiting the carrying of concealed firearms in public. *Id*. at 626.

Following the Supreme Court's decision, Courts have interpreted *Heller* to direct "a two-prong approach to Second Amendment challenges" to government action. The first inquiry is "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, [the] inquiry is complete. If it does, [the next step is to] evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid." *Fletcher v. Haas*, 2012 WL 1071713, at * 4 (D. Mass. March 30, 2012) (quoting *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir.2010)) (internal citation omitted). *See e.g. Heller v. District of Columbia*, 670 F.3d 1244, at *5 (D.C.Cir. Oct. 4, 2011) (hereinafter " *Heller II* ");

Ezell v. City of Chicago, 651 F.3d 684, 702–04 (7th Cir.2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir.2010); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir.2010).; *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *see United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc).

The threshold inquiry in assessing a Second Amendment claim is to determine whether the government action infringes upon "conduct that falls within the scope of the Second Amendment." *Marzzarella*, 614 F.3d at 89. Because Hightower never sought a Class B license to carry openly, or a Class A license restricted to self-defense, she is constrained to challenging only her right to carry concealed for "any lawful purpose."—a right, she freely admits is not within the ambit of the Second Amendment. As a result, Hightower's claim "is not subject to further Second Amendment review." *Ezell*, 651 F.3d 702-703.

a. The Concealed Carrying Of Firearms Was Expressly Excluded From Second Amendment Protection By The Supreme Court

The Supreme Court expressly rejected the concealed carrying of firearms as conduct falling within the purview of the Second Amendment.

> 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. 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.

Heller 554 U.S. at 626. In so stating, the Supreme Court did not alter its age-old holding in *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897), where the Court held that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." In the aftermath of the *Heller* and *McDonald* decisions, courts addressing the issue have acknowledged the constitutionality of prohibitions on concealed carrying. *See Moore v. Madigan*, 2012 WL 344760 (C.D. Ill. Feb. 3, 2012) (finding law criminalizing concealed carry constitutional); *Peruta v. County of San Diego*, 758 F.Supp.2d 1106 at * 4 (S.D. Cal. Dec. 10, 2010) (finding requirement that persons have "proper purpose" in order to carry firearm concealed passes constitutional scrutiny); *United States v. Hart*, 726 F.Supp.2d 56, 60 (D. Mass. 2010) ("Heller does not hold, or even suggest, that concealed weapons laws are unconstitutional"); *Dorr v. Weber*, 741 F.Supp.2d 993, at * 8 (N.D. Iowa, May 18, 2010).

b. The *Heller* Court Did Not Extend The Second Amendment's Protection Outside The Home.

Recognizing the insurmountable obstacle she faces in overcoming bans on concealed carrying, Hightower argues that she has a Second Amendment right to carry openly and that the revocation of her unrestricted Class A license prohibited her from doing so because the City does not allow for open carry. [81] In so doing, Hightower attempts to bring presumptively lawful concealed weapons restrictions

[81] App. Brief, p. 36, 40.

into the realm of the Second Amendment, by arguing that the City's application of the Massachusetts firearm laws imposes an unconstitutional burden on the carrying of handguns outside the home for self-defense in violation of the Second Amendment.[82] Hightower interprets *Heller* to hold that concealed carrying bans are only lawful if open carrying is a viable alternative. Even if *Heller* could be interpreted to hold as much, the City *does* allow for the concealed carrying of firearms, and Hightower has *never* applied for a license to carry openly. Consequently, she cannot argue with any authority that the City's licensing policy prohibits her from carrying a handgun outside her home for self defense.

Assuming *arguendo* that Hightower submitted *any* evidence to the District Court that the City does not issue Class A licenses with "self defense" restrictions, or Class B licenses to carry openly, the majority of courts that have addressed the issue have found that the Second Amendment does not guarantee a right to carry a firearm either openly or concealed outside the home. *United States v. Rene E.*, 583 F.3d 8, 11 (1st Cir. 2009) (Second Amendment protects the right to self-defense in "hearth and home"); *Moore v. Madigan*, 2012 WL 344760, * at 7 (C.D.Ill. Feb. 3, 2012) (finding Second Amendment does not extend beyond the home); *Piszczatoski v. Filko*, 2012 WL 104917, at *1 (D.N.J. Jan. 12, 2012) (finding that the Second Amendment does not include a general right to carry handguns outside

[82] *Id*. at 23-24.

the home); *Kachalsky v. Cacace*, 2011 WL 3962550, at *19, *23 (S.D.N.Y. Sept. 2, 2011) (*Heller*'s "emphasis on the Second Amendment's protection of the right to keep and bear arms for the purpose of 'self-defense in the home' permeates the Court's decision and forms the basis for its holding"); *Osterweil v. Bartlett*, 819 F.Supp.2d 72, at *6 (N.D.N.Y. May 20, 2011); *Gonzales v. Village of West Milwaukee*, 2010 WL 1904977, at *4 (E.D.Wis. May 11, 2010) ("The Supreme Court has never held that the Second Amendment protects the carrying of guns outside the home."); *Moreno v. N.Y. City Police Department*, 2011 WL 2748652, at *3 (S.D.N.Y. May 7, 2011) ("*Heller* has been narrowly construed, as protecting the individual right to bear arms for the specific purpose of self-defense within the home"); *United States v. Tooley*, 717 F.Supp.2d 580, 596 (S.D.W.Va.2010) ("[P]ossession of a firearm outside of the home or for purposes other than self-defense in the home are not within the 'core' of the Second Amendment right as defined by *Heller.* ").

The *Heller* Court limited the Second Amendment to the right to possess and carry a handgun in the *home* for self-defense.

> In sum, we hold that the 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 purpose of *immediate* self-defense.

Heller, 554 U.S. at 635 (emphasis added). Thus, even if Hightower had demonstrated to the District Court that she needed an unrestricted Class A license to carry a firearm in the City of Boston, her Second Amendment right has not been disturbed because *Heller* did not extend the Second Amendment outside the home. The *Heller* Court's use of the term "immediate" also suggests that the right to carry a firearm does not extend to Hightower's generalized fears of being attacked in public where police presence and avenues of escape lessen the *immediate* need for self defense. Quite simply, if Hightower wished to assert that the City violated her Second Amendment right to bear arms, it was incumbent upon her to challenge City action that actually implicated those rights.

III. The Revocation Of Hightower's License Based On The Submission Of Untruthful Information Passes Constitutional Scrutiny.

a. Carrying A Firearm Outside The Home Is Not A "Core" Second Amendment Right.

Even if this Court construed the Second Amendment to encompass a right to carry a firearm outside the home, and Hightower had demonstrated to the District Court that the only way she could carry a firearm in the City of Boston was through an unrestricted Class A license, the revocation of her license was nonetheless, constitutionally valid.

Hightower challenges only the impact the revocation of her license had on her ability to carry a firearm in public. Hightower argues, in essence, that *Heller*

announced a nearly unfettered right to carry a firearm, either openly or concealed, in public at all times for "self defense." The holding in *Heller*, however, is not nearly as broad as Hightower suggests. *Heller* held that the Second Amendment "gives qualified individuals (*i.e.* mentally competent persons who are not felons) the right to possess lawful firearms 'in the home' for purposes of self-defense." *Moore v. Madigan*, 2012 WL 344760, at * 6 (C.D.Ill., February 3, 2012) (citing *Heller*, 554 U.S. at 626, 635). In so limiting its holding, the Court stated that "whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of *hearth and home*." *Heller*, 554 U.S. at 635 (emphasis added).

Thus, *Heller* established that the "core" of the Second Amendment is the use of arms "in defense of hearth and home," "where the need for defense of self, family, and property is most acute." 554 U.S. at 628, 635. The *Heller* Court warned that the Second Amendment does not encompass a right to keep and carry firearms "in any manner whatsoever," "for any sort of confrontation," and "for whatever purpose." *Id.* at 626. Nor does the Amendment "cast doubt" on various "longstanding" restrictions, which are "presumptively lawful." *Id.* at 627 n.26. Carrying a gun outside the home is not a "core" right. If it was, the *Heller* Court would not have deemed restrictions on carrying firearms outside the home as

"presumptively lawful," while holding restrictions, such as keeping a firearm inoperable in the home, as unconstitutional. *Heller*, 554 U.S. at 626 n.26. As the *Heller* Court accurately pointed out, it is protection of "hearth and home" that is most "acute." *Id*. at 626.

b. The District Court Properly Applied Intermediate Scrutiny.

Although *Heller* declined to establish a standard of constitutional review in Second Amendment cases, the Court ruled out rational basis review. *Heller*, 554 U.S. at 634. Moreover, the Court's approval of "presumptively lawful regulatory measures" eliminates strict scrutiny review to government action that does not implicate the "core" Second Amendment right to possess a firearm in the home for self defense. *Id*. at 626.

Since *Heller* and *McDonald*, courts have applied intermediate scrutiny to prohibitions that do not implicate an individual's "core" Second Amendment right to possess a firearm in one's home for the purpose of self defense. *United States v. Booker*, 644 F.3d 12, 25 (1st Cir.), *cert. petition filed*, No. 11-6765 (2011) (applying "substantial showing" form of intermediate scrutiny); *United States v. Masciandaro*, 638 F.3d 458, 471, (4th Cir. 2011) ("a lesser showing [than strict scrutiny] is necessary with respect to laws that burden the right to keep and bear arms *outside of the home*."); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir.

2010); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010).

Hightower challenges only the revocation's impact on her ability to carry a handgun in public for self-defense, conduct which does not fall within the "core" right announced in *Heller*. Therefore, the "substantial burden" form of intermediate scrutiny is the appropriate level of constitutional review. *Booker*, 644 F.3d at 25; *Masciandaro*, 638 F.3d at 471 ("While we find the application of strict scrutiny important to protect the core right of self-defense of a law-abiding citizen in his home ..., we conclude that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside the home.") (internal quotation marks and citation omitted); *Osterweil v. Bartlett*, 819 F.Supp.2d 72 at * 10 (N.D.NY May 20 2011) (applying intermediate scrutiny because the challenged law "falls at least one level outside the core right recognized in *Heller*, *i.e.*, the right of a law abiding individual to keep and carry a firearm for the purpose of self defense in the home"). *Peruta v. County of San Diego*, 758 F.Supp.2d 1106 at * 8 (S.D. Cal. Dec. 10, 2010) (applying intermediate scrutiny to County licensing scheme that restricted the number of people who could carry a concealed firearm in public).

"To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its

objective is advanced by means reasonably related to that objective." *Williams*, 616 F.3d at 692. Intermediate scrutiny requires the asserted governmental end to be more than just legitimate; it must be either "significant," "substantial," or "important," and it requires the "fit between the challenged regulation and the asserted objective be reasonable, not perfect." *Marzzarella*, 614 F.3d at 89 (citations omitted). In contrast with strict scrutiny, intermediate scrutiny, "by definition, allows [the government] to paint with a broader brush." *Miller*, 604 F.Supp.2d at 1172. "To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective. *Williams*, 616 F.3d at 692-93.

Courts that have applied intermediate scrutiny in the Second Amendment context have required that the governmental interest must be substantial or important and that the fit between the challenged regulation and the government's objective be a reasonable, but not perfect, fit. *See, e.g., Marzzarella*, 614 F.3d at 98; *Chester*, 628 F.3d at 683; *Reese*, 627 F.3d at 802. Here, Hightower concedes that the City's interest in promoting public safety is substantial. *See, e.g., Bach v. Pataki*, 408 F.3d 75, 91 (2d Cir.2005); *Kachalsky*, 2011 WL 3962550, at *27 (collecting cases); *Osterweil*, 819 F.Supp.2d at * 10.

The question of constitutionality then turns on whether the revocation of a license to carry based on an individual's untruthful submission on an application form promotes the City's interest in keeping firearms out of the hands of dangerous individuals. There can be no doubt, that promoting accuracy through revocation or denial, helps prevent deadly weapons from getting into the hands individuals who are a danger to themselves or others.

c. Revocation Of A Firearm License Based On A Determination That False Information Was Submitted On The Renewal Form Is Substantially Related To Achieve An Important Government Interest.

Without question, the veracity of an applicant is critical to the City's need to ensure that its most expansive firearm license is entrusted only to those who are responsible law-abiding citizens. Indeed the revocation of a license based on the submission of untruthful information has long been held to be a legitimate form of promoting licensing efficiency. *See Huddleston v. United States*, 415 U.S. 814, 825 (1974) (upholding constitutionality of federal statute that criminalized untruthful response on firearm redemption form); *see* M.G.L. c 140, § 129 (criminalizing use of false information in obtaining firearm or applications for firearms); *see also Catucci v. Benedetti*, 27 Mass.L.Rptr. 385, *1 (Mass.Super.Ct. 2010) (finding licensing authority could consider applicant's untruthful denial of prior convictions on firearm application form in finding applicant "unsuitable"); *Wetherbee v. Costerus*, 13 Mass.L.Rptr. 159, *8 (Mass.Super.Ct. 2001) (reinstating

police chief's revocation of licensee's firearm license based on untruthful, misleading, and unforthcoming responses on firearm application form); *Coletti v. Department of State Police*, 832 N.E.2d 8, 12 (Mass.App.Ct. 2005) (affirming revocation of private detective license; misrepresentation on firearms license application helped show lack of "good moral character").

The requirement that applicants provide truthful information on firearm licensing forms is consistent with the "goal of firearms control legislation in Massachusetts [which] is to limit access to deadly weapons by irresponsible persons." *Ruggiero v. Police Commissioner of Boston*, 464 N.E.2d 104, 106 (Mass.App.Ct. 1984). "Consistent with these aims, persons who [are] immature[e] [or of] antisocial behavior . . . are deemed improper persons to obtain licenses." *Id.* The firearms licensing statute provides local police chiefs with the authority to prevent firearms from landing into the hands of improper persons. *Id*. "[C]haracter is a necessary qualification" for being a suitable person who can be trusted with carrying a firearm. *DeLuca v. Chief of Police of Newton*, 612 N.E.2d 628, 630 (Mass. 1993); *see also Godfrey*, 616 N.E.2d at 486, 488 (affirming revocation on ground that licensee who refused to cooperate with investigation into gunshots fired into a school, a residence, and an automobile was no longer a "suitable person").

In order to ensure that only responsible individuals possess firearms, one of the City's requirements is that applicants truthfully and accurately complete firearm license forms.[83] *See* M.G.L. c. 140, §§ 129B(8) and 131(h). Indeed, the Massachusetts firearm application/renewal form requires applicants to sign the form under the pains and penalties of perjury.[84] The veracity of an applicant's responses on a firearm licensing form is crucial to the City's goal in preventing firearms from getting into the hands of dangerous or mentally unstable individuals. *Ruggiero*, 464 N.E.2d at 106. A wide range of methods has been adopted by the Massachusetts Legislature to accomplish this goal, including licensing for the sale and possession of firearms and ammunition, and the imposition of penalties for infractions of firearms control laws. *Id.* at 259, 464 N.E.2d 104.

d. The City Relies On The Accuracy Of Material Information Provided By Applicants When Issuing Firearm Licenses.

Of particular importance, is the City's dependence on applicants to provide accurate information on certain questions because the City is not omniscient in its review of application forms. For example, an applicant may fail to disclose that he or she has been previously hospitalized for a mental illness or treated for a chemical dependency. Individuals who have been hospitalized or treated for mental illness and drug addiction are statutorily disqualified from possessing a

83 Appx. 142, ¶ 15 (Hightower Declaration)

84 Appx. 203 (Mass. Firearms Application/Renewal Form)

firearm in Massachusetts. *See* M.G.L. c. 140, §§ 129B, 131. *See also Heller*, 554 U.S. at 626 (explicitly sanctioned the long-standing prohibition of possession of firearms by the mentally ill). It is not always discernable by an individual's appearance or through available public, criminal, or department of mental health records whether an individual has been hospitalized or treated for mental illness or chemical dependency. The City's inability to immediately detect the submission of false information on firearm applications compels it, in some instances, to rely on the applicant's word. The only reasonable way to compel applicants to take affirmative steps to ensure that they provide complete, accurate, and up-to-date information is to impose penalties, such as denial or revocation, when an untruthful submission is discovered.

With respect to the BPD's Form G13-S, it is imperative that the City's own police officers provide truthful and complete answers as to whether they have pending internal affairs complaints against them. Certain internal affairs complaints require officers to immediately surrender their department-issued firearms. If the City has divested one of its officers of his or her department-issued firearm it logically follows that the City may also take away that officer's personal firearm. Therefore, it is crucial that the Boston police department be allowed to immediately disarm a police officer, who either provides false information to the department, or is being investigated for misconduct.

Furthermore, as the District Court recognized, "the importance of well-run, efficient police forces [is] paramount [to] . . . public safety . . . [and] perhaps the federal courts ought to proceed even more deliberately when scrutinizing the discretionary determinations made by local police chiefs as to whether and under what restrictions individual police officers in their employ are suitable to carry firearms." *Hightower v. City of Boston, et al.* 2011 WL 4543084 (D. Mass. September 29, 2011) (citing *Plummer v. Town of Somerset*, 601 F.Supp.2d 358, 366-67 (D. Mass. 2009)) (stating, with regard to a police officer's conduct outside the workplace, that "[a] police department is a highly regimented organization that must, in the interests of morale, efficiency, and public safety, place restrictions on the constitutional rights of its rank-and-file that exceed those permitted with regard to civilian employees").

e. The City Must Be Able To Revoke Or Deny A Firearm License Based On The Submission Of False Information To Efficiently Regulate Firearm Licenses And Achieve The City's Goal Of Protecting The Public From Gun Violence.

Forcing the City to accept false or misleading information without consequence would render the regulation process meaningless. Regulation of firearms was expressly sanctioned by the *Heller* Court as a constitutionally permissible tool to aid states in reducing the serious problem of gun violence. *Heller*, 554 U.S. at 636 (noting importance of the "variety of tools for combating th[e] problem [of handgun violence], including some measures regulating

handguns."); *United States v. Chester*, 628 F.3d 673, 676 (4th Cir. 2010) ("Significantly, *Heller* recognized that the right to keep and bear arms, like other Constitutional rights, is limited in scope and subject to some regulation").

As recognized by the *Heller* Court, reducing the level of gun violence is both a substantial and compelling government interest. *See Masciandaro*, 638 F.3d at 473 (observing government interest in public safety has been found by federal courts to be compelling); *United States v. Salerno*, 481 U.S. 739, 748-50 (1987) (crime prevention is compelling government interest and in some instances outweighs an individual's liberty interest). Gun violence is a serious problem within the City of Boston. In fact, in the past six years, the City has seen 1,876 shootings.[85]

In its efforts to reduce the level of gun violence in the City of Boston, the City issues unrestricted Class A licenses only to "suitable" individuals who have "good reason to fear injury to his [or her] person or property, or for any other reason, including sport and target practice," and whose stated need corresponds with the interests of the Boston police department.[86] M.G.L., c. 140, § 131(a), (d). In order to monitor license holders in the City of Boston, the City has a licensing department that screens applicants to ensure that only responsible mentally

[85] Appx. 224 (City of Boston Homicides with a Firearm and Non-Fatal Shootings by District 2005-3/1/2011)

[86] Appx. 142, ¶ 19 (Harrington Declaration)

competent individuals are issued a license.[87] The City then maintains records on all persons residing or having a business in Boston who have firearm licenses.[88] Additionally, the City monitors its license holders through daily checks of criminal record information to ensure that its 3,798[89] Class A license holders remain "suitable" to possess a firearm.[90]

The City's regulation of firearms is completely undermined when an individual, either intentionally or unintentionally, provides false information on a licensing form. Denial or revocation is the most direct and logical means of enforcing the requirement that accurate information be provided in licensing forms.[91] Massachusetts courts have consistently upheld license denials and revocations in other areas of licensing when an individual provides false information on an application. *See e.g.*, *Kaplan v. Board of Public Accountancy*, 452 Mass. 1026, 1027 (2008) (upholding revocation of licensee's accounting license based on his false denial of a criminal conviction); *Number Three Lounge*,

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87 Appx. 142, ¶¶ 2, 3 (Harrington Declaration)

88 Appx. 142, ¶¶ 2, 3 (Harrington Declaration)

89 Because Hightower sought only the return of her unrestricted Class A license and never applied for her Class B license, the record does not include statistics on the number of issued Class B licenses.

90 Appx. 142 ¶ 3-5 (Harrington Declaration)

91 To the extent that Hightower maintains that she did not have pending charges against her and that the information on her renewal form was accurate, proper protections are in place to guard against erroneous revocations. *See* M.G.L. c, 140, 131(f) (right of appeal for revocation of firearm). This post-deprivation remedy is discussed in depth in Point IV, *infra*.

Inc. v. Alcoholic Beverages Control Commission, 7 Mass.App.Ct. 301, 313 (1979) (upholding revocation of liquor license to licensee after it was determined that licensee had provided false information on license application form).

Accepting falsified information without a meaningful penalty would eviscerate the regulation of handguns in the City of Boston. Imposing a revocation penalty[92] on persons who submit false information on their firearms applications forces applicants to take affirmative steps to ensure that the information submitted is accurate and up-to-date. Although Hightower argues that the revocation of her license was arbitrary because it had not been revoked in the four years the internal affairs investigation was ongoing, that argument is wide of the mark. It was not the pending charges against Hightower that resulted in the revocation; rather, it was her untruthful response to whether charges were pending against her that caused the City to revoke her license.[93]

All of this could have been avoided had Hightower simply asked someone at the Licensing Unit to clarify the term "charges pending," and when informed that it meant internal disciplinary charges, asked internal affairs if she had any. Instead,

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[92] Although Hightower's license was revoked, she was not forever barred from possessing a firearm as she could have, and still can, reapply for an unrestricted Class A firearm license, a Class A restricted firearm license, a Class B license, or an FID card. Thus, revocation in this instance was akin to a suspension—requiring only that Hightower fill out an application form truthfully. *See* Appx. 142 ¶ 12 (Hightower Declaration).

[93] Appx. 142, ¶ 12 (Hightower Declaration).

Hightower submitted false information on her form, either knowingly or unknowingly, causing the City to have incorrect information regarding an unrestricted Class A license holder. The burden should be on the applicant to ensure that the information submitted is correct in order to assist the City in its goal of maintaining accurate and complete licensing information so that it may reduce the risk that dangerous individuals are armed with deadly weapons.

Finally, the City need not prove that revocation as a penalty actually reduces gun violence. "*Heller* did not suggest that [a regulation] would be effective only if the statute's benefits are first established by admissible evidence," and there is no requirement of "proof, satisfactory to a court," that a regulation is "vital to the public safety." *Skoien,* 614 F.3d at 641. *See also Moore,* 2012 WL 344760, at *13 (not necessary to show that carry ban "truly" reduces risk of gun violence). Unquestionably, accurate record keeping is vital to the effective regulation of firearm licensing. Efficiency in licensing is just one method available to the City in achieving its goal of reducing gun violence. Revoking an untruthful applicant's license helps reduce the risk to the public that a dangerous individual will be armed.

IV. The Post-Deprivation Due Process Afforded Hightower Was Constitutional.

The City did not deprive Hightower of due process when her license was revoked without a pre-deprivation hearing. Hightower was afforded adequate post-

deprivation due process after her license was revoked because the Massachusetts firearm statute allows an individual aggrieved by a firearm revocation the right to appeal to a district court for review. M.G.L. c. 140, § 131(f). Further judicial review is available in an action in the nature of certiorari, pursuant to Mass. Gen. Laws c. 249, § 4. *See Godfrey v. Chief of Police of Wellesley* 616 N.E.2d 485, 487 (Mass.App.Ct. 1993).

To establish a procedural due process claim, Hightower must show that she had a liberty or property interest and that the City deprived her of that interest without a constitutionally adequate process. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982); *PFZ Properties, Inc. v. Rodriguez,* 928 F.2d 28, 30 (1st Cir.1991). To have a constitutionally protected property interest in a benefit, "a person clearly must have more than an abstract need or desire for it. He [or she] must have more than a unilateral expectation of it. He [or she] must, instead, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). Property interests are not created by the Constitution; "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth,* 408 U.S. at 577.

Due process guarantees that, "before a significant deprivation of liberty or property takes place at the state's hands, the affected individual must be forewarned and afforded an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Amsden v. Moran*, 904 F.2d 748, 753 (1st Cir. 1990) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). "No rigid taxonomy exists for evaluating the adequacy of state procedures in a given case; rather, 'due process is flexible and calls for such procedural protections as the particular situation demands.'" *Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 13 (1st Cir. 2011) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

"In its procedural aspect, due process ensures that government, when dealing with private persons, will use fair procedures." *DePoutot v. Raffaelly*, 424 F.3d 112, 118 (1st Cir. 2005). "The fundamental requirement of [procedural] due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Bibiloni Del Valle v. Puerto Rico*, 661 F.Supp.2d 155, 182 (D.P.R. 2009). "An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (citation and internal quotation marks omitted).

To determine "when a pre-deprivation hearing is compulsory and what process is due, an inquiring court must balance a myriad of factors, including the

private and public interests involved, the risk of an erroneous deprivation inherent in the procedures employed by the state, and the likely benefit that might accrue from additional procedural protections." *Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 13 (1st Cir. 2011) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Whether the deprivation was in fact, erroneous does not figure the procedural due process inquiry. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978).

Hightower contends that the City was required to provide her with notice and hearing before her license was revoked. Although Hightower correctly points out that ordinarily due process requires "some kind of hearing" before a state may deprive an individual of a protected property interest, *Zinermon v. Burch*, 494 U.S. 113, 127 (1990), this requirement is not absolute. *Herwins v. City of Revere*, 163 F.3d 15, 18 (1st Cir.1998) (noting that the generalization that due process requires a pre-deprivation hearing "is a very loose one.") Where the government's interest in quick action is particularly strong, a *pre*-deprivation hearing is not constitutionally necessary so long as adequate *post*-deprivation process is available. *Pease v. Burns*, 719 F.Supp.2d 143, 151-52 (D. Mass. 2010) (citing *Federal Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 240 (1988))

In this case, the revocation of Hightower's firearm license prior to a hearing is supported by the compelling interest the City has in immediately disarming individuals who are not "suitable" to possess a firearm. The City should not be

forced to wait until a hearing is held to discern the reason an individual provided false information on a firearm application. The risk that a firearm license is erroneously revoked is far outweighed by the risk posed to the public if a dangerous individual is permitted to retain possession of a firearm while the adequacy of the revocation itself is resolved. *See Patel v. Midland Memorial Hospital and Medical Center*, 298 F.3d 333, 339-40 (5th Cir. 2002) (holding where public safety is at risk post-deprivation due process is sufficient). Hightower's continued insistence that she answered "no" to the question of whether she had charges pending against her in good faith and that the City "erroneously" revoked her firearm is of no moment. "Whether the deprivation was, in fact, justified is not an element of the procedural due process inquiry." *Gonzalez-Droz*, 660 F.3d at 13; *See Carey v. Piphus*, 435 U.S. 247, 266 (1978).

Once Hightower's license was revoked, she had a statutory ninety day right of appeal to a district court. M.G.L. c. 140, § 131(f). Hightower's decision not to exercise her right to a post-deprivation hearing did not make the due process afforded her any less meaningful. Because the City has such a compelling public safety interest in reducing the risk of gun violence, the statutory post-deprivation process afforded Hightower was constitutionally adequate.

V. Hightower Has Waived Her Substantive Due Process And Equal Protection Claims By Failing To Raise Them In Her Appeal Brief.

It is bedrock appellate jurisprudence that claims not made or claims alluded to in a cursory fashion, unaccompanied by developed argument are deemed waived. *Rodriguez v. Municipality of San Juan*, 659 F.3d 168, 175 -176 (1st Cir. 2011); (citing *Tejada–Batista v. Morales*, 424 F.3d 97, 103 (1st Cir.2005)) (stressing that "[a]n argument not seriously developed in the opening brief" is lost); *see also Grigous v. Gonzáles*, 460 F.3d 156, 163 (1st Cir.2006); *Conto v. Concord Hosp., Inc.*, 265 F.3d 79, 81–82 (1st Cir.2001).

Arguments may also be waived if they are "confusingly constructed and lacking in coherence." *United States v. Eirby*, 515 F.3d 31, 36 n. 4 (1st Cir.2008). "Judges are not mind-readers, so parties must spell out their issues clearly, highlighting the relevant facts and analyzing on-point authority." *Rodriguezn*, 659 F.3d at 175 -176; *See United States v. Bongiorno*, 106 F.3d 1027, 1034 (1st Cir.1997); *see also Rodríguez v. Señor Frog's de la Isla, Inc.*, 642 F.3d 28, 39 (1st Cir.2011); *Janeiro v. Urological Surgery Prof'l Ass'n*, 457 F.3d 130, 143 n. 9 (1st Cir.2006).

Although Hightower makes a passing reference to her equal protection claim in her brief, she does not press the point in her appeal.[94] Hightower also affirmatively states that she does not separately raise her substantive due process

[94] App. Brief, pp. 17, 53-54

claim on appeal as it is "encompassed within her Second Amendment claim." These cursory references are "hardly a serious treatment of . . . complex issue[s]" and are therefore insufficient to preserve this point for review. *Tayag v. Lahey Clinic Hosp., Inc.*, 632 F.3d 788, 792 (1st Cir. 2011); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991) (per curiam). *See also United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990) (cautioning that it is insufficient for appellants to mention arguments "in the most skeletal way, leaving the court to do counsel's work"). Accordingly, Hightower's equal protection and substantive due process claims should be deemed waived.

CONCLUSION

The District Court properly found that Hightower's Second Amendment claim is not ripe as the revocation of her unrestricted Class A license did not infringe on her Second Amendment rights because she had other means of obtaining a license to carry. Even if Hightower's Second Amendment claim was ripe, the revocation of her firearm passes intermediate scrutiny as the City has an important government interest in maintaining accurate and complete records on license holders and revocation as penalty for submitting false information is substantially related to that interest. Hightower was afforded adequate due process through the statutory post-deprivation hearing that was available. Finally,

Hightower waived her substantive due process and equal protection claims because she did not raise them on appeal.

CERTIFICATE OF SERVICE

I, Lisa Skehill Maki, hereby certify that on this date I served a copy of the foregoing documents upon plaintiff's counsel, Alan Gura and Chester Darling, and counsel for the Commonwealth of Massachusetts, Ken Salinger, by electronic filing.

April 12, 2012 /s/ Lisa Skehill Maki
Date Lisa Skehill Maki

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP.P. 32(a)(7)(C)

I, Lisa Skehill Maki, as counsel for the Defendants-Appellees, City of Boston and Edward M. Davis, hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the foregoing Brief of Appellees complies with the type-volume limitations as set forth within the requirements of Fed. R. Civ. P. 28.1(e)(2). Specifically, in reliance on the word count function of Microsoft Word, the word processing software used to create this Brief, excluding those portions of the Brief exempted from the count by Fed. R. App. P. 32(a)(7)(B)(iii), the Brief contains 10,875 words.

Date: April 12, 2012

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CERTIFICATE OF SERVICE

I, Lisa Skehill Maki, counsel for the Defendants-Appellees, hereby certify that on the below entered date, I served via electronic filing one (1) copy of the *Brief of Defendants-Appellees, City of Boston and Edward M. Davis* upon the Court. I further certify that I served one copy of the *Brief of Defendants-Appellees, City of Boston and Edward M. Davis* upon all attorneys of record for the Plaintiff-Appellant, Stacey Hightower, and Defendant-Appellee, Commonwealth of Massachusetts, via electronic mail to, alan@gurapossessky.com , chesterdarling@comcast.net, ken.salinger@state.ma.us.

Date: April 12, 2012

/s/ Lisa Skehill Maki
Lisa Skehill Maki

Addendum.

Mass. Gen. L. c. 140, § 131

All licenses to carry firearms shall be designated Class A or Class B, and the issuance and possession of any such license shall be subject to the following conditions and restrictions:

(a) A Class A license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry: (i) firearms, including large capacity firearms, and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper; and (ii) rifles and shotguns, including large capacity weapons, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as it deems proper. A violation of a restriction imposed by the licensing authority under the provisions of this paragraph shall be cause for suspension or revocation and shall, unless otherwise provided, be punished by a fine of not less than $1,000 nor more than $10,000; provided, however, that the provisions of section 10 of chapter 269 shall not apply to such violation.

The colonel of state police may, after an investigation, grant a Class A license to a club or facility with an on-site shooting range or gallery, which club is incorporated under the laws of the commonwealth for the possession, storage and use of large capacity weapons, ammunition therefor and large capacity feeding devices for use with such weapons on the premises of such club; provided, however, that not less than one shareholder of such club shall be qualified and suitable to be issued such license; and provided further, that such large capacity weapons and ammunition feeding devices may be used under such Class A club license only by such members that possess a valid firearm identification card issued under section 129B or a valid Class A or Class B license to carry firearms, or by such other persons that the club permits while under the direct supervision of a certified firearms safety instructor or club member who, in the case of a large capacity firearm, possesses a valid Class A license to carry firearms or, in the case of a large capacity rifle or shotgun, possesses a valid Class A or Class B license to carry firearms. Such club shall not permit shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by public safety personnel performing in line with their official duties.

No large capacity weapon or large capacity feeding device shall be removed from the premises except for the purposes of: (i) transferring such firearm or feeding device to a licensed dealer; (ii) transporting such firearm or feeding device to a

licensed gunsmith for repair; (iii) target, trap or skeet shooting on the premises of another club incorporated under the laws of the commonwealth and for transporting thereto; (iv) attending an exhibition or educational project or event that is sponsored by, conducted under the supervision of or approved by a public law enforcement agency or a nationally or state recognized entity that promotes proficiency in or education about semiautomatic weapons and for transporting thereto and therefrom; (v) hunting in accordance with the provisions of chapter 131; or (vi) surrendering such firearm or feeding device under the provisions of section 129D. Any large capacity weapon or large capacity feeding device kept on the premises of a lawfully incorporated shooting club shall, when not in use, be secured in a locked container, and shall be unloaded during any lawful transport. The clerk or other corporate officer of such club shall annually file a report with the colonel of state police and the commissioner of the department of criminal justice information services listing all large capacity weapons and large capacity feeding devices owned or possessed under such license. The colonel of state police or his designee, shall have the right to inspect all firearms owned or possessed by such club upon request during regular business hours and said colonel may revoke or suspend a club license for a violation of any provision of this chapter or chapter 269 relative to the ownership, use or possession of large capacity weapons or large capacity feeding devices.

(b) A Class B license shall entitle a holder thereof to purchase, rent, lease, borrow, possess and carry: (i) non-large capacity firearms and feeding devices and ammunition therefor, for all lawful purposes, subject to such restrictions relative to the possession, use or carrying of such firearm as the licensing authority deems proper; provided, however, that a Class B license shall not entitle the holder thereof to carry or possess a loaded firearm in a concealed manner in any public way or place; and provided further, that a Class B license shall not entitle the holder thereof to possess a large capacity firearm, except under a Class A club license issued under this section or under the direct supervision of a holder of a valid Class A license at an incorporated shooting club or licensed shooting range; and (ii) rifles and shotguns, including large capacity rifles and shotguns, and feeding devices and ammunition therefor, for all lawful purposes; provided, however, that the licensing authority may impose such restrictions relative to the possession, use or carrying of large capacity rifles and shotguns as he deems proper. A violation of a restriction provided under this paragraph, or a restriction imposed by the licensing authority under the provisions of this paragraph, shall be cause for suspension or revocation and shall, unless otherwise provided, be punished by a fine of not less than $1,000 nor more than $10,000; provided, however, that the provisions of section 10 of chapter 269 shall not apply to such violation.

A Class B license shall not be a valid license for the purpose of complying with any provision under this chapter governing the purchase, sale, lease, rental or transfer of any weapon or ammunition feeding device if such weapon is a large capacity firearm or if such ammunition feeding device is a large capacity feeding device for use with a large capacity firearm, both as defined in section 121.

(c) Either a Class A or Class B license shall be valid for the purpose of owning, possessing, purchasing and transferring non-large capacity rifles and shotguns, and for purchasing and possessing chemical mace, pepper spray or other similarly propelled liquid, gas or powder designed to temporarily incapacitate, consistent with the entitlements conferred by a firearm identification card issued under section 129B.

(d) Any person residing or having a place of business within the jurisdiction of the licensing authority or any law enforcement officer employed by the licensing authority or any person residing in an area of exclusive federal jurisdiction located within a city or town may submit to such licensing authority or the colonel of state police, an application for a Class A or Class B license to carry firearms, or renewal of the same, which such licensing authority or said colonel may issue if it appears that the applicant is a suitable person to be issued such license, and that the applicant has good reason to fear injury to his person or property, or for any other reason, including the carrying of firearms for use in sport or target practice only, subject to such restrictions expressed or authorized under this section, unless the applicant:

(i) has, in any state or federal jurisdiction, been convicted or adjudicated a youthful offender or delinquent child for the commission of (a) a felony; (b) a misdemeanor punishable by imprisonment for more than two years; (c) a violent crime as defined in section 121; (d) a violation of any law regulating the use, possession, ownership, transfer, purchase, sale, lease, rental, receipt or transportation of weapons or ammunition for which a term of imprisonment may be imposed; or (e) a violation of any law regulating the use, possession or sale of controlled substances as defined in section 1 of chapter 94C;

(ii) has been confined to any hospital or institution for mental illness, unless the applicant submits with his application an affidavit of a registered physician attesting that such physician is familiar with the applicant's mental illness and that in such physician's opinion the applicant is not disabled by such an illness in a manner that should prevent such applicant from possessing a firearm;

(iii) is or has been under treatment for or confinement for drug addiction or habitual drunkenness, unless such applicant is deemed to be cured of such condition by a licensed physician, and such applicant may make application for such license after the expiration of five years from the date of such confinement or treatment and upon presentment of an affidavit issued by such physician stating that such physician knows the applicant's history of treatment and that in such physician's opinion the applicant is deemed cured;

(iv) is at the time of the application less than 21 years of age;

(v) is an alien;

(vi) is currently subject to: (A) an order for suspension or surrender issued pursuant to section 3B or 3C of chapter 209A or a similar order issued by another jurisdiction; or (B) a permanent or temporary protection order issued pursuant to chapter 209A or a similar order issued by another jurisdiction; or

(vii) is currently the subject of an outstanding arrest warrant in any state or federal jurisdiction.

(e) Within seven days of the receipt of a completed application for a license to carry or possess firearms, or renewal of same, the licensing authority shall forward one copy of the application and one copy of the applicant's fingerprints to the colonel of state police, who shall within 30 days advise the licensing authority, in writing, of any disqualifying criminal record of the applicant arising from within or without the commonwealth and whether there is reason to believe that the applicant is disqualified for any of the foregoing reasons from possessing a license to carry or possess firearms. In searching for any disqualifying history of the applicant, the colonel shall utilize, or cause to be utilized, files maintained by the department of probation and statewide and nationwide criminal justice, warrant and protection order information systems and files including, but not limited to, the National Instant Criminal Background Check System. The colonel shall inquire of the commissioner of the department of mental health relative to whether the applicant is disqualified from being so licensed. If the information available to the colonel does not indicate that the possession of a firearm or large capacity firearm by the applicant would be in violation of state or federal law, he shall certify such fact, in writing, to the licensing authority within said 30 day period.

The licensing authority may also make inquiries concerning the applicant to: (i) the commissioner of the department of criminal justice information services relative to any disqualifying condition and records of purchases, sales, rentals, leases and

transfers of weapons or ammunition concerning the applicant; (ii) the commissioner of probation relative to any record contained within the department of probation or the statewide domestic violence record keeping system concerning the applicant; and (iii) the commissioner of the department of mental health relative to whether the applicant is a suitable person to possess firearms or is not a suitable person to possess firearms. The director or commissioner to whom the licensing authority makes such inquiry shall provide prompt and full cooperation for that purpose in any investigation of the applicant.

The licensing authority shall, within 40 days from the date of application, either approve the application and issue the license or deny the application and notify the applicant of the reason for such denial in writing; provided, however, that no such license shall be issued unless the colonel has certified, in writing, that the information available to him does not indicate that the possession of a firearm or large capacity firearm by the applicant would be in violation of state or federal law.

(f) A license issued under this section shall be revoked or suspended by the licensing authority, or his designee, upon the occurrence of any event that would have disqualified the holder from being issued such license or from having such license renewed. A license may be revoked or suspended by the licensing authority if it appears that the holder is no longer a suitable person to possess such license. Any revocation or suspension of a license shall be in writing and shall state the reasons therefor. Upon revocation or suspension, the licensing authority shall take possession of such license and the person whose license is so revoked or suspended shall take all actions required under the provisions of section 129D. No appeal or post-judgment motion shall operate to stay such revocation or suspension. Notices of revocation and suspension shall be forwarded to the commissioner of the department of criminal justice information services and the commissioner of probation and shall be included in the criminal justice information system. A revoked or suspended license may be reinstated only upon the termination of all disqualifying conditions, if any.

Any applicant or holder aggrieved by a denial, revocation or suspension of a license, unless a hearing has previously been held pursuant to chapter 209A, may, within either 90 days after receiving notice of such denial, revocation or suspension or within 90 days after the expiration of the time limit during which the licensing authority is required to respond to the applicant, file a petition to obtain judicial review in the district court having jurisdiction in the city or town wherein the applicant filed for, or was issued, such license. A justice of such court, after a hearing, may direct that a license be issued or reinstated to the petitioner if such justice finds that there was no reasonable ground for denying, suspending or

revoking such license and that the petitioner is not prohibited by law from possessing same.

(g) A license shall be in a standard form provided by the executive director of the criminal history systems board in a size and shape equivalent to that of a license to operate motor vehicles issued by the registry of motor vehicles pursuant to section 8 of chapter 90 and shall contain a license number which shall clearly indicate whether such number identifies a Class A or Class B license, the name, address, photograph, fingerprint, place and date of birth, height, weight, hair color, eye color and signature of the licensee. Such license shall be marked “License to Carry Firearms” and shall clearly indicate whether the license is Class A or Class B. The application for such license shall be made in a standard form provided by the executive director of the criminal history systems board, which form shall require the applicant to affirmatively state under the pains and penalties of perjury that such applicant is not disqualified on any of the grounds enumerated above from being issued such license.

(h) Any person who knowingly files an application containing false information shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment for not less than six months nor more than two years in a house of correction, or by both such fine and imprisonment.

(i) A license to carry or possess firearms shall be valid, unless revoked or suspended, for a period of not more than 6 years from the date of issue and shall expire on the anniversary of the licensee's date of birth occurring not less than 5 years but not more than 6 years from the date of issue, except that if the licensee applied for renewal before the license expired, the license shall remain valid for a period of 90 days beyond the stated expiration date on the license, unless the application for renewal is denied if [FN1] the licensee is on active duty with the armed forces of the United States on the expiration date of his license, the license shall remain valid until the licensee is released from active duty and for a period of not less than 90 days following such release. Any renewal thereof shall expire on the anniversary of the licensee's date of birth occurring not less than 5 years but not more than 6 years from the effective date of such license. Any license issued to an applicant born on February 29 shall expire on March 1. The fee for the application shall be $100, which shall be payable to the licensing authority and shall not be prorated or refunded in case of revocation or denial. The licensing authority shall retain $25 of the fee; $50 of the fee shall be deposited into the general fund of the commonwealth and not less than $50,000 of the funds deposited into the General Fund shall be allocated to the Firearm Licensing Review Board, established in section 130B, for its operations and that any funds not expended by said board for

its operations shall revert back to the General Fund; and $25 of the fee shall be deposited in the Firearms Fingerprint Identity Verification Trust Fund. For law enforcement officials, or local, state, or federal government entities acting on their behalf, the fee for the application shall be set at $25, which shall be payable to the licensing authority and shall not be prorated or refunded in case of revocation or denial. The licensing authority shall retain $12.50 of the fee, and $12.50 of the fee shall be deposited into the general fund of the commonwealth. Notwithstanding any general or special law to the contrary, licensing authorities shall deposit such portion of the license application fee into the Firearms Record Keeping Fund quarterly, not later than January 1, April 1, July 1 and October 1 of each year. Notwithstanding any general or special law to the contrary, licensing authorities shall deposit quarterly such portion of the license application fee as is to be deposited into the General Fund, not later than January 1, April 1, July 1 and October 1 of each year. For the purposes of section 10 of chapter 269, an expired license to carry firearms shall be deemed to be valid for a period not to exceed 90 days beyond the stated date of expiration, unless such license to carry firearms has been revoked.

Any person over the age of 70 and any law enforcement officer applying for a license to carry firearms through his employing agency shall be exempt from the requirement of paying a renewal fee for a Class A or Class B license to carry.

(j)(1) No license shall be required for the carrying or possession of a firearm known as a detonator and commonly used on vehicles as a signaling and marking device, when carried or possessed for such signaling or marking purposes.

(2) No license to carry shall be required for the possession of an unloaded large capacity rifle or shotgun or an unloaded feeding device therefor by a veteran's organization chartered by the Congress of the United States, chartered by the commonwealth or recognized as a nonprofit tax-exempt organization by the Internal Revenue Service, or by the members of any such organization when on official parade duty or during ceremonial occasions. For purposes of this subparagraph, an “unloaded large capacity rifle or shotgun” and an “unloaded feeding device therefor” shall include any large capacity rifle, shotgun or feeding device therefor loaded with a blank cartridge or blank cartridges, so-called, which contain no projectile within such blank or blanks or within the bore or chamber of such large capacity rifle or shotgun.

(k) Whoever knowingly issues a license in violation of this section shall be punished by a fine of not less than $500 nor more than $1,000 or by imprisonment

for not less than six months nor more than two years in a jail or house of correction, or by both such fine and imprisonment.

<[Paragraph (l) effective until April 11, 2011. For text effective April 11, 2011, see below.]>

(l) The executive director of the criminal history systems board shall send by first class mail to the holder of each such license to carry firearms, a notice of the expiration of such license not less than 90 days prior to such expiration and shall enclose therein a form for the renewal of such license. The taking of fingerprints shall not be required in issuing the renewal of a license if the renewal applicant's fingerprints are on file with the department of the state police. Any licensee shall notify, in writing, the licensing authority who issued said license, the chief of police into whose jurisdiction the licensee moves and the executive director of the criminal history systems board of any change of address. Such notification shall be made by certified mail within 30 days of its occurrence. Failure to so notify shall be cause for revocation or suspension of said license.

<[Paragraph (l) as amended by 2011, 9, Secs. 16 and 17 effective April 11, 2011. For text effective until April 11, 2011, see above.]>

(l) The executive director of the criminal history systems board shall send electronically or by first class mail to the holder of each such license to carry firearms, a notice of the expiration of such license not less than 90 days prior to such expiration and shall enclose therein a form for the renewal of such license. The taking of fingerprints shall not be required in issuing the renewal of a license if the renewal applicant's fingerprints are on file with the department of the state police. Any licensee shall notify, in writing, the licensing authority who issued said license, the chief of police into whose jurisdiction the licensee moves and the executive director of the criminal history systems board of any change of address. Such notification shall be made by certified mail within 30 days of its occurrence. Failure to so notify shall be cause for revocation or suspension of said license. The commissioner of criminal justice information services shall provide electronic notice of expiration only upon the request of a cardholder. A request for electronic notice of expiration shall be forwarded to the department on a form furnished by the commissioner. Any electronic address maintained by the department for the purpose of providing electronic notice of expiration shall be considered a firearms record and shall not be disclosed except as provided in section 10 of chapter 66.

(m) Notwithstanding the provisions of section 10 of chapter 269, any person in possession of a firearm, rifle or shotgun whose license issued under this section is

invalid for the sole reason that it has expired, meaning after 90 days beyond the stated expiration date on the license, but who shall not be disqualified from renewal upon application therefor under this section, shall be subject to a civil fine of not less than $500 nor more than $5,000 and the provisions of section 10 of chapter 269 shall not apply; provided, however, that the exemption from the provisions of said section 10 of said chapter 269 provided herein shall not apply if: (i) such license has been revoked or suspended, unless such revocation or suspension was caused by failure to give notice of a change of address as required under this section; (ii) revocation or suspension of such license is pending, unless such revocation or suspension was caused by failure to give notice of a change of address as required under this section; or (iii) an application for renewal of such license has been denied. Any law enforcement officer who discovers a person to be in possession of a firearm, rifle or shotgun after such person's license has expired, meaning after 90 days beyond the stated expiration date on the license, has been revoked or suspended, solely for failure to give notice of a change of address, shall confiscate such firearm, rifle or shotgun and the expired or suspended license then in possession and such officer, shall forward such license to the licensing authority by whom it was issued as soon as practicable. The officer shall, at the time of confiscation, provide to the person whose firearm, rifle or shotgun has been confiscated, a written inventory and receipt for all firearms, rifles or shotguns confiscated and the officer and his employer shall exercise due care in the handling, holding and storage of these items. Any confiscated weapon shall be returned to the owner upon the renewal or reinstatement of such expired or suspended license within one year of such confiscation or may be otherwise disposed of in accordance with the provisions of section 129D. The provisions of this paragraph shall not apply if such person has a valid license to carry firearms issued under section 131F.

(n) Upon issuance of a license to carry or possess firearms under this section, the licensing authority shall forward a copy of such approved application and license to the executive director of the criminal history systems board, who shall inform the licensing authority forthwith of the existence of any disqualifying condition discovered or occurring subsequent to the issuance of a license under this section.

(o) No person shall be issued a license to carry or possess a machine gun in the commonwealth, except that a licensing authority or the colonel of state police may issue a machine gun license to:

(i) a firearm instructor certified by the municipal police training committee for the sole purpose of firearm instruction to police personnel;

(ii) a bona fide collector of firearms upon application or upon application for renewal of such license.

(p) The executive director of the criminal history systems board shall promulgate regulations in accordance with chapter 30A to establish criteria for persons who shall be classified as bona fide collectors of firearms.

(q) Nothing in this section shall authorize the purchase, possession or transfer of any weapon, ammunition or feeding device that is, or in such manner that is, prohibited by state or federal law.

(r) The secretary of the executive office of public safety or his designee may promulgate regulations to carry out the purposes of this section.