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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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STACEY HIGHTOWER,

Plaintiff,

Civil Action  
No. 08-11955-DJC

V.

June 21, 2011  
1:59 p.m.

CITY OF BOSTON, et al.,  
Defendant.

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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

DEBRA M. JOYCE, RMR, CRR  
Official Court Reporter  
John J. Moakley U.S. Courthouse  
1 Courthouse Way, Room 5204  
Boston, MA 02210  
617-737-4410

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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.

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 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

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

3 Counsel, do you want to begin?

4 MR. GURA: Thank you, your Honor.

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

7 If there are two principles that we would seek to  
8 vindicate in this action, it is that we wish to see the Second  
9 Amendment, right to keep and bear arms, subjected to licensing  
02:00 10 regimes, only if those licensing regimes contain objective  
11 standards and due process. Objective standards and due process  
12 are time-honored constitutional requirements when we're dealing  
13 with fundamental rights, and there's no reason why the Second  
14 Amendment should be any different than the First Amendment or  
15 the Fourth Amendment, the Sixth Amendment, or any other part of  
16 the Bill of Rights.

17 This is not a case about, as the defendants sometimes  
18 have intimated in their papers, a right to have machine guns or  
19 the right to have high-capacity, semiautomatic Glocks. It's  
02:01 20 not a case about concealment. It's not a case that argues for  
21 any aversion of some absolute right that is completely immune  
22 from government regulations. All we are saying is that if the  
23 defendants wish to regulate the right to bear arms -- and we  
24 concede fully that they are entitled to do so -- that they use  
25 objective standards and provide some due process.

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

7           MR. GURA: That's correct, your Honor. We're not  
8 challenging any particular disqualifying feature. In fact,  
9 Stacey Hightower is not disqualified under any particular  
02:01 10 aspect of the Massachusetts law. The defendants have certainly  
11 not suggested as much. They have admitted in their papers that  
12 she is entitled to some form of a handgun permit, and we're not  
13 aware of any disqualifying feature.

14           What we are bothered by is the fact that her  
15 entitlement to engage in what is for her a constitutional right  
16 is subjected -- is subjected to the complete and utter whim of  
17 a licensing official without any standards governing the  
18 licensing official's discretion whatsoever. That is something  
19 the Supreme Court has condemned now for a very long time as  
02:02 20 unconstitutional prior constraint. It literally fits the  
21 definition of Staub v. City of Baxley, which held that whenever  
22 a freedom which the Constitution guarantees is subject to, as  
23 an initial matter, a licensing regime, it's an unlawful prior  
24 restraint if there is unbridled discretion in the issuance of  
25 that license.

1           There can be no room for an assessment of facts, there  
2           can be no room for opinion or feelings or any other kind of  
3           subjective notions about whether the applicant is a good person  
4           or a deserving person or whether the right is a good idea or a  
5           bad idea. There have to be objective licensing standards. A  
6           background check is an objective licensing standard, we have no  
7           problem with that. Something that requires, as many states do,  
8           some demonstration, perhaps, of proficiency, knowledge of the  
9           state's use of force laws, all those are common objective  
02:03 10          qualifications that are imposed upon permits to carry firearms.

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

18           THE COURT: And, counsel, I certainly understand the  
19          argument, but what case or have there been any cases yet that  
02:04 20          have imported this concept of prior restraint in the Second  
21          Amendment context?

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

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

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

8 What we have seen the D.C. Circuit, the 3rd Circuit,  
9 and the 4th Circuit all say that the First Amendment will  
02:05 10 henceforth be a guide for the Second Amendment. They do this  
11 by drawing upon Heller, which refers repeatedly to First  
12 Amendment analogies. The D.C. Circuit case in Parker, which  
13 became Heller, that drew heavily upon the First Amendment.  
14 We've seen recent cases, the Nordyke case, 9th Circuit that  
15 came out in May, although it has sort of an unusual way of  
16 approaching the Second Amendment, it also draws upon first  
17 amendment standards for the way that it goes after the Second  
18 Amendment. And it's not a mystery as to why the Supreme Court  
19 and all the circuit courts have looked to the First Amendment  
02:05 20 for a guide.

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

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

7 Likewise, the Second Amendment, if we look at the  
8 Heller case and its various discussions of the right to carry a  
9 gun as traditionally understood sounds a lot like time, place,  
02:06 10 and manner. There are sensitive places to which you cannot  
11 carry a gun. You can carry a gun for some types of reasons,  
12 not for all reasons. There is definitely an established  
13 history of regulating the manner in which firearms are carried.  
14 It's undisputed that the state can ban entirely, for example,  
15 the concealed carrying of guns. We're not challenging that.  
16 However, all of those cases, if you read them carefully, what  
17 pops out is an explanation that we can ban the concealed  
18 carrying of weapons because we allow the open carrying of guns.  
19 The lesson there is they can tell you how to do it. I think  
02:07 20 the society has changed its preference since the 19th century.  
21 Today the preference has probably reversed itself. There are  
22 some people who like to openly carry their firearms, I think  
23 it's a political statement in some regard.

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



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

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

7 THE COURT: But isn't there an argument here that even  
8 the discretion to the Commissioner for whether or not someone  
9 was suitable for a class A license, that it's on the continuum  
02:08 10 of time, place, and manner restrictions in the sense that the  
11 legislature has decided that it should be within the discretion  
12 of the leading law enforcement officer in that community to  
13 decide whether or not there are folks who fall outside of the  
14 categories of disqualification that still should not be in  
15 possession of a large capacity or concealed weapon?

16 MR. GURA: That is exactly, your Honor -- there's no  
17 question that the legislature has done that, and that's why  
18 we're challenging their decision to do that. The fact is that  
19 that kind of subjective determination is exactly what the prior  
02:08 20 restraint doctrine seeks to disallow.

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

1     protections.

2             I suppose that in theory one can imagine a regime  
3     where an officer asserts some reason as to why a person is to  
4     be disqualified, but, again, that reason has to be objective,  
5     it has to be within a defined set of objective standards. And  
6     here what's amazing is we don't actually have much of a reason.  
7     There is no question whatsoever that Stacey Hightower is fit to  
8     carry a gun. She's not a public hazard, they never claimed  
9     that she is. We have this dispute about whether charges were  
02:09 10     pending on this application, and we can dispute that all day  
11     long, but the one thing that is completely missing from the  
12     defense brief is any accusation or allegation that Stacey  
13     Hightower is a dangerous person. In fact, the alleged pendency  
14     of these charges were known to the defendants for three years.  
15     They took no action against her. She was still on the force,  
16     she still had her class A license. It was only when she left  
17     her employment that suddenly these things became problematic.

18             THE COURT: And, counsel, do you think that the  
19     imposing this prior restraint framework on Second Amendment  
02:10 20     cases follows from Heller and McDonald, which I think in both  
21     of those cases the Supreme Court was very careful to say that  
22     they were not doing away with or not questioning the  
23     government's right to regulate the issuance of licenses for  
24     firearms?

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

1 prior restraint framework is probably the most limited kind of  
2 action that the Court could take with respect to striking down  
3 gun regulations, because we're not -- our primary argument does  
4 not require any sort of judicial interest balancing or even the  
5 selection of some kind of a means end level scrutiny. Of  
6 course we would need that if we were to get to our equal  
7 protection argument. However, all the Court would be saying is  
8 you, City of Boston, Commonwealth of Massachusetts, you can  
9 regulate guns, but you need to come up with objective  
02:11 10 standards. And what those standards are, they are free to come  
11 up with them in the first instance, and if they adopt standards  
12 that are problematic or difficult, then we can have a lawsuit  
13 that examines those specific standards and evaluates whether or  
14 not they are appropriate to regulate the Second Amendment  
15 right. But all the Court would be saying here is that however  
16 they go about the business of regulating firearms, it simply  
17 has to be done with some kind of objectively defined  
18 limitations, and they have to provide some level of due process  
19 to people so that those limitations can be effectively applied.  
02:12 20 And that's a very minimal approach.

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

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

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

7 Moving on, your Honor, to the due process questions  
8 that we have raised, it's not really in dispute after McDonald  
9 that there is a Fourteenth Amendment liberty interest at stake.  
02:13 10 There is a liberty interest in keeping and bearing arms. We  
11 also have alleged that there's a property interest that  
12 Ms. Hightower possessed in her license. It's interesting that  
13 the defendants contest that. I suppose it goes both ways.

14 An alternative form of argument for us, their primary  
15 dispute with the property interest is that we can't have a  
16 property interest under Massachusetts law in having handgun  
17 licenses because it is wholly discretionary and can be revoked  
18 at any time, and the applicant always has the burden of  
19 disproving the lack of entitlement to the license. Taking them  
02:13 20 at their word and accepting that, that's sort of works to prove  
21 the other part of our case, which is that the discretion here  
22 is excessive. But at least the liberty interest is not really  
23 at issue. McDonald came out, it's a fundamental right, and we  
24 know that it applies to the defendants.

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

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

6 Again, we concede that there might be exigent  
7 circumstances. There might be times that come up, as with  
8 other contexts where there's an emergency, an applicant or a  
9 license holder has done something bad or is under indictment  
02:14 10 and the government has to act quickly. That's not really the  
11 case here, though. The case here is remarkably similar to the  
12 Supreme Court's landmark ruling in the Lattimore case.

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

15 MR. GURA: Correct, correct. And actually, the City  
16 of Boston does have enough discretion to adopt procedures that  
17 would be constitutionally sufficient, and there are licensing  
18 officials in the Commonwealth of Massachusetts that take a more  
19 constitutionally adequate approach to applying section 131.

02:15 20 But these defendants don't, and in fact, we have the quite  
21 helpful declaration of, I believe it's Lieutenant Harrington,  
22 Defense Exhibit C, which really we welcome. It states quite  
23 candidly that in the City of Boston, people are not going to  
24 get an unrestricted license to carry a handgun unless the  
25 police department determines that it is within its interests,

1 whatever those might be, undefined.

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

5 The City could do a better job of applying the  
6 statute. Perhaps if they did so, then they would have an  
7 argument about standing or ripeness, but they don't, because  
8 they maximize the amount of discretion that the statute allows  
9 them to take. So we do have both a facial challenge and as  
02:16 10 applied challenge.

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

19 MR. GURA: That's correct, but the procedures in  
02:16 20 District Court don't comport with due process also.

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

1 in the nature of the -- of what has occurred. Here, however,  
2 when there's no emergency, when there's no possible argument  
3 that the wrong that was allegedly committed by Ms. Hightower  
4 had anything to do with public safety, perhaps a pretermination  
5 hearing would have avoided this entire lawsuit because we would  
6 have had some kind of a meaningful notice and opportunity to be  
7 heard as to whether or not, quote-unquote, charges were,  
8 quote-unquote, pending. And it's always better to have  
9 appropriate due process at the administrative level before you  
02:17 10 have a federal case under section 1983. It's obviously the  
11 more logical, appropriate way to approach things.

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

19 THE COURT: And is it abuse of discretion? I mean,  
02:18 20 what is the standard of review?

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

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

6 THE COURT: And where would you put the balance of  
7 public safety -- if you're moving -- I'm assuming when you're  
8 saying moving to a pretermination hearing, you're talking about  
9 the owner of a firearm retaining their firearm while any  
02:19 10 hearing is being conducted. Where do you think the balance, if  
11 you think the balance of public safety falls in that analysis?

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



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

8           Anyway, finally, moving on to our last argument,  
9 the -- or last due process argument, we have a substantive due  
02:21 10 process violation as well. The defendants make a very  
11 interesting argument. They correctly note that the 1st Circuit  
12 in -- I'm not sure how to pronounce this case -- DePoutot v.  
13 Raffaelly case, it's in both of our briefs, adopted a so-called  
14 conscience-shocking test. Where only behavior that shocks the  
15 conscience, depriving someone of a substantive liberty interest  
16 is going to be held as constitutional. When we first look at  
17 that kind of language, as people -- all of us who speak the  
18 English language, conscience-shocking, that's a pretty high  
19 standard, but if we read the case close, the 1st Circuit has a  
02:22 20 much more dry definition of how that is to be applied. It's a  
21 totality of circumstances test, where conduct that was  
22 reasonable under the circumstances and proportionate to the  
23 governmental interests at stake is going to be okay. And of  
24 course, in many of these types of cases it's going to wind up  
25 being something dramatic that violates that standard because

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

7 So it's -- here, if we apply the language of the test,  
8 was it reasonable under the circumstances to order Stacey  
9 Hightower to give up her -- essentially her means of  
02:23 10 self-defense? Was that proportionate to the government  
11 interest in whatever this dispute is about the language on the  
12 form? It might be, we submit that it's not. And so it's also  
13 a substantive due process violation.

14 THE COURT: And let me ask you now to respond to one  
15 of the government's arguments in regard to the fact that this  
16 challenge is not ripe at this time, that as I understand the  
17 argument, that Ms. Hightower was -- her class A license was  
18 revoked but she didn't appeal that revocation and that she  
19 didn't -- or she hasn't since applied as a civilian for a class  
02:23 20 A license or -- and she hasn't applied for a class B license,  
21 which, although not allowing her to carry a concealed revolver,  
22 would allow her to carry her revolver. What, if any, response  
23 do you have to that argument?

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

1 judicial remedies under Patsy v. Board of Regents and all the  
2 cases that flow through that. The Supreme Court has  
3 established that in a 1983 action, once there's been some  
4 action taken by the government, people are entitled to federal  
5 court review. The federal courts have primary jurisdiction  
6 over federal civil rights claims. So there's no need to  
7 involve any sort of state administrative procedure, especially  
8 when the question here is not so much whether the standard was  
9 properly applied, it's whether the standard itself is  
02:24 10 constitutional or not. So that's how we would answer that.

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

18 THE COURT: I follow you there. I think the argument,  
19 at least how I took the argument, was to the extent that I  
02:25 20 think you concede in your papers that there's no Second  
21 Amendment right to carry a concealed firearm, and that to the  
22 extent that's the portion of class A that appears to apply to  
23 Ms. Hightower's privately held firearm, that the fact that you  
24 haven't applied for the lesser license that would allow her to  
25 carry the firearm but not as concealed means that this matter

1 isn't ripe for review at this time.

2 MR. GURA: There are two parts to that, your Honor.  
3 The first part is the license that Ms. Hightower happened to  
4 have, she happened to have a class A license which did permit  
5 her to carry a gun. It permitted her to carry a gun in a  
6 concealed fashion, it permitted her to carry a gun in an open  
7 fashion. However, either of those manners could have been  
8 banned by the Commonwealth. There are some states that do ban  
9 the open carrying of guns but allow the concealed carrying of  
02:26 10 guns, and we would not contend that those states are in  
11 violation of the Second Amendment. So you're right, there's no  
12 right to carry a concealed gun, we would also say there's no  
13 right to carry an open gun, there's a right to carry a gun  
14 somehow. So we don't think that distinction makes sense.

15 The fact was she had this particular permission and it  
16 was taken away from her and now they're not going to give it  
17 back, because we have this declaration from Lieutenant  
18 Harrington who says there's not going to be an unrestricted  
19 license to carry of any flavor unless it is deemed to be within  
02:27 20 the interests of the Boston Police Department. So going  
21 forward, if she wanted to reapply, Ms. Hightower is subject to  
22 an unconstitutional prior constraint, and the Supreme Court has  
23 made clear in cases like City of Lakewood and others going back  
24 further than that, that when a person is confronted with an  
25 unconstitutional licensing regime, there's no need to make an

1 application in order to challenge its constitutionality. And  
2 in fact, beyond that, there's the futile act doctrine. People  
3 do not need to engage in futile acts in order to trigger the  
4 jurisdiction of the federal courts where the government has  
5 made it very clear what its policy is and has established  
6 practice. Here there's no dispute as to what the practice is.  
7 We have Lieutenant Harrington's declaration, which we accept as  
8 being accurate and representing the police department's views,  
9 then we have an injury. Because it would be completely  
02:28 10 pointless for her to file paperwork, we know what's going to  
11 happen. She was going to get some kind of permit that's  
12 restricted, that does not allow the carrying of guns, or at the  
13 very least her application will be subjected to unbridled  
14 discretion, the prior restraint that she's entitled to  
15 challenge because she disagrees with the fact that her  
16 application could even be subjected to that kind of scheme.

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

02:28 20 MR. GURA: It is not clear that she would be denied a  
21 class B license. We believe that she might probably get one.  
22 But what is clear on the record is that there would be a  
23 restriction on that. Lieutenant Harrington's declaration is  
24 fairly clear. The law in Massachusetts allows the issuers of  
25 carry licenses A or B to impose restrictions, and typically the

1 City of Boston will restrict the carrying of license. It's  
2 called the license to carry, but that's not carry in the  
3 constitutional sense. Carrying under the Commonwealth's law,  
4 the case is Seay, S-e-a-y, v. Commonwealth or Commonwealth v.  
5 Seay, it's in both of our pleadings, I believe, states that  
6 carrying for purposes of section 131 is having even momentary  
7 possession of a gun and then moving it from place to place.  
8 That's not the same definition of bear arms that Heller gives  
9 for what the Second Amendment allows, which is to carry a gun  
02:30 10 upon one's person for purposes of self-defense in cases of  
11 confrontation with another person. If Ms. Hightower were to do  
12 that even with a restricted class B license, she would be in  
13 jail. There's no suggestion that she would get an unrestricted  
14 class B license any more than she would get an unrestricted  
15 class A license, unless, of course, they deemed it to be in  
16 their interests. It is not common in the City of Boston to see  
17 people freely walking around with open small capacity handguns  
18 on their hip, and it's because those licenses just aren't given  
19 out.

02:30 20 Thank you.

21 THE COURT: Thank you.

22 Counsel.

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

25 Your Honor, Ms. Hightower's Second Amendment and

1 substantive due process claims are not ripe. The 1st Circuit  
2 has stressed that ripeness doctrine is particularly important  
3 in cases like this one, where a party comes to federal court  
4 and asks a judge to strike down a state law on constitutional  
5 grounds, same, of course, as a federal law. We cite in our  
6 papers, for example, Doe v. Bush, 2003 case where the 1st  
7 Circuit affirmed dismissal of a challenge to that 2002  
8 congressional authorization of use of military force in Iraq on  
9 the ground that it wasn't clear there was going to be any use  
02:31 10 of the force so the claim was not ripe.

11 Your Honor, I think you've got our argument right, but  
12 just to summarize it very quickly, the complaint specifically  
13 seeks an order restoring Ms. Hightower's unrestricted class A  
14 license. An unrestricted class A license allows Ms. Hightower  
15 to do things that clearly are not protected by the Second  
16 Amendment, that would allow her to carry a concealed weapon.  
17 She concedes today that's not a right she has under the Second  
18 Amendment. We've shown that, in addition, unrestricted class A  
19 license allows somebody to carry a capacity firearm in a  
02:32 20 concealed matter. And under the Supreme Court's decision in  
21 Heller, the Court makes clear than an M-16 assault riffle and  
22 other kinds of weapons not in common use at the time the Second  
23 Amendment was enacted are not protected by that amendment. On  
24 remand, the federal District Court in Heller II has held that  
25 high capacity firearms are not protected by the Second

1 Amendment.

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

9 First she says, well, there's no need to exhaust  
02:32 10 administrative remedies. Your Honor, we haven't made an  
11 exhaustion argument, so I am not sure why she makes that as a  
12 defense to the ripeness question.

13 Second, she says, well, there's clearly injury in  
14 fact. Your Honor, injury in fact goes to standing, not  
15 ripeness. And in Ms. Hightower's response, not to the  
16 Commonwealth's paper, but to the City's papers she asserted  
17 basically, well, if I have standing, I must have ripeness.  
18 We've demonstrated at page 3 of our reply memorandum that under  
19 settled 1st Circuit precedent that's not correct. Standing and  
02:33 20 ripeness are discrete inquiries, both are required for the  
21 Court to have subject matter jurisdiction.

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



1 Court has rejected this kind of argument when it comes to  
2 ripeness in the regulatory takings area. People used to go  
3 into courts saying, you know, I presented one development plan  
4 for my property to the local officials and they denied it, so  
5 what can I do? They've taken my property. The Supreme Court  
6 made clear in MacDonald -- not the same McDonald of Second  
7 Amendment fame but the one cited in our papers at pages 8 to  
8 9 -- that the denial of a grandiose development plan doesn't  
9 demonstrate that a less ambitious one would be denied here as  
02:34 10 well.

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

19 And so for important prudential and constitutional  
02:34 20 reasons, the Court should not reach the merits of these claims.

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

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

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

02:35 10 MR. SALINGER: I believe I know the answer, although I  
11 don't represent the City. I understand from the City's  
12 papers --

13 THE COURT: I can wait to ask the City.

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

19 Now, there have been some arguments today by  
02:36 20 Ms. Hightower and in her papers, that's silly, she's not  
21 dangerous, there really weren't grounds for finding she's not a  
22 civil person. Your Honor, none of those issues is before the  
23 Court.

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

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

9 So the Court with respect to the claims that are  
02:37 10 asserted in this case has to assume that Commissioner Davis had  
11 good grounds for finding that Ms. Hightower was no longer a  
12 suitable person.

13 THE COURT: Well, let me ask you this question. Your  
14 brother has argued that in light of McDonald, in light of  
15 Heller, clearly the Second Amendment has been recognized as a  
16 fundamental right and that the issue here is not whether or not  
17 Ms. Hightower has a right to carry a concealed weapon or  
18 high-capacity weapon under the class A license, but that her  
19 right at this moment, her possession of her firearm, has been  
02:37 20 taken away by the operation of the statutory scheme,  
21 particularly in regard to the discretion that the Commissioner  
22 has to determine whether or not someone is suitable. What, if  
23 any, standard is there that cabins the Commissioner's  
24 discretion in determining whether or not someone is suitable?  
25 I didn't see any language in my review of Chapter 140 section

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

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

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

02:38 10 We quote at the bottom of page 4 of our summary  
11 judgment memorandum the relevant language from section 131(f)  
12 of Chapter 140 of the Massachusetts General Laws. It's a long  
13 section, and so that's why I draw your attention to where we  
14 quote.

15 The statute provides that if an appeal had been taken  
16 to state District Court, if the District Court had found that  
17 there was, quote, no reasonable ground for denying, suspending  
18 or revoking such license and that the petitioner is not  
19 prohibited by law from possessing the same, close quote, then  
02:39 20 the District Court could have and of course would have ordered  
21 the reinstatement of the weapon.

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

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

3 The case law is clear as well, your Honor. There is  
4 no opportunity -- I'm sorry, Massachusetts law simply does not  
5 permit arbitrary denial or revocation of a license, that would  
6 be unlawful. The standard, making clear that arbitrary action  
7 is unlawful, is discussed, for example, in the Howard case, 59  
8 Mass. App. Ct. at page 902. And, your Honor, we gave an  
9 example in our papers. We cite to a Superior Court case from  
02:40 10 2006, the Lizotte case, where the District Court judge  
11 undertook just this review, found that the denial was  
12 arbitrary, and reversed, ordered the granting of a license. So  
13 the premise of Ms. Hightower's position that a licensing  
14 authority can just on a whim say, well, I don't feel like  
15 giving it to you, is wrong as a matter of law in Massachusetts.  
16 Although it is not a categorical standard, the suitable person  
17 standard does require that there be a reasonable ground for  
18 granting or for revoking.

19 Your Honor, if the Court, despite the lack of ripeness  
02:40 20 and the important reasons -- well, before I make the  
21 transition -- you pointed out that Ms. Hightower's argument --  
22 well, she's trying to protect the standard, she's as concerned  
23 about her facial claim as she is about her as applied claim.  
24 That was the point of us directing the Court's attention to Doe  
25 v. Bush and the other case law we have cited at that spot in

1 our memorandum, your Honor. Someone with great passion that a  
2 statute is incorrect under ripeness doctrine is not allowed to  
3 come into federal court and the court is not allowed to  
4 exercise jurisdiction unless it's clear there's a violation or  
5 a potential violation that needs to be addressed. Here, where  
6 Ms. Hightower now says, you know, that unrestricted class A  
7 license that I previously had, that's not what I want, I'm not  
8 trying to carry a concealed weapon, I'm not trying to carry a  
9 high-capacity weapon, like a Glock with a .33 round magazine, I  
02:41 10 just want to be able to carry in public my old five-round  
11 revolver. Again, she hasn't sought that kind of license. If  
12 she were to seek one and it were to be denied, she would have a  
13 ripe claim. But rather than either do that or exercise her due  
14 process right of getting judicial review in state District  
15 Court, she has opted to prematurely try to get this Court to  
16 pass judgment on the constitutionality of a Massachusetts  
17 statute that violates the requirements of ripeness.

18 Your Honor, if nonetheless you were to reach the  
19 merits of the Second Amendment claim, I think it boils down to  
02:42 20 there being two parts. One, this prior restraint notion --  
21 excuse me, just a little twinge in the back. I need to sit for  
22 a moment, I'll be back up in a moment. I apologize.

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

1 firearm or not.

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

8 So in her opposition to the Commonwealth's papers at  
9 page 8, Ms. Hightower said for the first time, the issue, and  
02:43 10 I'm quoting, is whether defendants may bar individuals from  
11 exercising the right at all by use of a permitting scheme,  
12 close quote.

13 Today Ms. Hightower seemed to go back to her original  
14 position in response to a question from the Court, conceding  
15 some level of licensing is allowed. That position is the  
16 correct one. Indeed, the position that having a licensing  
17 requirement is an unconstitutional prior restraint cannot be  
18 squared with the Supreme Court's decision in Heller. We can't  
19 lose sight of what the Court required at the end of Heller.  
02:44 20 What it required is that the District of Columbia permit  
21 Mr. Heller, as long as he's not disqualified under other  
22 provisions of the licensing scheme from doing so, had to permit  
23 him to register his handgun and issue him a license to carry in  
24 the home. Neither Heller nor McDonald called into question the  
25 ability of the Commonwealth and other states to require a

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

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

02:45 10 MR. SALINGER: I don't have the cite. I'm told by  
11 counsel for the City that apparently there's a recent decision  
12 rejecting the notion. But our position, as I was just  
13 suggesting, your Honor, is that although the Supreme Court in  
14 Heller did not speak in these terms, in the terms of prior  
15 restraint, by enumerating presumptively constitutional  
16 restrictions on eligibility to carry firearms, including  
17 restrictions on felons and violent -- and the mentally ill, the  
18 Court was necessarily rejecting the notion of a licensing  
19 scheme constituting an unlawful prior restraint. There would  
02:45 20 be no practical way to implement the kinds of categorical  
21 restrictions that the Supreme Court has said are presumptively  
22 constitutional without a licensing scheme. So the whole prior  
23 restraint notion just does not fit this case, your Honor.

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



1 Amendment cases that say one can't have a good character test  
2 or some other sort of more discretionary test as a condition  
3 for exercising rights of speech in public forum don't apply  
4 here, that's not just us saying that, your Honor, we point to  
5 the 1st Circuit's decision from 2004 in Ridley v. MBTA. This  
6 is one of the many cases where somebody is challenging the  
7 MBTA's refusal to carry certain kinds of advertising on their  
8 property. And that case, 390 F.3d at pages 94 to 95, the 1st  
9 Circuit expressly held that the case law about discretion  
02:47 10 doesn't apply throughout all of the First Amendment law. They  
11 only apply at the very core in the exercise of speech in public  
12 forum, but in other contexts there can indeed be the equivalent  
13 of licensing requirements.

14 We've noted, your Honor, as the Supreme Court has made  
15 clear, the core of the Second Amendment is keeping a handgun  
16 inside your home to protect hearth and home. But, in any case,  
17 the position taken by Ms. Hightower, what she calls prior  
18 restraint, is basically asking this Court to do, aside from  
19 Heller, something that would be certainly first impression,  
02:47 20 completely novel. There is no court that has struck down  
21 licensing and permitting requirements on the grounds suggested  
22 here, that the mere existence of any such requirements violates  
23 the Second Amendment. And so Ms. Hightower has her fallback  
24 argument, which is, well, even if prior restraint doesn't work,  
25 this standard, the suitable person standard, we don't like it,

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

3 Your Honor, there's been some back and forth in the  
4 papers about if you were to skip over ripeness and reach the  
5 merits, should you apply strict scrutiny versus intermediary  
6 scrutiny. Just quickly, the same kind of -- the same part of  
7 Heller I was just discussing, the presumption that various  
8 restrictions on the ability of certain folks to carry weapons  
9 is inconsistent with any notion of strict scrutiny. So at most  
02:48 10 there would be intermediate scrutiny here.

11 The suitable person standard is not devoid of content.  
12 It's entirely consistent with that critical language from  
13 Heller I quoted a moment ago, saying that the Second Amendment  
14 protects, quote, law abiding, responsible citizens, close  
15 quote. The suitable person standard under Massachusetts law,  
16 as developed by the courts, means someone sufficiently  
17 responsible to be entrusted with a license to carry firearms.  
18 The Massachusetts Appeals Court stressed in the MacNutt case  
19 that the point of the licensing scheme under Massachusetts law  
02:49 20 is, quote, to limit access to deadly weapons by irresponsible  
21 persons, close quote. And we noted as an aside that the  
22 Supreme Judicial Court in the DeLuca case acknowledged that of  
23 course character is a necessary qualification. If somebody  
24 can't tell the truth on their licensing application, that  
25 certainly calls into question at the very least their ability

1 still to be trusted with a deadly weapon.

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

9 Now, here, your Honor, Ms. Hightower's argument is  
02:50 10 entirely inconsistent with First Amendment doctrine. We  
11 pointed out at page 15 of our memorandum there are at least two  
12 U.S. Supreme Court cases that in the First Amendment context  
13 reject categorical restrictions on speech but acknowledge that  
14 an individualized determination could lawfully produce the same  
15 result in the same case. Florida Star had to do with the  
16 newspaper publishing victims' names. It's unconstitutional to  
17 bar that categorically, but in particular cases that might pass  
18 constitutional muster. And the Globe Newspaper case, there the  
19 question was media access to trials involving victims of sex  
02:50 20 crimes who are younger than age 18. The court said, well, a  
21 categorical rule barring that is not permissible, it violates  
22 the First Amendment, but acknowledged that based on an  
23 individualized determination of potential harm to such a  
24 victim, in an appropriate case the judge could exclude the  
25 media.

1 Well, Ms. Hightower's only response -- and this is at  
2 page 11 of her memorandum responding to the Commonwealth --  
3 Ms. Hightower says that she, quote, respectfully disagrees with  
4 the claim that statutory categories are not always better than  
5 individualized decisions, close quote. Your Honor,  
6 respectfully, that does not rise to the level of constitutional  
7 argument. Ms. Hightower cites no case law to support the  
8 notion that in all instances if one is going to restrict either  
9 a First Amendment right or a Second Amendment claimed right  
02:51 10 that it has to be done through categorical rules. That's  
11 simply inconsistent with precedent in other areas, and there is  
12 nothing in Heller or McDonald that suggest that that is the  
13 rule under the Second Amendment.

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

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

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

19 So the procedural due process claim. It's undisputed  
02:52 20 that Ms. Hightower had a post-deprivation right of judicial  
21 review. She got notice of revocation, so there's no question  
22 about notice. The question is review. She had the right of  
23 review, she chose not to exercise it. Her claim, therefore, is  
24 that as a matter of constitutional law she was required to be  
25 given that right of review before having to turn in her license

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

02:53 10 THE COURT: And was the 2nd Circuit case before or  
11 after McDonald?

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

16 THE COURT: Okay.

17 MR. SALINGER: Your Honor, Mackey, that's the case  
18 having to do with revocation of driver's licenses for somebody  
19 who refuses a Breathalyzer test, Massachusetts case where very  
02:53 20 similar claim went up, the claim was it's not enough that I can  
21 get judicial review afterwards, you should let me keep my  
22 license until I've had that review. The Supreme Court rejected  
23 the claim, holding that the public safety interests at stake  
24 justify some administrative action with no predeprivation  
25 hearing and post-deprivation review was sufficient to satisfy

1 due process.

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

8 The theme here, and we explore it at greater length in  
9 our memorandum at pages 17 to 19, is when public safety  
02:54 10 interests are at stake, the flexibility of procedural due  
11 process allows for the review to happen post deprivation rather  
12 than predeprivation.

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

02:55 20 MR. SALINGER: So if I may give a two-part answer.  
21 First of all, this is an example -- there were quite a few in  
22 his case, unfortunately, where Ms. Hightower is failing to  
23 distinguish whether she's addressing arguments by the  
24 Commonwealth or by the City.

25 The City has raised some serious questions about

1 whether Ms. Hightower has the requisite property or liberty  
2 interests. The Commonwealth did not. We have assumed for  
3 present purposes that the license that she had was a sufficient  
4 property interest. Certainly she has no liberty interest here  
5 but a sufficient property interest. But Mackey and other cases  
6 that we've discussed say -- Mackey as an example -- you don't  
7 have a property interest in getting a driver's license. The  
8 1st Circuit has held -- I don't have the cite handy but can  
9 send it if it matters -- has held once Massachusetts gives  
02:56 10 someone a driver's license, then a person has a property  
11 interest and is entitled to due process protection; and yet,  
12 the 1st Circuit has held notwithstanding that existing property  
13 interest, a post-deprivation hearing is sufficient. Hodel is  
14 the same. The order was not upheld for a lack of property  
15 interest; the order was upheld under the assumption or holding,  
16 I forget which, that there was a property interest in the prior  
17 operation to conduct surface mining, but given the public  
18 interest at stake, it satisfies due process to tell someone to  
19 stop and then have review afterward.

02:57 20 Here we're talking about deadly weapons, your Honor,  
21 and the notion that in any and all circumstances where a local  
22 police chief learns of new information that calls into question  
23 whether somebody is still a suitable person, they have to  
24 provide for judicial review before they can order somebody to  
25 turn in their firearm -- presumably this rule would apply in

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

02:57 10 Your Honor, turning to substantive due process, this  
11 is a different kind of claim, even though it shares two words  
12 in common. It's foreclosed by the 1st Circuit's decision in  
13 Rosenfeld. Rosenfeld v. Egy was a case arising under the  
14 Massachusetts -- or concerning the Massachusetts firearm  
15 licensing laws. Interestingly, it also involved revocation of  
16 a firearms license that had been held by a police officer. And  
17 there were allegations that the revocation was unlawful and  
18 improper.

19 The 1st Circuit held -- and it spent all of a sentence  
02:58 20 or two on it because it thought it was such an easy question --  
21 that the revocation of a firearms license does not shock the  
22 conscience, and therefore, as a matter of law cannot constitute  
23 a substantive due process violation.

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



1 the Commonwealth. She was talking about a case cited in the  
2 City's brief, not cited in our brief, which is fine. She  
3 ignored the many cases we cite in our brief at pages 15 to 17.  
4 For example, the 1st Circuit's decision from last year,  
5 Gonzalez-Fuentes, a 2010 decision, where the 1st Circuit  
6 reiterated that not only is shocking of the conscience a  
7 necessary element of any substantive due process claim, but  
8 that to shock the conscience the challenged action must be,  
9 quote, so inspired by malice or sadism that it amounted to a  
02:59 10 brutal and inhumane abuse of official power, close quote.

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

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

03:00 20 Your Honor, I see there was one small point I intended  
21 to make on procedural due process, for completeness why don't I  
22 make it, because today in court Ms. Hightower argues, again,  
23 that the judicial review available in District Court does not  
24 satisfy due process because hearsay evidence would be allowed.  
25 Again, the 1st Circuit has rejected that claim in the context

1 of the revocation of a license to practice medicine in the  
2 Beauchamp case, 779 F.2d at 775 to 776. The 1st Circuit held,  
3 and it's reiterated since then, we cite the case, that it does  
4 not violate due process for a reliable hearsay to be admitted  
5 either during the administrative agency's action, or what  
6 concerns Ms. Hightower here as well in judicial review of that.  
7 Because, again, the District Court review that Ms. Hightower  
8 had available but didn't pursue is not the typical  
9 administrative review that's on the record. It's an  
03:01 10 evidentiary review. It's a de novo hearing. Ms. Hightower had  
11 the opportunity to go in and present new affirmative evidence  
12 that she was suitable, still suitable, and she opted not to do  
13 that.

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

16 MR. SALINGER: Yes, your Honor.

17 THE COURT: And is that set by case law?

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

03:01 20 So that, your Honor, leaves us with the equal  
21 protection claim, and I think this is another area where  
22 Ms. Hightower in her responses, today and in her papers, has  
23 not grappled with the gist of the Commonwealth's argument.

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

1 right to keep and bear arms to protect hearth and home, to have  
2 a firearm in the home is sufficiently fundamental that it is  
3 incorporated into the Fourteenth Amendment. The 1st Circuit  
4 has held repeatedly -- and we discuss this as pages 19 to 20 of  
5 our memorandum, your Honor -- repeatedly that in these  
6 circumstances, where a right established by one of the first  
7 eight amendments is incorporated into the Fourteenth Amendment,  
8 the equal protection clause does not erect a separate and  
9 distinct framework for analyzing the claims. Instead, the  
03:02 10 Court is first to review under a substantive amendment. So  
11 here if the claim were ripe, which here it's not, would review  
12 under the Second Amendment, but any additional equal protection  
13 claim only implicates rational basis review and nothing more.  
14 We discuss a long line of 1st Circuit cases that go back to  
15 that much earlier U.S. Supreme Court case. Ms. Hightower in  
16 her opposition tries to distinguish that 1974 case, but doesn't  
17 deal properly here.

18 But, your Honor, we point out in our reply brief at  
19 pages 4 to 5 that this very principle that's clear in 1st  
03:03 20 Circuit case law was just a few weeks ago applied in a Second  
21 Amendment context by the 9th Circuit, this is the Nordyke v.  
22 King case that counsel referred to, and it adopts the same  
23 principle, that if there's a claim that an action violates the  
24 Second Amendment and also a claim that the same action violates  
25 the equal protection clause, the only thing that the equal

1 protection clause adds is rational basis review.

2 So if the Court were to reach the merits of the Second  
3 Amendment claim and rule in the Commonwealth's favor, then  
4 clearly we prevail under the equal protection clause. But if  
5 the Court were to agree that the Second Amendment claim is not  
6 ripe, then it should rule in favor of the defendants on the  
7 equal protection claim on the grounds that there is a rational  
8 basis, as the Massachusetts Appeals Court said in MacNutt, for  
9 example. The goal of these statutes -- I've quoted this  
03:04 10 language before -- is to limit access to deadly weapons by  
11 irresponsible persons. That's entirely rational, and entirely  
12 consistent with the Heller standard.

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

16 MR. SALINGER: It's different, and she alludes this  
17 much for fundamental reasons in terms of the as applied claim.  
18 The 1st Circuit held in many cases, but again, for example, in  
19 Rosenfeld, a claim that a person has been treated differently  
03:04 20 in terms of having a license revoked compared to other persons  
21 just -- it's not a constitutional equal protection claim as a  
22 matter of law. The mere claim that she was treated differently  
23 does not give rise to an equal protection claim. And there are  
24 many 1st Circuit cases saying that to come up with a different  
25 result would be -- you know, any time any kind of local permit

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

7 Thank you, your Honor.

8 THE COURT: Counsel.

9 MS. SKEHILL MAKI: Good afternoon again, your Honor.

03:05 10 Lisa Skehill Maki on behalf of the City of Boston and the  
11 Boston Police Commissioner.

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

15 Plaintiff has suggested it would be futile for her to  
16 go and apply for a different type of license here. Exhibit C  
17 of the City of Boston's summary judgment motion, paragraph 19,  
18 Lieutenant Detective Harrington states, assuming Stacey  
19 Hightower does not have a statutory disqualification under  
03:06 20 General Laws Chapter 140 section 131 if she applied for a class  
21 A license to carry a large capacity firearm, she would receive,  
22 she would receive a class A restricted license to carry for  
23 sport and target and for her protection.

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

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

3 Certainly receiving a firearm for sport and target and  
4 for transportation qualifies as carrying a handgun. You can't  
5 do it concealed under the restricted license, but you can  
6 certainly openly carry it in a locked box unloaded. So because  
7 she has not applied for the restricted class A license, because  
8 she has not applied for the class B license, her claim is not  
9 ripe here, it has not been definitively denied by the City of  
03:06 10 Boston.

11 Assuming that we do get to the merits of the case,  
12 there is no constitutionally burden conduct here. The  
13 revocation was a temporary revocation of a concealed carry  
14 license of the plaintiff because she submitted an application  
15 form untruthfully. Plaintiff -- the revocation itself did not  
16 bar her from applying for a different type of license so that  
17 she could carry it openly in a locked box, that she could carry  
18 it for purposes of sport and target, and under the  
19 Commonwealth -- common law she's also able to carry a loaded --  
03:07 20 carry a loaded firearm when she's in imminent danger. There's  
21 an exception for that. So any suggestion she would be arrested  
22 if she were faced with imminent harm were she to arm herself  
23 with a loaded weapon is false.

24 We cited two cases in our brief --

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

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

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

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

7 MS. SKEHILL MAKI: That's correct. And she could have  
8 applied again for an unrestricted class A license. She would  
9 not have to fill out the Boston Police Department internal  
03:08 10 form. The requirement here is that the paperwork is correct,  
11 that the City of Boston knows who's armed, all the pertinent  
12 information about them, because it's important to know who has  
13 guns in the City of Boston, where they live, and all the  
14 information that's required.

15 The only thing that was required here was that she  
16 submit another form. And, yes, we do not guarantee that she  
17 would be given an unrestricted class A license to carry  
18 concealed again. You know, it's not something that we  
19 guarantee, it is within the discretion of the licensing  
03:08 20 official, but there's nothing at all to suggest she wouldn't be  
21 given one. In fact, she was licensed for ten years to carry  
22 concealed. It's not unfathomable that she would be given an  
23 unconcealed license again, given that she submits accurate  
24 paperwork. Whether intentionally or unintentionally she didn't  
25 submit it before, we need the accurate paperwork.

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

7 MS. SKEHILL MAKI: I don't believe so, your Honor. I  
8 believe the rationale is just, you know, these are police  
9 officers, they're -- the licensing Commissioner is a Boston  
03:09 10 Police Department official, and when it's internal employees  
11 that are -- you know, do have more rights than the average  
12 citizen in taking away someone's constitutional rights, that  
13 they want to know more information. Certainly if there's an  
14 internal affairs issue pending against them, which they may  
15 abuse their power, it's certainly within the licensing  
16 official's right to know what's going on.

17 So the only real difference between the civilian  
18 application and the application for a Boston police officer in  
19 applying or renewing for firearm license is the question of  
03:10 20 whether there are internal affairs charges pending.

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



1           Back to the issue of whether there was constitutional  
2     protected conduct that was infringed upon here by the  
3     revocation. Again, there was nothing preventing the plaintiff  
4     from going out and getting a different type of license. She  
5     could still, even though it's the defendants' position that  
6     Heller and McDonald do not go as far as to say the Second  
7     Amendment guaranties this right to carry a loaded weapon,  
8     either concealed -- has specifically not said not concealed, so  
9     the other alternative is unconcealed. Even if it were to  
03:10 10    extend that far, she's certainly not prohibited under a class A  
11    restricted license and a class B to carry the gun openly, as  
12    long as it's in a locked box to transport it, and use it for  
13    sport and target purposes. It's also another paragraph in  
14    Exhibit C where it states class A restricted licenses are  
15    allowed for people traveling to employment as security officers  
16    for their protection, or further, to get to their job so that  
17    they don't have to put it in a locked box and they don't have  
18    to fear losing their license over that. So there are ways the  
19    plaintiff could have exercised her Second Amendment right but  
03:11 20    simply chose not to do so here.

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

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

5 Even if this -- if there were some sort of  
6 infringement upon her right to carry -- although the defendant  
7 still maintains that Heller and McDonald do not go so far --  
8 the constitutional scrutiny that should be applied here is at  
9 the very most intermediate scrutiny. In the case cited by my  
03:12 10 brother counsel, Nordyke v. King, the 9th Circuit has now  
11 utilized a new test, it's the substantial burden test, and it  
12 determines whether the conduct being infringed upon or the  
13 government actions substantially burdens the Second Amendment  
14 right.

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

03:12 20 If there's no substantial burden under the 9th  
21 Circuit's analysis, it's a rationale basis review. Certainly  
22 this is the revocation of a firearm for someone who has  
23 submitted false information is rationally related to the  
24 government's interest in making sure that they have the correct  
25 information of all people who are licensed to carry firearms

1 within the City of Boston.

2 Since our brief does the analysis under the  
3 intermediate scrutiny, I will again repeat it. Obviously the  
4 City has an important government interest in ensuring everybody  
5 fills out their application form accurately and provides the  
6 correct information so that they have accurate records as to  
7 who's licensed. Heller specifically said that people can --  
8 that the states can and the cities can regulate firearm  
9 licensing. The only way to regulate firearm licensing is to  
03:13 10 know who has firearms and to know the important information and  
11 to make sure that they're not statutorily disqualified or  
12 they're not irresponsible persons that should not be having  
13 guns.

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

03:14 20 THE COURT: And is the statutory language that counsel  
21 pointed to under Chapter 140 section 131(f), is that the  
22 language that the City points to as well in terms of regulating  
23 how the Commissioner exercises his discretion in terms of who  
24 is a suitable or unsuitable person?

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

1 licensing Commissioner is well aware of the fact that -- and it  
2 happens all the time -- that denials of revocations are  
3 appealed to the District Court. The discretion that is  
4 utilized is to make sure that irresponsible people don't get  
5 guns, not to exercise arbitrary exercise of judgment in  
6 determining who can have guns or not. This -- you know, going  
7 to my brother counsel's argument that is this is an arbitrary  
8 revocation, it certainly is not, it is an objective revocation.  
9 Anyone who falsifies information unintentionally or  
03:15 10 intentionally on a form will have their license revoked.

11 Exhibit C, again, Lieutenant Detective Harrington states that  
12 he's not only revoked people's licenses, civilians' licenses  
13 for submitting false information on forms, but he's done it to  
14 police officers as well. It is imperative that we have the  
15 correct information. Revocation is the best way to achieve  
16 that.

17 THE COURT: Just hypothetically speaking, let's say  
18 Ms. Hightower had filled out the sworn officer form correctly,  
19 accurately, truthfully, but the police Commissioner had  
03:15 20 information that bore on her character that didn't bear on the  
21 truthfulness of her answers to the sworn form, would the  
22 Commissioner still have discretion to deny her class A license?

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

1 that it was being revoked. The reasons here were simply she  
2 provided an untruthful answer on the form. Holding people  
3 accountable to provide the accurate information is not an undue  
4 burden. If Ms. Hightower was confused as to what the question  
5 meant, there was certainly ample people to ask what it meant.  
6 She could have gone to the Commissioner's office and said, I  
7 don't understand what this means, this charge is pending, I've  
8 been asked this five times on my other form, why would you ask  
9 me again? There was nothing preventing her from calling  
03:16 10 Internal Affairs and making sure all her internal affairs  
11 investigations had been closed. That's something that did not  
12 happen here and the City of Boston simply revoked based on her  
13 untruthful answer and it was not a bar from preventing her from  
14 going again and applying to a different form or, if she was  
15 even still a police officer, correcting the form and submitting  
16 a new one.

17 THE COURT: And I don't think there's any information  
18 about this in the record, but I think there was a figure about  
19 how many licenses had been denied or revoked, but I don't  
03:17 20 recall that there was a figure about how many times applicants  
21 for licenses which are denied or revoked appeal to the District  
22 Court. Do you have any sense on order of magnitude how often  
23 that happens?

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

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

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

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

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

03:17 10 MS. SKEHILL MAKI: Unfortunately, I don't have the  
11 answer to that, your Honor. I do not know. I guess it all  
12 depends on the court's docket.

13 THE COURT: Okay.

14 MS. SKEHILL MAKI: So I just wanted to point out two  
15 cases out of California also, one was most recently Richard v.  
16 County of Yolo in the Eastern District of California, but it's  
17 a very similar case as to this one. There, California allows  
18 for concealed carrying upon the discretion of the licensing  
19 Commissioner. The statute gives the licensing Commissioner  
03:18 20 discretion to determine who has good cause or proper cause to  
21 have a license to carry concealed. The alternative is that the  
22 individual can carry an unconcealed weapon unloaded or can  
23 carry a loaded weapon openly when they're in danger. That is  
24 almost exactly what we have here in Massachusetts. In both of  
25 those cases the court found that the statutory scheme, the

1 discretion, was constitutional.

2 Just moving on -- I don't want to repeat too much of  
3 my brother's arguments regarding due process -- but the  
4 suggestion that exigent circumstances -- in exigent  
5 circumstances only predeprivation due process should not be  
6 allowed in case -- somebody is seen on TV shooting a gun at  
7 other people, that's, like, the only instance in which somebody  
8 would be denied predeprivation due process. That requires  
9 subjective discretion. If somebody has lied on their  
03:19 10 revocation form, you have to use your subjective discretion to  
11 determine whether or not that lie equals a public safety  
12 threat. Plaintiff labors to argue that these charges pending  
13 meant nothing to the City of Boston in the three years prior  
14 once they were brought and all of a sudden meant something  
15 three years later. That's not the case. Her license was not  
16 revoked because of the charges. Her license was revoked  
17 because she submitted inaccurate information.

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

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

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

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

8 THE COURT: Thank you, counsel.

9 Counsel, I appreciate the arguments on both sides, the  
03:20 10 advocacy today, as well as the advocacy in your papers. I will  
11 certainly take the matter under advisement. Thank you,  
12 counsel.

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

14 - - - - -

15 CERTIFICATION

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

19

20

21

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

September 15, 2011  
Date

24

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