UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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STACEY HIGHTOWER,

Plaintiff,

V.

CITY OF BOSTON, et al.,
Defendant.

_____

Civil Action
No. 08-11955-DJC

June 21, 2011
1:59 p.m.

TRANSCRIPT OF MOTION HEARING

BEFORE THE HONORABLE DENISE J. CASPER

UNITED STATES DISTRICT COURT

JOHN J. MOAKLEY U.S. COURTHOUSE

1 COURTHOUSE WAY

BOSTON, MA 02210

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P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Denise J. Casper, United States District Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, 1 Courthouse Way, Boston, Massachusetts, on June 21, 2011.)

THE CLERK: Civil action 08-1955, Stacey Hightower v. City of Boston, et al.

Counsel, please state your name for the record.

01:59 MR. GURA: Good afternoon, your Honor. Alan Gura for the plaintiff.

MR. DARLING: Chester Darling with him.

MR. GURA: And with us, of course, is our client, Stacey Hightower, as well.

MS. HIGHTOWER: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. SALINGER: Good afternoon. Assistant Attorney General Kenneth Salinger for the Commonwealth of Massachusetts.

MS. SKEHILL MAKI: Good afternoon. Lisa Skehill Maki

01:59 on behalf of the City of Boston and Commissioner Ed Davis.

MR. PRIOR: Good afternoon. Ian Prior on behalf of the City of Boston and Edward Davis.

THE COURT: Good afternoon.

Counsel, I've got your papers for planitiff's motion for summary judgment and also the cross-motion for summary

judgment. I've had an opportunity to read the briefs on both sides, so I'm ready to hear argument.

Counsel, do you want to begin?

MR. GURA: Thank you, your Honor.

Your Honor, this is a narrow case, and we believe it's a fairly simple case.

If there are two principles that we would seek to vindicate in this action, it is that we wish to see the Second Amendment, right to keep and bear arms, subjected to licensing
02:00 regimes, only if those licensing regimes contain objective standards and due process. Objective standards and due process are time-honored constitutional requirements when we're dealing with fundamental rights, and there's no reason why the Second Amendment should be any different than the First Amendment or the Fourth Amendment, the Sixth Amendment, or any other part of the Bill of Rights.

This is not a case about, as the defendants sometimes have intimated in their papers, a right to have machine guns or the right to have high-capacity, semiautomatic Glocks. It's
02:01 not a case about concealment. It's not a case that argues for any aversion of some absolute right that is completely immune from government regulations. All we are saying is that if the defendants wish to regulate the right to bear arms -- and we concede fully that they are entitled to do so -- that they use objective standards and provide some due process.

THE COURT: So, counsel, is your argument that even post Heller and post McDonald it's permissible for the statute to bar the disqualifi -- the bases for disqualification from having a license, but that the discretion that is allowed to the Commissioner for determining whether or not someone is suitable is what's problematic here?

MR. GURA: That's correct, your Honor. We're not challenging any particular disqualifying feature. In fact, Stacey Hightower is not disqualified under any particular aspect of the Massachusetts law. The defendants have certainly not suggested as much. They have admitted in their papers that she is entitled to some form of a handgun permit, and we're not aware of any disqualifying feature.

What we are bothered by is the fact that her entitlement to engage in what is for her a constitutional right is subjected -- is subjected to the complete and utter whim of a licensing official without any standards governing the licensing official's discretion whatsoever. That is something the Supreme Court has condemned now for a very long time as unconstitutional prior constraint. It literally fits the definition of Staub v. City of Baxley, which held that whenever a freedom which the Constitution guarantees is subject to, as an initial matter, a licensing regime, it's an unlawful prior restraint if there is unbridled discretion in the issuance of that license.

There can be no room for an assessment of facts, there can be no room for opinion or feelings or any other kind of subjective notions about whether the applicant is a good person or a deserving person or whether the right is a good idea or a bad idea. There have to be objective licensing standards. A background check is an objective licensing standard, we have no problem with that. Something that requires, as many states do, some demonstration, perhaps, of proficiency, knowledge of the state's use of force laws, all those are common objective qualifications that are imposed upon permits to carry firearms.

But what is not permissible anymore, in the post McDonald world, is a statute that says we, the government, will determine whether or not you have a good enough reason to engage in this behavior. If you have a right to do something, then that's the beginning of the discussion. The government carries the burden of disproving entitlement to engage in a constitutional right.

THE COURT: And, counsel, I certainly understand the argument, but what case or have there been any cases yet that have imported this concept of prior restraint in the Second Amendment context?

MR. GURA: No, there have not. However, what we have had is a trend in the federal courts that look to the First Amendment to interpret the Second Amendment.

We are really in a very new and emerging area of law.

It's been less than a year since McDonald came out. That was the green light for us to even file such cases. There are not many of them because the Massachusetts law is definitely rare. There are a small handful of states that have unbridled discretion in their licensing scheme. I believe there's only five or six states left that do this. So there hasn't been a lot of time for law to develop.

What we have seen the D.C. Circuit, the 3rd Circuit, and the 4th Circuit all say that the First Amendment will
02:05 henceforth be a guide for the Second Amendment. They do this by drawing upon Heller, which refers repeatedly to First Amendment analogies. The D.C. Circuit case in Parker, which became Heller, that drew heavily upon the First Amendment. We've seen recent cases, the Nordyke case, 9th Circuit that came out in May, although it has sort of an unusual way of approaching the Second Amendment, it also draws upon first amendment standards for the way that it goes after the Second Amendment. And it's not a mystery as to why the Supreme Court and all the circuit courts have looked to the First Amendment
02:05 for a guide.

The first and Second Amendment are the two places in the Bill of Rights where people are secured in engaging in some sort of affirmative conduct, be it speaking, worshipping, or keeping and bearing arms. And so it makes sense that the kind of regulations that you see in the First Amendment will happen

in the Second Amendment area. For example, in the First Amendment we have a very well-established regime of time, place, and manner. You can speak but you can't have a sound truck blaring it through your morning. There are tests about which forums are appropriate and what kind of restrictions are going to be allowed in different forums.

Likewise, the Second Amendment, if we look at the Heller case and its various discussions of the right to carry a gun as traditionally understood sounds a lot like time, place, and manner. There are sensitive places to which you cannot carry a gun. You can carry a gun for some types of reasons, not for all reasons. There is definitely an established history of regulating the manner in which firearms are carried. It's undisputed that the state can ban entirely, for example, the concealed carrying of guns. We're not challenging that. However, all of those cases, if you read them carefully, what pops out is an explanation that we can ban the concealed carrying of weapons because we allow the open carrying of guns. The lesson there is they can tell you how to do it. I think the society has changed its preference since the 19th century. Today the preference has probably reversed itself. There are some people who like to openly carry their firearms, I think it's a political statement in some regard.

Today we have states that generously license the concealed carry of guns and some look at open carrying as kind

of horrifying to the public. It's seen as a brandishment or perhaps a hostile act in some places that are otherwise quite friendly to gun rights.

In any event, it's for the legislature to decide. They can regulate the manner in which the guns are carried, but they can't ban it all completely.

THE COURT: But isn't there an argument here that even the discretion to the Commissioner for whether or not someone was suitable for a class A license, that it's on the continuum of time, place, and manner restrictions in the sense that the legislature has decided that it should be within the discretion of the leading law enforcement officer in that community to decide whether or not there are folks who fall outside of the categories of disqualification that still should not be in possession of a large capacity or concealed weapon?

MR. GURA: That is exactly, your Honor -- there's no question that the legislature has done that, and that's why we're challenging their decision to do that. The fact is that that kind of subjective determination is exactly what the prior restraint doctrine seeks to disallow.

If a person meets certain objective standards or -- they should be able to exercise their constitutional rights. If they're disqualified by objective standards, they should be disqualified, of course, as long as they have due process and can face their accusers and sort of have the normal

protections.

I suppose that in theory one can imagine a regime where an officer asserts some reason as to why a person is to be disqualified, but, again, that reason has to be objective, it has to be within a defined set of objective standards. And here what's amazing is we don't actually have much of a reason. There is no question whatsoever that Stacey Hightower is fit to carry a gun. She's not a public hazard, they never claimed that she is. We have this dispute about whether charges were
02:09 pending on this application, and we can dispute that all day long, but the one thing that is completely missing from the defense brief is any accusation or allegation that Stacey Hightower is a dangerous person. In fact, the alleged pendency of these charges were known to the defendants for three years. They took no action against her. She was still on the force, she still had her class A license. It was only when she left her employment that suddenly these things became problematic.

THE COURT: And, counsel, do you think that the imposing this prior restraint framework on Second Amendment
02:10 cases follows from Heller and McDonald, which I think in both of those cases the Supreme Court was very careful to say that they were not doing away with or not questioning the government's right to regulate the issuance of licenses for firearms?

MR. GURA: Oh, yes, your Honor. In fact, adopting our

prior restraint framework is probably the most limited kind of action that the Court could take with respect to striking down gun regulations, because we're not -- our primary argument does not require any sort of judicial interest balancing or even the selection of some kind of a means end level scrutiny. Of course we would need that if we were to get to our equal protection argument. However, all the Court would be saying is you, City of Boston, Commonwealth of Massachusetts, you can regulate guns, but you need to come up with objective
02:11 standards. And what those standards are, they are free to come up with them in the first instance, and if they adopt standards that are problematic or difficult, then we can have a lawsuit that examines those specific standards and evaluates whether or not they are appropriate to regulate the Second Amendment right. But all the Court would be saying here is that however they go about the business of regulating firearms, it simply has to be done with some kind of objectively defined limitations, and they have to provide some level of due process to people so that those limitations can be effectively applied.
02:12 And that's a very minimal approach.

THE COURT: Counsel, do you want to go on?

MR. GURA: Well, the -- I think the application of prior restraint doctrine flows both from Heller, McDonald but also from Staub and Shuttlesworth and prior doctrine of prior restraint. Of course, in Staub v. City of Baxley, the court

defined prior restraint quite broadly. It spoke about freedom that Constitution guarantees. Now we know this is a freedom that the Constitution guarantees, so if it's going to be regulated -- of course we don't contest that it need be regulated -- it has to be regulated in accordance with something other than the licensing official's mere whim.

Moving on, your Honor, to the due process questions that we have raised, it's not really in dispute after McDonald that there is a Fourteenth Amendment liberty interest at stake. 02:13 There is a liberty interest in keeping and bearing arms. We also have alleged that there's a property interest that Ms. Hightower possessed in her license. It's interesting that the defendants contest that. I suppose it goes both ways.

An alternative form of argument for us, their primary dispute with the property interest is that we can't have a property interest under Massachusetts law in having handgun licenses because it is wholly discretionary and can be revoked at any time, and the applicant always has the burden of disproving the lack of entitlement to the license. Taking them 02:13 at their word and accepting that, that's sort of works to prove the other part of our case, which is that the discretion here is excessive. But at least the liberty interest is not really at issue. McDonald came out, it's a fundamental right, and we know that it applies to the defendants.

So the question now is whether or not there's going to

be some kind of hearing afforded to someone who is going to be losing this interest. There has to be some pretermination opportunity to respond and there has to be some kind of notice. Notice and an opportunity to be heard are the fundamental aspects of the procedure of due process.

Again, we concede that there might be exigent circumstances. There might be times that come up, as with other contexts where there's an emergency, an applicant or a license holder has done something bad or is under indictment and the government has to act quickly. That's not really the case here, though. The case here is remarkably similar to the Supreme Court's landmark ruling in the Lattimore case.

THE COURT: But, counsel, you're attacking the statutory scheme here both facially and as applied.

MR. GURA: Correct, correct. And actually, the City of Boston does have enough discretion to adopt procedures that would be constitutionally sufficient, and there are licensing officials in the Commonwealth of Massachusetts that take a more constitutionally adequate approach to applying section 131. But these defendants don't, and in fact, we have the quite helpful declaration of, I believe it's Lieutenant Harrington, Defense Exhibit C, which really we welcome. It states quite candidly that in the City of Boston, people are not going to get an unrestricted license to carry a handgun unless the police department determines that it is within its interests,

whatever those might be, undefined.

So if there's any question at all as to whether or not there's an injury or a ripeness, I think that probably resolves it.

The City could do a better job of applying the statute. Perhaps if they did so, then they would have an argument about standing or ripeness, but they don't, because they maximize the amount of discretion that the statute allows them to take. So we do have both a facial challenge and as
02:16 applied challenge.

THE COURT: And, counsel, I know you're arguing obviously that the notice and hearing should be before any revocation or before any firearm has to be handed back, as it was by Ms. Hightower in this case by her revocation. As I understand the statutory scheme, anyone aggrieved of a revocation can go into state District Court, am I right in that, once the revocation has occurred to contest the revocation of a license?

MR. GURA: That's correct, but the procedures in
02:16 District Court don't comport with due process also.

First of all, the Supreme Court has made it clear, as has the 1st Circuit, sometimes we do need pretermination, predeprivation hearings. Sometimes you do need a predeprivation process. Sometimes it's not going to be available because there are exigent reasons, because it's not

in the nature of the -- of what has occurred. Here, however, when there's no emergency, when there's no possible argument that the wrong that was allegedly committed by Ms. Hightower had anything to do with public safety, perhaps a pretermination hearing would have avoided this entire lawsuit because we would have had some kind of a meaningful notice and opportunity to be heard as to whether or not, quote-unquote, charges were, quote-unquote, pending. And it's always better to have appropriate due process at the administrative level before you
02:17 have a federal case under section 1983. It's obviously the more logical, appropriate way to approach things.

But the post-deprivation procedures we don't contend are sufficient either. There's hearsay evidence is admissible, there's no right to conduct discovery, the police Commissioner is not required to even file any kind of written response. And the standards applied by the Massachusetts court are such that the applicant has the burden of disproving their lack of entitlement.

THE COURT: And is it abuse of discretion? I mean,
02:18 what is the standard of review?

MR. GURA: The standard of review is that the applicant has to -- the applicant has to prove that the police Commissioner has abused his or her discretion. And of course, that's kind of tough to do because the -- there's no entitlement to having the license in the first place. So it

puts people in the sort of Kafkaesque procedure where they have the burden of disproving a negative that they're not entitled to do. So it's not really a very fair proceeding either in terms of what's evidentially going to be allowed or even in terms of how things are balanced.

THE COURT: And where would you put the balance of public safety -- if you're moving -- I'm assuming when you're saying moving to a pretermination hearing, you're talking about the owner of a firearm retaining their firearm while any
02:19 hearing is being conducted. Where do you think the balance, if you think the balance of public safety falls in that analysis?

MR. GURA: Well, actually, that's -- if I may correct -- if I gave that impression, that's not necessarily true. There are going to be circumstances where for public safety reasons the police have to intervene and take the firearm away, if a person has been seen on, you know, live TV, you know, shooting people in the street. Obviously we can write regulations that capture that sort of incident and say, you know, under certain circumstances there's going to be a
02:20 seizure prior to any hearing. Again, we can write laws that capture, that make an allowance for public safety. And we would have no objection at all to laws that properly account for public safety, but we have to see what those are first before we can evaluate their constitutionality. It's not for us to propose laws for the Commonwealth, and it's not for the

court to rewrite the Commonwealth's laws. All we can do is look at the legislature's handiwork, look and say this is not enough, you have to do something different because there's a fundamental right at stake. And there's going to be a place where public safety is adequately secured and people's rights are adequately secured, and that balance is going to be achieved. But that balance is not achieved here.

Anyway, finally, moving on to our last argument, the -- or last due process argument, we have a substantive due process violation as well. The defendants make a very interesting argument. They correctly note that the 1st Circuit in -- I'm not sure how to pronounce this case -- DePoutot v. Raffaelly case, it's in both of our briefs, adopted a so-called conscience-shocking test. Where only behavior that shocks the conscience, depriving someone of a substantive liberty interest is going to be held as constitutional. When we first look at that kind of language, as people -- all of us who speak the English language, conscience-shocking, that's a pretty high standard, but if we read the case close, the 1st Circuit has a much more dry definition of how that is to be applied. It's a totality of circumstances test, where conduct that was reasonable under the circumstances and proportionate to the governmental interests at stake is going to be okay. And of course, in many of these types of cases it's going to wind up being something dramatic that violates that standard because

usually you're talking about the police interacting with somebody under some kind of an emergency or some kind of fast-evolving situation, but not in this type of case where it's very much a paperwork dispute that's happening in an office somewhere over what box somebody checked off three years ago.

So it's -- here, if we apply the language of the test, was it reasonable under the circumstances to order Stacey Hightower to give up her -- essentially her means of self-defense? Was that proportionate to the government interest in whatever this dispute is about the language on the form? It might be, we submit that it's not. And so it's also a substantive due process violation.

THE COURT: And let me ask you now to respond to one of the government's arguments in regard to the fact that this challenge is not ripe at this time, that as I understand the argument, that Ms. Hightower was -- her class A license was revoked but she didn't appeal that revocation and that she didn't -- or she hasn't since applied as a civilian for a class A license or -- and she hasn't applied for a class B license, which, although not allowing her to carry a concealed revolver, would allow her to carry her revolver. What, if any, response do you have to that argument?

MR. GURA: Several responses. First of all, there was no need for Stacey Hightower to exhaust her administrative or

judicial remedies under Patsy v. Board of Regents and all the cases that flow through that. The Supreme Court has established that in a 1983 action, once there's been some action taken by the government, people are entitled to federal court review. The federal courts have primary jurisdiction over federal civil rights claims. So there's no need to involve any sort of state administrative procedure, especially when the question here is not so much whether the standard was properly applied, it's whether the standard itself is
02:24 constitutional or not. So that's how we would answer that.

Beyond that, we have the simple fact of a revocation and seizure of a firearm is plainly an Article III injuring fact. That was the basis, of course, for the injury in Heller. It's the basis for the entire body of administrative law in the United States courts. If a license disapproval or revocation does not constitute an Article III injury, then all of the administrative laws are unconstitutional.

THE COURT: I follow you there. I think the argument, at least how I took the argument, was to the extent that I
02:25 think you concede in your papers that there's no Second Amendment right to carry a concealed firearm, and that to the extent that's the portion of class A that appears to apply to Ms. Hightower's privately held firearm, that the fact that you haven't applied for the lesser license that would allow her to carry the firearm but not as concealed means that this matter

isn't ripe for review at this time.

MR. GURA: There are two parts to that, your Honor. The first part is the license that Ms. Hightower happened to have, she happened to have a class A license which did permit her to carry a gun. It permitted her to carry a gun in a concealed fashion, it permitted her to carry a gun in an open fashion. However, either of those manners could have been banned by the Commonwealth. There are some states that do ban the open carrying of guns but allow the concealed carrying of
02:26 guns, and we would not contend that those states are in violation of the Second Amendment. So you're right, there's no right to carry a concealed gun, we would also say there's no right to carry an open gun, there's a right to carry a gun somehow. So we don't think that distinction makes sense.

The fact was she had this particular permission and it was taken away from her and now they're not going to give it back, because we have this declaration from Lieutenant Harrington who says there's not going to be an unrestricted license to carry of any flavor unless it is deemed to be within
02:27 the interests of the Boston Police Department. So going forward, if she wanted to reapply, Ms. Hightower is subject to an unconstitutional prior constraint, and the Supreme Court has made clear in cases like City of Lakewood and others going back further than that, that when a person is confronted with an unconstitutional licensing regime, there's no need to make an

application in order to challenge its constitutionality. And in fact, beyond that, there's the futile act doctrine. People do not need to engage in futile acts in order to trigger the jurisdiction of the federal courts where the government has made it very clear what its policy is and has established practice. Here there's no dispute as to what the practice is. We have Lieutenant Harrington's declaration, which we accept as being accurate and representing the police department's views, then we have an injury. Because it would be completely
02:28 pointless for her to file paperwork, we know what's going to happen. She was going to get some kind of permit that's restricted, that does not allow the carrying of guns, or at the very least her application will be subjected to unbridled discretion, the prior restraint that she's entitled to challenge because she disagrees with the fact that her application could even be subjected to that kind of scheme.

THE COURT: Although -- and correct me if I'm wrong -- it wasn't my impression it was clear on the record that she would be denied a class B license.

02:28 MR. GURA: It is not clear that she would be denied a class B license. We believe that she might probably get one. But what is clear on the record is that there would be a restriction on that. Lieutenant Harrington's declaration is fairly clear. The law in Massachusetts allows the issuers of carry licenses A or B to impose restrictions, and typically the

City of Boston will restrict the carrying of license. It's called the license to carry, but that's not carry in the constitutional sense. Carrying under the Commonwealth's law, the case is Seay, S-e-a-y, v. Commonwealth or Commonwealth v. Seay, it's in both of our pleadings, I believe, states that carrying for purposes of section 131 is having even momentary possession of a gun and then moving it from place to place. That's not the same definition of bear arms that Heller gives for what the Second Amendment allows, which is to carry a gun upon one's person for purposes of self-defense in cases of confrontation with another person. If Ms. Hightower were to do that even with a restricted class B license, she would be in jail. There's no suggestion that she would get an unrestricted class B license any more than she would get an unrestricted class A license, unless, of course, they deemed it to be in their interests. It is not common in the City of Boston to see people freely walking around with open small capacity handguns on their hip, and it's because those licenses just aren't given out.

02:30 Thank you.

THE COURT: Thank you.

Counsel.

MR. SALINGER: Good afternoon. Ken Salinger for the Commonwealth, your Honor.

Your Honor, Ms. Hightower's Second Amendment and

substantive due process claims are not ripe. The 1st Circuit has stressed that ripeness doctrine is particularly important in cases like this one, where a party comes to federal court and asks a judge to strike down a state law on constitutional grounds, same, of course, as a federal law. We cite in our papers, for example, Doe v. Bush, 2003 case where the 1st Circuit affirmed dismissal of a challenge to that 2002 congressional authorization of use of military force in Iraq on the ground that it wasn't clear there was going to be any use of the force so the claim was not ripe.

02:31

Your Honor, I think you've got our argument right, but just to summarize it very quickly, the complaint specifically seeks an order restoring Ms. Hightower's unrestricted class A license. An unrestricted class A license allows Ms. Hightower to do things that clearly are not protected by the Second Amendment, that would allow her to carry a concealed weapon. She concedes today that's not a right she has under the Second Amendment. We've shown that, in addition, unrestricted class A license allows somebody to carry a capacity firearm in a concealed matter. And under the Supreme Court's decision in Heller, the Court makes clear than an M-16 assault riffle and other kinds of weapons not in common use at the time the Second Amendment was enacted are not protected by that amendment. On remand, the federal District Court in Heller II has held that high capacity firearms are not protected by the Second

02:32

Amendment.

Today, Ms. Hightower gave three reasons why she said our ripeness argument is just wrong, even though she acknowledges she has never gone back to the City and applied for either for a restricted class A license that would allow her to carry the five-shot revolver she used to carry but not large-capacity guns, and she's also not applied for a class B license.

First she says, well, there's no need to exhaust
02:32 administrative remedies. Your Honor, we haven't made an exhaustion argument, so I am not sure why she makes that as a defense to the ripeness question.

Second, she says, well, there's clearly injury in fact. Your Honor, injury in fact goes to standing, not ripeness. And in Ms. Hightower's response, not to the Commonwealth's paper, but to the City's papers she asserted basically, well, if I have standing, I must have ripeness. We've demonstrated at page 3 of our reply memorandum that under settled 1st Circuit precedent that's not correct. Standing and
02:33 ripeness are discrete inquiries, both are required for the Court to have subject matter jurisdiction.

Now, most substantively Ms. Hightower asserted today well, it would be a futile act to go back and apply for, say, a restricted class A license. Your Honor, as we pointed out, albeit in another constitutional context, the U.S. Supreme

Court has rejected this kind of argument when it comes to ripeness in the regulatory takings area. People used to go into courts saying, you know, I presented one development plan for my property to the local officials and they denied it, so what can I do? They've taken my property. The Supreme Court made clear in MacDonald -- not the same McDonald of Second Amendment fame but the one cited in our papers at pages 8 to 9 -- that the denial of a grandiose development plan doesn't demonstrate that a less ambitious one would be denied here as well.

02:34

There can be no basis for presuming that if Ms. Hightower, as a civilian, had gone back instead of deciding to press her Second Amendment claim, applied for a restricted class A license, for example, limited to the kind of weapon she wants to carry, we can't know that the City of Boston would have denied that. Certainly the declaration doesn't say that. It says the application would be reviewed individually as all applications are.

And so for important prudential and constitutional reasons, the Court should not reach the merits of these claims.

02:34

THE COURT: And can I just ask a question, factually speaking, the reason the license was not renewed in the first place was the position, the Commissioner's position, that Ms. Hightower had lied on the application in response to a question about charges pending, as I recall.

MR. SALINGER: Technically, that's the reason why the license was revoked. It was renewed for a week and a half and then revoked.

THE COURT: Is that still true? Meaning, is that disqualification still in place because now she's no longer a police officer and can apply as a civilian, and, as I understood it, would not have to fill out this additional form that sworn officers needed to fill out to apply for a class A license?

02:35 MR. SALINGER: I believe I know the answer, although I don't represent the City. I understand from the City's papers --

THE COURT: I can wait to ask the City.

MR. SALINGER: But I think the answer is yes. First of all, she wouldn't have to fill out that form; and secondly, Commissioner Davis quite understandably should have concern if a sworn Boston police officer, in applying for renewal of a firearms license, lies to the Commissioner.

Now, there have been some arguments today by

02:36 Ms. Hightower and in her papers, that's silly, she's not dangerous, there really weren't grounds for finding she's not a civil person. Your Honor, none of those issues is before the Court.

The 1st Circuit made clear in Rosenfeld v. Egy, which we cite in our memorandum, that the question of whether under

the Massachusetts firearms statute somebody is or is not a suitable person is a question of state law, that Ms. Hightower, if she wanted to press it, could have appealed to District Court, as you suggested, she chose not to. But in footnote 5 -- I'm sorry, not in footnote 5 -- in footnote 4 of the Rosenfeld decision, the 1st Circuit made clear that's a question that should be raised in state court as a matter of state law, it's not a constitutional question.

So the Court with respect to the claims that are
02:37 asserted in this case has to assume that Commissioner Davis had good grounds for finding that Ms. Hightower was no longer a suitable person.

THE COURT: Well, let me ask you this question. Your brother has argued that in light of McDonald, in light of Heller, clearly the Second Amendment has been recognized as a fundamental right and that the issue here is not whether or not Ms. Hightower has a right to carry a concealed weapon or high-capacity weapon under the class A license, but that her right at this moment, her possession of her firearm, has been
02:37 taken away by the operation of the statutory scheme, particularly in regard to the discretion that the Commissioner has to determine whether or not someone is suitable. What, if any, standard is there that cabins the Commissioner's discretion in determining whether or not someone is suitable? I didn't see any language in my review of Chapter 140 section

131. I wasn't sure if there are regulations that bear on that. If you could address that. Certainly if I need to address your sister representing the City, I can do that.

MR. SALINGER: That's very much a question about the State of Massachusetts law, which I'm able to and happy to answer.

A two-part answer, your Honor. First, there's a statutory part of the answer and then there's a case law part of the answer.

02:38 We quote at the bottom of page 4 of our summary judgment memorandum the relevant language from section 131(f) of Chapter 140 of the Massachusetts General Laws. It's a long section, and so that's why I draw your attention to where we quote.

The statute provides that if an appeal had been taken to state District Court, if the District Court had found that there was, quote, no reasonable ground for denying, suspending or revoking such license and that the petitioner is not prohibited by law from possessing the same, close quote, then 02:39 the District Court could have and of course would have ordered the reinstatement of the weapon.

So there's got to be a reasonable ground for denying, suspending or revoking a license. And this goes directly to the repeated incorrect, mistaken assertion by Ms. Hightower that Massachusetts law allows a licensing authority, such as

Commissioner Davis of the City, to just on a whim revoke or refuse to renew a license.

The case law is clear as well, your Honor. There is no opportunity -- I'm sorry, Massachusetts law simply does not permit arbitrary denial or revocation of a license, that would be unlawful. The standard, making clear that arbitrary action is unlawful, is discussed, for example, in the Howard case, 59 Mass. App. Ct. at page 902. And, your Honor, we gave an example in our papers. We cite to a Superior Court case from 2006, the Lizotte case, where the District Court judge undertook just this review, found that the denial was arbitrary, and reversed, ordered the granting of a license. So the premise of Ms. Hightower's position that a licensing authority can just on a whim say, well, I don't feel like giving it to you, is wrong as a matter of law in Massachusetts. Although it is not a categorical standard, the suitable person standard does require that there be a reasonable ground for granting or for revoking.

Your Honor, if the Court, despite the lack of ripeness and the important reasons -- well, before I make the transition -- you pointed out that Ms. Hightower's argument -- well, she's trying to protect the standard, she's as concerned about her facial claim as she is about her as applied claim. That was the point of us directing the Court's attention to Doe v. Bush and the other case law we have cited at that spot in

our memorandum, your Honor. Someone with great passion that a statute is incorrect under ripeness doctrine is not allowed to come into federal court and the court is not allowed to exercise jurisdiction unless it's clear there's a violation or a potential violation that needs to be addressed. Here, where Ms. Hightower now says, you know, that unrestricted class A license that I previously had, that's not what I want, I'm not trying to carry a concealed weapon, I'm not trying to carry a high-capacity weapon, like a Glock with a .33 round magazine, I
02:41 just want to be able to carry in public my old five-round revolver. Again, she hasn't sought that kind of license. If she were to seek one and it were to be denied, she would have a ripe claim. But rather than either do that or exercise her due process right of getting judicial review in state District Court, she has opted to prematurely try to get this Court to pass judgment on the constitutionality of a Massachusetts statute that violates the requirements of ripeness.

Your Honor, if nonetheless you were to reach the merits of the Second Amendment claim, I think it boils down to
02:42 there being two parts. One, this prior restraint notion -- excuse me, just a little twinge in the back. I need to sit for a moment, I'll be back up in a moment. I apologize.

Ms. Hightower has gone back and forth as to the nature of her claim, your Honor, whether she is conceding that the Commonwealth can require a license before somebody can carry a

firearm or not.

In her initial summary judgment memorandum, for example, at page 1, she expressly conceded that states may license the carrying of firearms. We pointed out in our summary judgment memorandum that that concession is inconsistent with her claim that imposing licensing requirements is unconstitutional.

So in her opposition to the Commonwealth's papers at page 8, Ms. Hightower said for the first time, the issue, and
02:43 I'm quoting, is whether defendants may bar individuals from exercising the right at all by use of a permitting scheme, close quote.

Today Ms. Hightower seemed to go back to her original position in response to a question from the Court, conceding some level of licensing is allowed. That position is the correct one. Indeed, the position that having a licensing requirement is an unconstitutional prior restraint cannot be squared with the Supreme Court's decision in Heller. We can't lose sight of what the Court required at the end of Heller.
02:44 What it required is that the District of Columbia permit Mr. Heller, as long as he's not disqualified under other provisions of the licensing scheme from doing so, had to permit him to register his handgun and issue him a license to carry in the home. Neither Heller nor McDonald called into question the ability of the Commonwealth and other states to require a

license in order to make sure somebody is a law-abiding, responsible citizen. Remember, the Supreme Court in Heller made clear that the Second Amendment only protects the rights of, quote, law abiding, responsible citizens, close quote.

THE COURT: And, counsel, do you agree with your brother's point that applying prior restraint to the Second Amendment context would be a matter of first impression? Are there any other courts that have applied prior restraint in the Second Amendment context?

02:45 MR. SALINGER: I don't have the cite. I'm told by counsel for the City that apparently there's a recent decision rejecting the notion. But our position, as I was just suggesting, your Honor, is that although the Supreme Court in Heller did not speak in these terms, in the terms of prior restraint, by enumerating presumptively constitutional restrictions on eligibility to carry firearms, including restrictions on felons and violent -- and the mentally ill, the Court was necessarily rejecting the notion of a licensing scheme constituting an unlawful prior restraint. There would 02:45 be no practical way to implement the kinds of categorical restrictions that the Supreme Court has said are presumptively constitutional without a licensing scheme. So the whole prior restraint notion just does not fit this case, your Honor.

Similarly, as we've shown in our papers, the arguments that Ms. Hightower has repeated about the various First

Amendment cases that say one can't have a good character test or some other sort of more discretionary test as a condition for exercising rights of speech in public forum don't apply here, that's not just us saying that, your Honor, we point to the 1st Circuit's decision from 2004 in Ridley v. MBTA. This is one of the many cases where somebody is challenging the MBTA's refusal to carry certain kinds of advertising on their property. And that case, 390 F.3d at pages 94 to 95, the 1st Circuit expressly held that the case law about discretion doesn't apply throughout all of the First Amendment law. They only apply at the very core in the exercise of speech in public forum, but in other contexts there can indeed be the equivalent of licensing requirements.

02:47

We've noted, your Honor, as the Supreme Court has made clear, the core of the Second Amendment is keeping a handgun inside your home to protect hearth and home. But, in any case, the position taken by Ms. Hightower, what she calls prior restraint, is basically asking this Court to do, aside from Heller, something that would be certainly first impression, completely novel. There is no court that has struck down licensing and permitting requirements on the grounds suggested here, that the mere existence of any such requirements violates the Second Amendment. And so Ms. Hightower has her fallback argument, which is, well, even if prior restraint doesn't work, this standard, the suitable person standard, we don't like it,

Judge, so you should strike it down. That's how I understand the fallback position.

Your Honor, there's been some back and forth in the papers about if you were to skip over ripeness and reach the merits, should you apply strict scrutiny versus intermediary scrutiny. Just quickly, the same kind of -- the same part of Heller I was just discussing, the presumption that various restrictions on the ability of certain folks to carry weapons is inconsistent with any notion of strict scrutiny. So at most there would be intermediate scrutiny here.

02:48

The suitable person standard is not devoid of content. It's entirely consistent with that critical language from Heller I quoted a moment ago, saying that the Second Amendment protects, quote, law abiding, responsible citizens, close quote. The suitable person standard under Massachusetts law, as developed by the courts, means someone sufficiently responsible to be entrusted with a license to carry firearms. The Massachusetts Appeals Court stressed in the MacNutt case that the point of the licensing scheme under Massachusetts law is, quote, to limit access to deadly weapons by irresponsible persons, close quote. And we noted as an aside that the Supreme Judicial Court in the DeLuca case acknowledged that of course character is a necessary qualification. If somebody can't tell the truth on their licensing application, that certainly calls into question at the very least their ability

02:49

still to be trusted with a deadly weapon.

So, your Honor, really what Ms. Hightower's arguments seem to boil down to is an argument, well, categorical rules, like the kind discussed at the end of the Heller decision, may be okay under the Second Amendment, but an individualized determination of whether someone is a responsible person or not is somehow by the very broad language of the Second Amendment rendered unconstitutional.

Now, here, your Honor, Ms. Hightower's argument is
02:50 entirely inconsistent with First Amendment doctrine. We pointed out at page 15 of our memorandum there are at least two U.S. Supreme Court cases that in the First Amendment context reject categorical restrictions on speech but acknowledge that an individualized determination could lawfully produce the same result in the same case. Florida Star had to do with the newspaper publishing victims' names. It's unconstitutional to bar that categorically, but in particular cases that might pass constitutional muster. And the Globe Newspaper case, there the question was media access to trials involving victims of sex
02:50 crimes who are younger than age 18. The court said, well, a categorical rule barring that is not permissible, it violates the First Amendment, but acknowledged that based on an individualized determination of potential harm to such a victim, in an appropriate case the judge could exclude the media.

Well, Ms. Hightower's only response -- and this is at page 11 of her memorandum responding to the Commonwealth -- Ms. Hightower says that she, quote, respectfully disagrees with the claim that statutory categories are not always better than individualized decisions, close quote. Your Honor, respectfully, that does not rise to the level of constitutional argument. Ms. Hightower cites no case law to support the notion that in all instances if one is going to restrict either a First Amendment right or a Second Amendment claimed right
02:51 that it has to be done through categorical rules. That's simply inconsistent with precedent in other areas, and there is nothing in Heller or McDonald that suggest that that is the rule under the Second Amendment.

Your Honor, unless you have questions on the Second Amendment, I'll move to other claims.

THE COURT: Yes, and are you going to address the question of pretermination hearing versus post --

MR. SALINGER: Why don't I do that next, your Honor.

So the procedural due process claim. It's undisputed
02:52 that Ms. Hightower had a post-deprivation right of judicial review. She got notice of revocation, so there's no question about notice. The question is review. She had the right of review, she chose not to exercise it. Her claim, therefore, is that as a matter of constitutional law she was required to be given that right of review before having to turn in her license

and gun rather than afterward. Your Honor, that's wrong as a matter of constitutional law. First of all, the one court that we could find that that addressed this issue in a firearms licensing context is the 2nd Circuit in the Kuck case, 600 F.3d at 165, where the 2nd Circuit said that due process requires only, quote, opportunity to be heard after a denial or revocation, close quote. And perhaps more importantly, that is consistent with Supreme Court precedent, for example, the Mackey case coming out of Massachusetts.

02:53 THE COURT: And was the 2nd Circuit case before or after McDonald?

MR. SALINGER: After -- let's see, it was 2010 -- I'm not positive whether it was before or after McDonald, your Honor. I want to say after, but I'm just not positive. I apologize.

THE COURT: Okay.

MR. SALINGER: Your Honor, Mackey, that's the case having to do with revocation of driver's licenses for somebody who refuses a Breathalyzer test, Massachusetts case where very

02:53 similar claim went up, the claim was it's not enough that I can get judicial review afterwards, you should let me keep my license until I've had that review. The Supreme Court rejected the claim, holding that the public safety interests at stake justify some administrative action with no predeprivation hearing and post-deprivation review was sufficient to satisfy

due process.

Hodel is another example that we cite. That's a case having to do with surface mining cessation orders, the Interior Department having the power for safety or biohazard concerns to tell the surface mining operations to stop, it must stop, and only seek judicial review afterward. The U.S. Supreme Court upheld that.

The theme here, and we explore it at greater length in our memorandum at pages 17 to 19, is when public safety
02:54 interests are at stake, the flexibility of procedural due process allows for the review to happen post deprivation rather than predeprivation.

THE COURT: What about your brother's argument that given that Ms. Hightower has a liberty or property interest in her firearm post Heller, post McDonald that if there were -- that that compels a pretermination hearing, and that in terms of public safety there could be exceptions for taking away someone's firearm before those pretermination hearings are completed.

02:55 MR. SALINGER: So if I may give a two-part answer. First of all, this is an example -- there were quite a few in his case, unfortunately, where Ms. Hightower is failing to distinguish whether she's addressing arguments by the Commonwealth or by the City.

The City has raised some serious questions about

whether Ms. Hightower has the requisite property or liberty interests. The Commonwealth did not. We have assumed for present purposes that the license that she had was a sufficient property interest. Certainly she has no liberty interest here but a sufficient property interest. But Mackey and other cases that we've discussed say -- Mackey as an example -- you don't have a property interest in getting a driver's license. The 1st Circuit has held -- I don't have the cite handy but can send it if it matters -- has held once Massachusetts gives
02:56 someone a driver's license, then a person has a property interest and is entitled to due process protection; and yet, the 1st Circuit has held notwithstanding that existing property interest, a post-deprivation hearing is sufficient. Hodel is the same. The order was not upheld for a lack of property interest; the order was upheld under the assumption or holding, I forget which, that there was a property interest in the prior operation to conduct surface mining, but given the public interest at stake, it satisfies due process to tell someone to stop and then have review afterward.

02:57 Here we're talking about deadly weapons, your Honor, and the notion that in any and all circumstances where a local police chief learns of new information that calls into question whether somebody is still a suitable person, they have to provide for judicial review before they can order somebody to turn in their firearm -- presumably this rule would apply in

domestic abuse cases, spouse has become violent and he's attacking his wife and he's physically beating her and he has a firearms license and a weapon. It would be an odd and disturbing rule of constitutional law that said it's okay to revoke that gentleman's license but you have to let him keep it and keep the gun for the weeks or the months it would take to have the court review it beforehand. That is not what the Constitution requires in that case, and it's not what the Constitution requires in this case.

02:57 Your Honor, turning to substantive due process, this is a different kind of claim, even though it shares two words in common. It's foreclosed by the 1st Circuit's decision in Rosenfeld. Rosenfeld v. Egy was a case arising under the Massachusetts -- or concerning the Massachusetts firearm licensing laws. Interestingly, it also involved revocation of a firearms license that had been held by a police officer. And there were allegations that the revocation was unlawful and improper.

The 1st Circuit held -- and it spent all of a sentence 02:58 or two on it because it thought it was such an easy question -- that the revocation of a firearms license does not shock the conscience, and therefore, as a matter of law cannot constitute a substantive due process violation.

Here's another example of where Hightower was responding to the defendants, but she actually didn't engage

the Commonwealth. She was talking about a case cited in the City's brief, not cited in our brief, which is fine. She ignored the many cases we cite in our brief at pages 15 to 17. For example, the 1st Circuit's decision from last year, Gonzalez-Fuentes, a 2010 decision, where the 1st Circuit reiterated that not only is shocking of the conscience a necessary element of any substantive due process claim, but that to shock the conscience the challenged action must be, quote, so inspired by malice or sadism that it amounted to a
02:59 brutal and inhumane abuse of official power, close quote.

The one other case I'll just call out to you, your Honor, is the Collins case from 2001, again, a 1st Circuit case holding that a license revocation is not conscience-shocking, even if it's arbitrary or based on animus.

But Rosenfeld is the clearest. Same circumstances, revocation of firearms license, doesn't shock the conscience. Ms. Hightower could have gotten judicial review if she wanted it, that's beside the point now, but she has no substantive due process claim.

03:00 Your Honor, I see there was one small point I intended to make on procedural due process, for completeness why don't I make it, because today in court Ms. Hightower argues, again, that the judicial review available in District Court does not satisfy due process because hearsay evidence would be allowed. Again, the 1st Circuit has rejected that claim in the context

of the revocation of a license to practice medicine in the Beauchamp case, 779 F.2d at 775 to 776. The 1st Circuit held, and it's reiterated since then, we cite the case, that it does not violate due process for a reliable hearsay to be admitted either during the administrative agency's action, or what concerns Ms. Hightower here as well in judicial review of that. Because, again, the District Court review that Ms. Hightower had available but didn't pursue is not the typical administrative review that's on the record. It's an
03:01 evidentiary review. It's a de novo hearing. Ms. Hightower had the opportunity to go in and present new affirmative evidence that she was suitable, still suitable, and she opted not to do that.

THE COURT: I'm sorry, are you saying the District Court review is de novo?

MR. SALINGER: Yes, your Honor.

THE COURT: And is that set by case law?

MR. SALINGER: Yes, your Honor, and we've cited the case law in our papers.

03:01 So that, your Honor, leaves us with the equal protection claim, and I think this is another area where Ms. Hightower in her responses, today and in her papers, has not grappled with the gist of the Commonwealth's argument.

This is a case we all know where under McDonald the plurality, a four-member plurality said the Second Amendment

right to keep and bear arms to protect hearth and home, to have a firearm in the home is sufficiently fundamental that it is incorporated into the Fourteenth Amendment. The 1st Circuit has held repeatedly -- and we discuss this as pages 19 to 20 of our memorandum, your Honor -- repeatedly that in these circumstances, where a right established by one of the first eight amendments is incorporated into the Fourteenth Amendment, the equal protection clause does not erect a separate and distinct framework for analyzing the claims. Instead, the
03:02 Court is first to review under a substantive amendment. So here if the claim were ripe, which here it's not, would review under the Second Amendment, but any additional equal protection claim only implicates rational basis review and nothing more. We discuss a long line of 1st Circuit cases that go back to that much earlier U.S. Supreme Court case. Ms. Hightower in her opposition tries to distinguish that 1974 case, but doesn't deal properly here.

But, your Honor, we point out in our reply brief at pages 4 to 5 that this very principle that's clear in 1st
03:03 Circuit case law was just a few weeks ago applied in a Second Amendment context by the 9th Circuit, this is the Nordyke v. King case that counsel referred to, and it adopts the same principle, that if there's a claim that an action violates the Second Amendment and also a claim that the same action violates the equal protection clause, the only thing that the equal

protection clause adds is rational basis review.

So if the Court were to reach the merits of the Second Amendment claim and rule in the Commonwealth's favor, then clearly we prevail under the equal protection clause. But if the Court were to agree that the Second Amendment claim is not ripe, then it should rule in favor of the defendants on the equal protection claim on the grounds that there is a rational basis, as the Massachusetts Appeals Court said in MacNutt, for example. The goal of these statutes -- I've quoted this
03:04 language before -- is to limit access to deadly weapons by irresponsible persons. That's entirely rational, and entirely consistent with the Heller standard.

THE COURT: And, counsel, I follow that in terms of the facial challenge, but is the analysis the same as applied to Ms. Hightower's situation here?

MR. SALINGER: It's different, and she alludes this much for fundamental reasons in terms of the as applied claim. The 1st Circuit held in many cases, but again, for example, in Rosenfeld, a claim that a person has been treated differently
03:04 in terms of having a license revoked compared to other persons just -- it's not a constitutional equal protection claim as a matter of law. The mere claim that she was treated differently does not give rise to an equal protection claim. And there are many 1st Circuit cases saying that to come up with a different result would be -- you know, any time any kind of local permit

or license is denied, somebody would all of a sudden have an as applied equal protection claim allowing them to come into federal court. 1st Circuit has very strongly rejected that notion. So it's a different analysis but it gets to the same place. The equal protection claims, whether the facial claim or the as applied claim, fail as a matter of law.

Thank you, your Honor.

THE COURT: Counsel.

MS. SKEHILL MAKI: Good afternoon again, your Honor. Lisa Skehill Maki on behalf of the City of Boston and the Boston Police Commissioner.

I don't want to repeat many of my brother counsel's arguments, but I do want to address an argument on the ripeness issue.

Plaintiff has suggested it would be futile for her to go and apply for a different type of license here. Exhibit C of the City of Boston's summary judgment motion, paragraph 19, Lieutenant Detective Harrington states, assuming Stacey Hightower does not have a statutory disqualification under General Laws Chapter 140 section 131 if she applied for a class A license to carry a large capacity firearm, she would receive, she would receive a class A restricted license to carry for sport and target and for her protection.

So any argument that if the plaintiff were to reapply for a class A restricted license would be based on the

interests. That's not what the declaration says, it says she would receive it.

Certainly receiving a firearm for sport and target and for transportation qualifies as carrying a handgun. You can't do it concealed under the restricted license, but you can certainly openly carry it in a locked box unloaded. So because she has not applied for the restricted class A license, because she has not applied for the class B license, her claim is not ripe here, it has not been definitively denied by the City of
03:06 Boston.

Assuming that we do get to the merits of the case, there is no constitutionally burden conduct here. The revocation was a temporary revocation of a concealed carry license of the plaintiff because she submitted an application form untruthfully. Plaintiff -- the revocation itself did not bar her from applying for a different type of license so that she could carry it openly in a locked box, that she could carry it for purposes of sport and target, and under the Commonwealth -- common law she's also able to carry a loaded --
03:07 carry a loaded firearm when she's in imminent danger. There's an exception for that. So any suggestion she would be arrested if she were faced with imminent harm were she to arm herself with a loaded weapon is false.

We cited two cases in our brief --

THE COURT: Can I just ask you a question in terms of

timing? So at the time that her license was revoked, Ms. Hightower is no longer on the police department?

MS. SKEHILL MAKI: That's correct, your Honor.

THE COURT: Okay. At that time there's nothing barring her from applying as a civilian for a class B license -- class A license or a class B license.

MS. SKEHILL MAKI: That's correct. And she could have applied again for an unrestricted class A license. She would not have to fill out the Boston Police Department internal form. The requirement here is that the paperwork is correct, that the City of Boston knows who's armed, all the pertinent information about them, because it's important to know who has guns in the City of Boston, where they live, and all the information that's required.

The only thing that was required here was that she submit another form. And, yes, we do not guarantee that she would be given an unrestricted class A license to carry concealed again. You know, it's not something that we guarantee, it is within the discretion of the licensing official, but there's nothing at all to suggest she wouldn't be given one. In fact, she was licensed for ten years to carry concealed. It's not unfathomable that she would be given an unconcealed license again, given that she submits accurate paperwork. Whether intentionally or unintentionally she didn't submit it before, we need the accurate paperwork.

THE COURT: And I don't know if there's anything in the record, but what is the rationale for requiring a member of the police department -- requiring them to submit this additional form when they apply for a class A concealed or large-capacity weapon? Is there anything in the record that talks about the rationale?

MS. SKEHILL MAKI: I don't believe so, your Honor. I believe the rationale is just, you know, these are police officers, they're -- the licensing Commissioner is a Boston Police Department official, and when it's internal employees that are -- you know, do have more rights than the average citizen in taking away someone's constitutional rights, that they want to know more information. Certainly if there's an internal affairs issue pending against them, which they may abuse their power, it's certainly within the licensing official's right to know what's going on.

So the only real difference between the civilian application and the application for a Boston police officer in applying or renewing for firearm license is the question of whether there are internal affairs charges pending.

So I think it's just another check on the suitability of the individual looking for the gun. Certainly if an officer is abusing their power and being under investigation for whatever reason by the Internal Affairs Department, the licensing official should know that information.

Back to the issue of whether there was constitutional protected conduct that was infringed upon here by the revocation. Again, there was nothing preventing the plaintiff from going out and getting a different type of license. She could still, even though it's the defendants' position that Heller and McDonald do not go as far as to say the Second Amendment guaranties this right to carry a loaded weapon, either concealed -- has specifically not said not concealed, so the other alternative is unconcealed. Even if it were to 03:10 extend that far, she's certainly not prohibited under a class A restricted license and a class B to carry the gun openly, as long as it's in a locked box to transport it, and use it for sport and target purposes. It's also another paragraph in Exhibit C where it states class A restricted licenses are allowed for people traveling to employment as security officers for their protection, or further, to get to their job so that they don't have to put it in a locked box and they don't have to fear losing their license over that. So there are ways the plaintiff could have exercised her Second Amendment right but 03:11 simply chose not to do so here.

This is not like the case cited by the plaintiff, Bach v. Pataki, where an out-of-state resident was challenging the New York firearm licensing scheme because it did not allow for out-of-state residents to obtain a firearm license there. Plaintiff was an out-of-state resident, there was no question

he was going to be denied. This is completely different. She's been told in paragraph 19 she could get a class A restricted license and she would certainly be reviewed again for a class A unrestricted license.

Even if this -- if there were some sort of infringement upon her right to carry -- although the defendant still maintains that Heller and McDonald do not go so far -- the constitutional scrutiny that should be applied here is at the very most intermediate scrutiny. In the case cited by my brother counsel, Nordyke v. King, the 9th Circuit has now utilized a new test, it's the substantial burden test, and it determines whether the conduct being infringed upon or the government actions substantially burdens the Second Amendment right.

As discussed, there's no substantial burden here. The plaintiff had various alternative measures to exercise her Second Amendment right, has chosen not to do so. So there's no substantial burden here. There's nothing stopping her today from going to get a license to carry.

If there's no substantial burden under the 9th Circuit's analysis, it's a rationale basis review. Certainly this is the revocation of a firearm for someone who has submitted false information is rationally related to the government's interest in making sure that they have the correct information of all people who are licensed to carry firearms

within the City of Boston.

Since our brief does the analysis under the intermediate scrutiny, I will again repeat it. Obviously the City has an important government interest in ensuring everybody fills out their application form accurately and provides the correct information so that they have accurate records as to who's licensed. Heller specifically said that people can -- that the states can and the cities can regulate firearm licensing. The only way to regulate firearm licensing is to know who has firearms and to know the important information and to make sure that they're not statutorily disqualified or they're not irresponsible persons that should not be having guns.

Revocation upon a determination that there's been false information submitted is certainly reasonably related to the important government interests of ensuring that they have all the right information. You know, asking for accurate information without consequence really doesn't do much to make sure that the City of Boston knows who has guns.

THE COURT: And is the statutory language that counsel pointed to under Chapter 140 section 131(f), is that the language that the City points to as well in terms of regulating how the Commissioner exercises his discretion in terms of who is a suitable or unsuitable person?

MS. SKEHILL MAKI: Certainly, your Honor. I mean, the

licensing Commissioner is well aware of the fact that -- and it happens all the time -- that denials of revocations are appealed to the District Court. The discretion that is utilized is to make sure that irresponsible people don't get guns, not to exercise arbitrary exercise of judgment in determining who can have guns or not. This -- you know, going to my brother counsel's argument that is this is an arbitrary revocation, it certainly is not, it is an objective revocation. Anyone who falsifies information unintentionally or
03:15 intentionally on a form will have their license revoked. Exhibit C, again, Lieutenant Detective Harrington states that he's not only revoked people's licenses, civilians' licenses for submitting false information on forms, but he's done it to police officers as well. It is imperative that we have the correct information. Revocation is the best way to achieve that.

THE COURT: Just hypothetically speaking, let's say Ms. Hightower had filled out the sworn officer form correctly, accurately, truthfully, but the police Commissioner had
03:15 information that bore on her character that didn't bear on the truthfulness of her answers to the sworn form, would the Commissioner still have discretion to deny her class A license?

MS. SKEHILL MAKI: If the information bore on her suitability and he determined she was unsuitable. And the letter of revoking her license would have told her the reasons

that it was being revoked. The reasons here were simply she provided an untruthful answer on the form. Holding people accountable to provide the accurate information is not an undue burden. If Ms. Hightower was confused as to what the question meant, there was certainly ample people to ask what it meant. She could have gone to the Commissioner's office and said, I don't understand what this means, this charge is pending, I've been asked this five times on my other form, why would you ask me again? There was nothing preventing her from calling
03:16 Internal Affairs and making sure all her internal affairs investigations had been closed. That's something that did not happen here and the City of Boston simply revoked based on her untruthful answer and it was not a bar from preventing her from going again and applying to a different form or, if she was even still a police officer, correcting the form and submitting a new one.

THE COURT: And I don't think there's any information about this in the record, but I think there was a figure about how many licenses had been denied or revoked, but I don't
03:17 recall that there was a figure about how many times applicants for licenses which are denied or revoked appeal to the District Court. Do you have any sense on order of magnitude how often that happens?

MS. SKEHILL MAKI: I do not, your Honor. I don't believe that's a statistic that the Boston Police Department

keeps, but I can certainly ask and submit it to you if there is.

THE COURT: Do you also have any information or a sense of how much time -- is it 90 days in which --

MS. SKEHILL MAKI: You have 90 days to appeal.

THE COURT: Okay. You have 90 days to appeal. Is there any information about how long if someone does appeal to District Court, how long typically it takes for that matter to be heard?

03:17 MS. SKEHILL MAKI: Unfortunately, I don't have the answer to that, your Honor. I do not know. I guess it all depends on the court's docket.

THE COURT: Okay.

MS. SKEHILL MAKI: So I just wanted to point out two cases out of California also, one was most recently Richard v. County of Yolo in the Eastern District of California, but it's a very similar case as to this one. There, California allows for concealed carrying upon the discretion of the licensing Commissioner. The statute gives the licensing Commissioner

03:18 discretion to determine who has good cause or proper cause to have a license to carry concealed. The alternative is that the individual can carry an unconcealed weapon unloaded or can carry a loaded weapon openly when they're in danger. That is almost exactly what we have here in Massachusetts. In both of those cases the court found that the statutory scheme, the

discretion, was constitutional.

Just moving on -- I don't want to repeat too much of my brother's arguments regarding due process -- but the suggestion that exigent circumstances -- in exigent circumstances only predeprivation due process should not be allowed in case -- somebody is seen on TV shooting a gun at other people, that's, like, the only instance in which somebody would be denied predeprivation due process. That requires subjective discretion. If somebody has lied on their
03:19 revocation form, you have to use your subjective discretion to determine whether or not that lie equals a public safety threat. Plaintiff labors to argue that these charges pending meant nothing to the City of Boston in the three years prior once they were brought and all of a sudden meant something three years later. That's not the case. Her license was not revoked because of the charges. Her license was revoked because she submitted inaccurate information.

Using discretion once somebody has submitted inaccurate information to determine why they submitted, what is
03:20 their reason for submitting it, is it intentional, is it innocent, is it for bad reasons, it's all discretion that the plaintiff argues that the City shouldn't have. Here there was no subjective discretion utilized, it's an objective standard. You lie on your form, either intentionally or unintentionally, your license will be revoked or suspended. You can certainly

try to get another one and submit the most accurate information or apply for a different type of license and not a license to carry concealed.

I'll rest on our brief so I don't repeat ourself with regard to substantive due process and equal protection claims.

If you have any questions, I'm happy to answer, otherwise I'll rest.

THE COURT: Thank you, counsel.

Counsel, I appreciate the arguments on both sides, the advocacy today, as well as the advocacy in your papers. I will certainly take the matter under advisement. Thank you, counsel.

(Court adjourned at 3:20 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/Debra M. Joyce
Debra M. Joyce, RMR, CRR
Official Court Reporter

September 15, 2011
Date