STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

JARREN GENDREAU	:	
Petitioner	:	
	:	
vs.	:	Case No. SU ___-__
	:	
JOSUE D. CANARIO,	:	
In his capacity as Chief of Police of	:	
the Bristol Police Department	:	
Respondent	:	

Petition for Certiorari from the Denial of a
Concealed Carry Permit by the Bristol Police Chief

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

United States Supreme Court Decisions

Other Federal Court Decisions

Rhode Island Supreme Court Decisions

Other State Court Decisions

Statutory and Constitutional Provisions

IV. ARGUMENT

A. BRISTOL'S DECISION DENYING THE PETITIONER'S CONCEALED CARRY PERMIT APPLICATION IS INSUFFICIENT TO ALLOW FOR JUDICIAL REVIEW.

1. The Bristol Licensing Authority's summary decision denying petitioner's application for a gun permit without making any findings of fact or drawing any conclusions of law is insufficient to allow for judicial review.

In *Mosby v. Devine*, this Honorable Court declared:

> [I]t is within the province of the courts to review the licensing decision here to ensure that the General Assembly's intent is being effectuated. The opportunity for judicial review of a licensing body's decision under the Firearms Act is especially important when considering the nature of the right sought to be vindicated through the application process. As a matter of policy, this Court will not countenance any system of permitting under the Firearms Act that would be committed to the unfettered discretion of an executive agency. Although the court's authority to review the decision is limited, it is not nonexistent. One does not need to be an expert in American history to understand the fault inherent in a gun-permitting system that would allow a licensing body carte blanche authority to decide who is worthy of carrying a concealed weapon. *The constitutional right to bear arms would be illusory, of course, if it could be abrogated entirely on the basis of an unreviewable unrestricted licensing scheme*. Such review is available through a common-law writ of certiorari.

851 A.2d 1031, 1050-51 (R.I. 2004) (emphasis added).

It is well settled that "[t]o review a decision on certiorari, however, certain procedural steps must be employed to allow a meaningful review. . . ." This Honorable Court has often "conveyed the prerequisites for decisions of administrative agencies acting as fact-finders." *Id.* at 1051. Where, as here, neither this Court nor the Superior Court is empowered to make findings of fact in these matters, Judicial review "is limited to determining whether there is evidence in the record to support its findings. The hearing panel must, at a minimum, indicate the evidence upon which it relies." *Dionne v. Jalette*, 641 A.2d 744, 745 (R.I. 1994) (internal police

department disciplinary proceedings). The principle that "[a] rejected applicant is entitled to know the evidence upon which the department based its decision and the rationale for the denial" is so strong that the court has required it of decision-makers even where the government official exercises unfettered discretion. *Mosby*, 851 A.2d at 1051; See *DeCiantis v. Rhode Island Department of Corrections*, 840 A.2d 1090, 1092-93 (R.I. 2003) (per curiam) ("although the DOC director has unfettered discretion concerning classification determinations, when he or she exercises that discretion, an inmate is entitled to know the reasons upon which that decision is based.")

Where, as here, a licensing official's discretion is curtailed once a particular set of statutory criteria have been satisfied, and that determination depends upon an application of certain facts to the set of statutory criteria, an agency's findings of fact and conclusions of law in support of its decisions are a necessary predicate, "in order that such decisions may be susceptible of judicial review." *Von Bernuth v. Zoning Board of Review of New Shoreham*, 770 A.2d 396, 401 (R.I. 2001) (quoting *Cranston Print Works Co. v. City of Cranston*, 684 A.2d 689, 691 (R.I. 1996)); see also *Irish Partnership v. Rommel*, 518 A.2d 356, 358 (R.I. 1986); *May-Day Realty Corp. v. Board of Appeals of Pawtucket*, 107 R.I. 235, 239, 267 A.2d 400, 403 (1970). Indeed, as this Honorable Court has observed on multiple occasions, our Supreme Court has directed boards to make certain that decisions "address the evidence in the record before the board that either meets or fails to satisfy each of the legal preconditions for granting such relief" because "[s]uch a specification of evidence in the decision will greatly aid the Superior Court . . . in undertaking any requested review of these decisions." *Sciacca v. Caruso*, 769 A.2d 578, 585 (R.I. 2001). As this Court has explained in the zoning context,

> [i]n assessing the sufficiency of zoning board findings, this Court must decide whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles. *Those findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany. These are minimal requirements.* Unless they are satisfied, a judicial review of a board's work is impossible.

Irish Partnership, 518 A.2d at 358-59 (quoting *May-Day Realty*, 107 R.I. at 239, 267 A.2d at 403) (emphasis added). Additionally, "when the board fails to state findings of fact, the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances." *Irish Partnership*, 518 A.2d at 359. Like it did in the case of gun permits issued pursuant to § 11-47-18, "[t]he same logic applies in the gun-permitting context, especially when, as here, the Department's determination is subject to certiorari review." Only then, "[a]rmed with this information, an aggrieved applicant can petition this Court for a *writ of certiorari* so that [it][] may review the department's decision for error of law." *Mosby*, 851 A.2d at 1051.

Here, the Chief's decision falls far short of satisfying even the most minimum of these requirements. Apart from the short statement that the Chief "feels" the petitioner did not meet the criteria for issuance of a permit under §11-47-11 R.I. Gen. Laws, the Decision is utterly without a recitation of pertinent facts or the application of those facts to the law. Though the Decision indicates that the Chief had received a recommendation from the Interview Board, the letter neither indicates whether the recommendation was positive or negative nor the evidence upon which the recommendation was based. As will be discussed, the Chief's "feel[ings]" are completely irrelevant and a determination upon that basis would be arbitrary and capricious, per se. Even if it were possible, however, in the face of a detailed and well-reasoned decision including explicit findings of fact and application of those facts to the governing law, to overlook

a licensing official's plain language and forgive a use of the term "feel" as an imperfect synonym for "determine," such a forgiveness must only be had where the licensing official's decision contains such recitations of fact and law, so that the decision itself is susceptible to judicial review to ensure that it is based upon something other that the individual caprice of the decision-maker. Because the decision in this case is woefully inadequate in that it fails to make even a single finding of fact and the entirety of the probative evidence on the record demonstrates that the applicant has satisfied his burdens under §11-47-11(a) this Honorable Court should grant the instant Petition and remand this matter to the Chief with instructions to issue the Applicant's permit pursuant to § 11-47-11(a)'s "shall issue" mandate.

B. BRISTOL'S DENIAL OF PETITIONER'S CONCEALED CARRY PERMIT APPLICATION VIOLATES PETITIONER'S FUNDAMENTAL RIGHT TO CARRY ARMS IN PUBLIC.

1. The Second Amendment Secures a Fundamental Right to Carry Arms in Public.

"[H]istorical meaning enjoys a privileged interpretative role in the Second Amendment context." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (citations omitted). The first step in any Second Amendment case is to conduct an "historical inquiry seek[ing] to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification." *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). Answering whether an activity comes within the Amendment's protection "requires a textual and historical inquiry into original meaning." *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011).The Second Amendment protects the fundamental right "to keep and bear arms." U.S. Const. amend. II. In the landmark case of *District of Columbia v. Heller*, 554 U.S. 570, 591 (2008), the United States Supreme Court was faced with the question of whether that protection extended an individual right to carry arms for self-defense or whether the right created was collective in

nature. The Court rejected the argument that "keep and bear arms" was a unitary concept referring only to a right to possess weapons in the context of military duty. "At the time of the founding, as now, to 'bear' meant to 'carry.'" *Id*. at 584 (citations omitted). To "bear arms," as used in the Second Amendment, is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)); BLACK'S LAW DICTIONARY 214 (6th Ed. 1998)); "[B]ear arms means . . . simply the carrying of arms . . ." *Heller*, 554 U.S. at 589. Importantly the right protected by the Second Amendment is "an individual right protecting against both public and private violence." *Id.* at 594.

The syntax employed by the Second Amendment is not unique within the Bill of Rights. The Sixth Amendment guarantees the right to a "speedy and public trial," U.S. Const. amend. VI, while the Eighth Amendment secures individuals from "cruel and unusual" punishment. U.S. Const. amend. VIII. Just as the Sixth Amendment does not sanction secret, speedy trials or public, slow trials, and the Eighth Amendment does not allow the usual practice of torture, the Second Amendment's reference to "keep and bear" refers to two distinct concepts; a right to own guns and a right to "carry" guns for self-defense. To "bear arms," as used in the Second Amendment, is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (citation omitted). To paraphrase this court, while "it is the keeping of arms that is the *sine qua non* of the individual rights under art. 1, sec. 22" of the Rhode Island constitution, it is the carrying of arms that is the *sine qua non* of the Second Amendment. *Mosby v. Devine*, 851 A. 2d 1031, 1042 (R.I. 2004); *People v. Yanna*, No. 304293,

2012 Mich. App. LEXIS 1269, at *11 (Mich. App. June 26, 2012) ("The Second Amendment explicitly protects the right to 'carry' as well as the right to 'keep' arms.")

Heller's dissenters also acknowledged that the decision protected the public carrying of arms:

> Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.

Heller, 554 U.S. at 680 (Stevens, J., dissenting).

In upholding the right to carry a handgun under the Second Amendment, Heller broke no new ground. As early as 1846, Georgia's Supreme Court, applying the Second Amendment, quashed an indictment for the carrying of a handgun that failed to allege whether the handgun was being carried in a constitutionally-protected manner. *Nunn v. State*, 1 Ga. 243, 251 (1846); *see also In re Brickey*, 8 Idaho 597, 70 P. 609 (1902) (Second Amendment right to carry handgun). Numerous state constitutional right to arms provisions - including our own - have likewise been interpreted as securing the right to carry a gun in public, albeit often, to be sure, subject to some regulation. *See, e.g. Mosby,* 851 A. 2d at 1042*; Kellogg v. City of Gary*, 562 N.E.2d 685 (Ind. 1990); *State ex rel. City of Princeton v. Buckner*, 180 W. Va. 457, 377 S.E.2d 139 (1988); *City of Las Vegas v. Moberg*, 82 N.M. 626, 485 P.2d 737 (N.M. Ct. App. 1971); *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903) (striking down ban on concealed carry); *Andrews v. State*, 50 Tenn. 165 (1871); see also *State v. Delgado*, 298 Or. 395, 692 P.2d 610 (Or. 1984) (right to carry a switchblade knife).

Moreover, the right to bear arms is not abrogated by recognition of the fact it may be regulated. To the contrary, precedent approving of the government's ability to regulate the

carrying of handguns confirms the general rule to which it establishes exceptions. For example, traditionally, "the right of the people to keep and bear arms (Article 2)(sic) is not infringed by laws prohibiting the carrying of concealed weapons . . . ." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) (emphasis added). Recounting Heller's imposition of the common-use test to delineate between arms that are protected and unprotected by the Second Amendment, the Fourth Circuit observed, "The Court found support for this limitation in ''the historical tradition of prohibiting the carrying of dangerous and unusual weapons.' Thus, a citizen's right to carry or keep sawed-off shotguns, for instance, would not come within the ambit of the Second Amendment." *Chester*, 628 F.3d at 679 (citations omitted).

The recent U.S. Supreme Court decisions have likewise suggested that such bans are only "presumptively" constitutional and subject to invalidation by judicial review. *Heller*, 128 S. Ct. at 2817 n.26 (emphasis added). For example, surveying the history of concealed carry prohibitions, it appears time and again that such laws have been upheld as mere regulations of the manner in which arms are carried – with the understanding that a complete ban on the carrying of handguns is unconstitutional.

Heller discussed, with approval, four state supreme court opinions that referenced this conditional rule. See *Heller*, 544 U.S. at 613-614 (discussing *Nunn*, supra, 1 Ga. 243; *Andrews*, supra, 50 Tenn. 165; *State v. Reid*, 1 Ala. 612, 616-17 (1840); and *State v. Chandler*, 5 La. Ann. 489, 490 (1850)). In *Reid*, upholding a ban on the carrying of concealed weapons, Alabama's high court explained:

> We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render

> them wholly useless for the purpose of defense, would be clearly unconstitutional. But a law which is merely intended to promote personal security, and to put down lawless aggression and violence, and to this end prohibits the wearing of certain weapons in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others, does not come in collision with the Constitution.

Reid, 1 Ala. at 616-17.

The *Nunn* court followed *Reid*, and quashed an indictment for publicly carrying a pistol for failing to specify how the weapon was carried:

> so far as the act . . . seeks to suppress the practice of carrying certain weapons secretly, that it is valid, inasmuch as it does not deprive the citizen of his natural right of self defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void.

Nunn, 1 Ga. at 251 (emphasis original).

Andrews presaged *Heller* by finding that a revolver was a protected arm under the state constitution's Second Amendment analog. It therefore struck down as unconstitutional the application of a ban on the carrying of weapons to a man carrying a revolver, declaring:

> If the Legislature think proper, they may by a proper law regulate the carrying of this weapon publicly, or abroad, in such a manner as may be deemed most conducive to the public peace, and the protection and safety of the community from lawless violence. We only hold that, as to this weapon, the prohibition is too broad to be sustained.

Andrews, 165 Tenn. at 187-88.[1]

1 Andrews appeared to abrogate in large part *Aymette v. State*, 21 Tenn. 154 (1840), upholding the prohibition on the concealed carry of daggers. But even *Aymette*, which found a state right to bear arms limited by a military purpose, deduced from that interpretation that the right to bear arms protected the open carrying of arms. *Aymette*, 21 Tenn. at 160-61.

Finally, in *Chandler*, the Louisiana Supreme Court held that citizens had a right to carry arms openly:

> "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations."

Heller, 554 U.S. at 613 (quoting *Chandler*, 5 La. Ann. at 490).

The legal treatises relied upon by the Heller court explained the rule succinctly. Supporting the notion that concealed carrying may be banned, *Heller* further cites to THE AMERICAN STUDENTS' BLACKSTONE, 84 n.11 (G. Chase ed. 1884). *Heller*, 544 U.S. at 626. That source provides:

> [I]t is generally held that statutes prohibiting the carrying of concealed weapons are not in conflict with these constitutional provisions, since they merely forbid the carrying of arms in a particular manner, which is likely to lead to breaches of the peace and provoke to the commission of crime, rather than contribute to public or personal defence. In some States, however, a contrary doctrine is maintained.

AMERICAN STUDENTS' BLACKSTONE, 84 n.11 (emphasis original). Indeed, Rhode Island is one such jurisdiction where the General Assembly has made the policy choice to require that those exercising a right to carry, do so in a concealed manner. Yet despite the flexibility afforded the states to regulate for time place and manner, the Blackstone understanding survives. See, e.g. *In re Application of McIntyre*, 552 A.2d 500, 501 n.1 (Del. Super. 1988) ("[T]he right to keep and bear arms' does not of necessity require that such arms may be kept concealed."). It is important, then, to recall that the United States Supreme Court's definition of "bear arms" as that language is used in the Second Amendment includes the concealed carrying of handguns: "wear, bear, or carry . . . in the clothing or in a pocket . . ." Heller, 554 U.S. at 584 (citations omitted) and the

cases supporting concealed carry prohibitions explain that no abrogation of the right to carry arms is effected because open carrying is still permitted in those jurisdictions. The sum total of the precedent is clear: a state may reasonably regulate the time, place and manner of carrying guns, but cannot completely abrogate the right.

2. The Substantial and Probative Evidence of the Record Establishes that the Defendant was Required to Issue a Permit to the Petitioner.

In *Mosby*, 851 A.2d at 1031, this Honorable Court had its first occasion to consider the rights secured by Article 1, Sec. 22 of the Constitution of the State of Rhode Island and Providence Plantations. Article 1, Sec. 22 provides "The right of the people to keep and bear arms shall not be infringed." The *Mosby* Court was called upon to consider whether an applicant could appeal the denial of an Attorney General's carry permit under § 11-47-18, pursuant to the Rhode Island Administrative Procedures Act ("APA") §§ 42-35 et. seq. *Id.* In concluding that the APA did not control a licensing determination under § 11-47-18, the court explained that

> "[t]wo separate and distinct licensing procedures are set forth in the Firearms Act: § 11-47-18 . . . provides for the discretionary grant of a firearms license . . . and § 11-47-11(a), a mandatory licensing provision that provides in pertinent part:
>
> The licensing authorities of any city or town shall, upon application of any person twenty-one (21) years of age or over having a bona fide residence or place of business within the city or town, or of any person twenty-one (21) years of age or over having a bona fide residence within the United States and a license or permit to carry a pistol or revolver concealed upon his or her person issued by the authorities of any other state or subdivision of the United States, issue a license or permit to the person to carry concealed upon his or her person a pistol or revolver everywhere within this state for four (4) years from date of issue, if it appears that the applicant has good reason to fear an injury to his or her person or property or has any other proper reason for carrying a pistol or revolver, and that he or she is a suitable person to be so licensed."

Id. at 1047(Emphases added).

Because § 11-47-18 was an alternate route to licensure that vested complete discretion in the Attorney General, a determination under that section did not implicate the constitutional carry rights of citizens and issuance under that section was not controlled by the APA. However, the court explained, "[i]n contrast to § 11-47-18, the statute now before the Court, § 11-47-11 is mandatory — an applicant who meets the criteria set forth in § 11-47-11 is entitled to a gun permit. (Citing *Schubert v. DeBard*, 398 N.E.2d 1339, 1341 (Ind.Ct.App.1980) ("[I]f it is determined * * * that the applicant has met the conditions of the statute, the [licensing authority] has no discretion to withhold the license.")).

The *Mosby* court continued its analysis by explaining that the Rhode Island State constitutional guarantee to keep and bear arms is "fulfilled" by the mandatory licensing statute. Id. at 1048 ("Because anyone who meets the conditions of § 11-47-11 is entitled to a gun permit, this mandatory requirement supplies the necessary safeguards to the right to bear arms in this state and vindicates the rights set forth in art. 1, sec. 22, of the Rhode Island Constitution.") Though decided before the United States Supreme Court's decision in *Heller*, because a right cannot be secured by the arbitrary discretion afforded the Attorney General under § 11-47-18 it is clear that Rhode Island's "shall issue" permit statute must also serve as the mechanism through which law abiding citizens are able to exercise their rights under the Second Amendment and that failure to recognize and respect those rights constitutes a violation of Article I, § 22 of the Rhode Island State Constitution, as well as a violation of the Second Amendment.

As explained by this Honorable Court, the Firearms Act's mandatory provisions require an official presented with an application under § 11-47-11(a) to issue a permit upon satisfaction

of the statute's two criteria: that the applicant's reason for seeking a permit is "proper" and that the applicant is not "unsuitable." Though this Honorable Court has not had occasion, since *Mosby*, to further elucidate the meaning of either prong, nor to indicate the burden by which those prongs must be satisfied, there are several sources from which the meaning of these two prongs can be further clarified.

i. Gendreau satisfied § 11-47-11(a)'s suitability requirement.

While most Courts to have considered the question appear reluctant to reduce the discretion a public official may exercise under a firearms statute's suitability requirement to a bright line rule, there is near universal agreement that certain categories render an applicant per se unsuitable. "The finding that an applicant is a suitable person involves an exercise of discretion, but certain individuals are unsuitable as a matter of law, including convicted felons, habitual drunkards, mental incompetents, illegal aliens, and anyone who has failed to meet the minimum firing qualification score." *Mosby*, 851 A.2d at 1047-48; *see, also Heller*, 554 U.S. at 626; *Hightower v. City of Boston*, 693 F. 3d 61, 78-79 (1st Cir. 2012); *Kuck v. Danaher*, 822 F. Supp. 2d 109, 128-129 (D. Conn. 2011).

Beyond the per se unsuitable categories, it is clear the permitting officials are veiled with a certain degree of discretion to reject as unsuitable an applicant who poses a danger to the public or who impedes the ability of the official to conduct a fair evaluation of that individual's dangerousness. See *Hightower*, 693 F. 3d at 75 (failure to truthfully answer the questions on a permit application constitutes valid reason to deny a permit)[2] See also *Huddleston v. United*

2 Rhode Island already criminalizes the provision of false information in connection with a firearms license application see § 11-47-23 False information in securing firearm or license, providing ("[n]o person shall, in purchasing or otherwise securing delivery of a shotgun, rifle, pistol, or revolver, or in applying for a license to carry it, give false information or offer false evidence of his or her identity. Violation of the provisions of this section may be punished by imprisonment for not more than five (5) years.")

States, 415 U.S. 814, 825 (1974) (federal prohibition on providing material false information to a licensed dealer in connection with the acquisition of firearms constitutional). Yet as this Court has emphasized in the past, that discretion is not, and may not constitutionally, be carte blanche to decide who may exercise their constitutional rights. Mosby at 851 A.2d at 1051. Other courts to consider the suitability requirement have likewise found limits on the scope of an administrative suitability determination. For example, faced with a facial challenge to Connecticut's suitability requirement, the Court in *Kuck*, explained that the restriction was not unconstitutionally vague or overbroad because the requirement had traditionally been interpreted to require that the applicant must pose some appreciable danger to the public and that the determination be based on evidence. 822 F. Supp. 2d 109, 128-129. While this is most likely to occur in instances where individuals have a record of lawless or criminal behavior, it is conceivable, for example, that a finding of unsuitability might also be premised upon discovery of evidence that an applicant had a history of dangerous instability such that they had been banned from a shooting range for repeated failure to follow safety protocols, particularly if that fact were combined with some other evidence of continuing erratic, unsafe, or uncontrollable behavior.

While all of these may pose interesting questions for future cases, in the instant matter, the Court need not delve into that particular jurisprudential thicket because it is clear, given that he was granted an interview that based upon Bristol's Policy there is no question as to Gendreau's suitability. Moreover the transcript and audio recording of the interview reveals the absence of any fact that any rational fact-finder or administrative actor could rationally conclude casts doubt on Gendreau's suitability. As in Mosby, in which the Court's only mention of the suitability requirement was the observation that, “there is no suggestion that he is an unsuitable person” so

too here is there no suggestion that the petitioner is unsuitable to carry a concealed firearm for self-defense. Gendreau's application reveals he is a model citizen of exactly the sort we as a society would want to entrust with a firearm. Gendreau has never been arrested, never been confined or treated for mental health, never been indicted or charged with a criminal violation, and willingly disclosed a plea of nolo-contendre to a speeding violation in 2009. See Application at _. Nothing in the Chief's denial letter suggests otherwise. On this record, it is impossible to see how a determination that Gendreau is unsuitable could be sustained as rationally supported by the available evidence. "Although we are mindful that the 'suitable person' provision in § 11-47-11 vests the local licensing authority with discretion to reject an application filed by an unsuitable person, this leeway does not affect the requirement that the licensing authority *shall* issue a permit to a suitable person who meets the requirements set forth in the statute." *Mosby*, 851 A.2d at 1047-48. Accordingly, because it is clear Gendreau is suitable, any denial of Gendreau's permit application must have been premised on his failure to satisfy the statute's "proper reason" requirement.

ii. Gendreau satisfies any proper reason requirement contained in §11-47-11(a).

Perhaps the most important indication of this Court's understanding of the legislative intent behind 11-47-11(a)'s "proper reason" requirement, is the text of *Mosby* itself. In *Mosby*, the only discussion of the applicant's reason for wanting a permit was the court's observation that as "[a]n avid gun collector, plaintiff has a proper reason for carrying a pistol or revolver" *Id.* at 1147. Notably, this suggests that the *Mosby* Court adopted a broad view of the proper reason prong. The court was wise to do so. Though decided before the United States Supreme Court's decision in *Heller*, the *Heller* and *McDonald* decisions, combined with commonly accepted principles of constitutional avoidance reveal the *Mosby* Court's decision to interpret the proper

reason prong in as broad a fashion as possible to be one not only interpretationaly sound, but prescient in preserving the statute from constitutional attack. Unfortunately, Bristol's decision denying the petitioner's application adheres neither to the text and spirit of the Firearms Act as interpreted by *Mosby*, nor to the basic tenets of due process.

a. The due process and equal protection clauses prohibit government officials from arbitrarily determining whether an individual may exercise fundamental rights.

"*Heller* left open the issue of the standard of review, rejecting only rational-basis review." *Chester*, 628 F.3d at 680. Notwithstanding the lack of resort to means-end scrutiny. The Supreme Court in *Heller*, as did the D.C. Circuit before it, struck down Washington, D.C.'s functional firearms ban for conflicting with the Second Amendment's core self-defense interest, and struck down the city's handgun ban as barring a category of protected arms. As with other rights, means-ends scrutiny is thus not the exclusive method for evaluating Second Amendment claims where more precise tests are available. Such is the case here. Because the practice of bearing arms is secured by Article 22 and the Second Amendment, the decision to issue a license to bear arms cannot be left to the government's unbridled discretion.

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

Staub v. City of Baxley, 355 U.S. 313, 322 (1958) (citations omitted); see also F*W/PBS v. City of Dallas*, 493 U.S. 215, 226 (1990) (plurality opinion); *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

Courts have long analogized speech and gun rights. *Commonwealth v. Blanding*, 20 Mass. 304, 314 (1825); *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 330 n.* (Pa. 1788). It is, unsurprising then, that Courts faced with second amendment challenges have often turned to First Amendment jurisprudence to develop the analytical framework within which to evaluate those claims.

> Because Heller is the first Supreme Court case addressing the scope of the individual right to bear arms, we look to other constitutional areas for guidance in evaluating Second Amendment challenges. We think the First Amendment is the natural choice. Heller itself repeatedly invokes the First Amendment in establishing principles governing the Second Amendment. We think this implies the structure of First Amendment doctrine should inform our analysis of the Second Amendment.

Marzzarella, 614 F.3d at 89 n.4; See also *Ezell*, 651 F.3d at 703 & 708.

The law of prior restraint, well-developed in the First Amendment context, supplies useful guidance here. "We agree with those who advocate looking to the First Amendment as a guide in developing a standard of review for the Second Amendment." *Chester*, 628 F.3d at 682, (citing *United States v. Marzzarella*, 614 F.3d 85, 89 n.4 (3d Cir. 2010) ("the structure of First Amendment doctrine should inform our analysis of the Second Amendment") (other citation omitted); see also *Parker v. District of Columbia*, 478 F.3d 370, 399 (D.C. Cir. 2007), aff'd sub nom *Heller* ("The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment.") (citation omitted); *United States v. Skoien*, 587 F. 3d 803, 813 (7th Cir. 2009). This is especially so, considering that in *Staub* and its progeny, the Supreme Court did not limit its disapproval of prior restraints to First Amendment freedoms, but spoke more generally of

"freedoms which the Constitution guarantees." *Staub*, 355 U.S. at 322. As discussed infra, *Heller* itself summarily applied established prior restraint principles in a Second Amendment context.

In *Staub*, the Supreme Court struck down an ordinance authorizing a mayor and city council "uncontrolled discretion," *Staub*, 355 U.S. at 325, to grant or refuse a permit required for soliciting memberships in organizations. Such a permit, held the Court,

> makes enjoyment of speech contingent upon the will of the Mayor and Council of the City, although that fundamental right is made free from congressional abridgment by the First Amendment and is protected by the Fourteenth from invasion by state action. For these reasons, the ordinance, on its face, imposes an unconstitutional prior restraint upon the enjoyment of First Amendment freedoms and lays "a forbidden burden upon the exercise of liberty protected by the Constitution."

Staub, 355 U.S. at 325 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)); see also *Largent v. Texas*, 318 U.S. 418, 422 (1943) (striking down ordinance allowing speech permit where mayor "deems it proper or advisable."); *Louisiana v. United States*, 380 U.S. 145, 153 (1965) ("The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws . . . which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar.").

"Traditionally, unconstitutional prior restraints are found in the context of judicial injunctions or a licensing scheme that places 'unbridled discretion in the hands of a government official or agency.'" *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 350 n. 8 (4th Cir. 2005) (quoting *FW/PBS*, 493 U.S. at 225-26). "Unbridled discretion naturally exists when a licensing scheme does not impose adequate standards to guide the licensor's discretion." *Chesapeake B & M, Inc. v. Harford County*, 58 F.3d 1005, 1009 (4th Cir. 1995) (en banc); cf. *Green v. City of Raleigh*, 523 F.3d 293, 306 (4th Cir. 2008) ("'virtually unbridled and absolute power' to deny

permission to demonstrate publically(sic), or otherwise arbitrarily impose de facto burdens on public speech" is unconstitutional) (citation omitted).

In the First Amendment context, the presumption against prior restraints is not aimed exclusively at preventing content-based decision-making. "[W]hether or not the review is based upon content, a prior restraint arises where administrative discretion involves judgment over and beyond applying classifying definitions." *Mom N Pops, Inc. v. City of Charlotte*, 979 F. Supp. 372, 387 (W.D.N.C. 1997) (citations omitted); *Beal v. Stern*, 184 F.3 117, 124 (2d Cir. 1999). The presumption against prior restraints is in part based on "a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59 (1975) (citations omitted).

Accordingly, standards governing prior restraints must be "narrow, objective and definite." *Shuttlesworth*, 394 U.S. at 151. Standards involving "appraisal of facts, the exercise of judgment, [or] the formation of an opinion" are unacceptable. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (quoting *Cantwell*, 310 U.S. at 305).

Public safety is invoked to justify most laws, but where a fundamental right is concerned, a mere incantation of a public safety rationale does not save arbitrary licensing schemes. In the First Amendment arena, where the concept has been developed extensively,

> [W]e have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places . . . There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence.

Kunz v. New York, 340 U.S. 290, 294 (1951); *Shuttlesworth*, 394 U.S. at 153.

"But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right." *Hague v. Committee for Indus. Org.*, 307 U.S. 496, 516 (1937) (plurality opinion).

> Even when the use of its public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the "welfare," "decency," or "morals" of the community.

Shuttlesworth, 394 U.S. at 153.

Typical of the types of licensing schemes striken under these principles was a Baltimore ordinance that prohibited permits for public assembly "unless the [applicant] person, club, association or corporation is deemed fit, responsible and proper to receive same, by the chief of police." *Norton v. Ensor*, 269 F. Supp. 533, 537 (D. Md. 1967).For an example of these prior restraint principles applied in the Second Amendment context, the Court need look no further than *Heller* itself. Although the case is best known for its challenges to a direct handgun ban and a functional firearms ban, *Heller* also challenged application of a third law, for functioning as an indirect handgun ban: the District of Columbia's requirement that handgun registrants obtain a discretionary (but never issued) permit to carry a gun inside the home. The Supreme Court held that the city had no discretion to refuse issuance of the permit: "Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in the home." *Heller*, 570 U.S. 572. In other words, the city could deny Heller a permit if it could demonstrate there was some constitutionally valid reason for denying him Second Amendment rights. But the city could not otherwise refuse to issue the permit. The city repealed its home carry permit requirement.

The same logic governs this case. In addition to violating the Firearms Act's two tiered licensing scheme by claiming for itself the discretion vested only with the Attorney General, Bristol's insistence that applicants demonstrate a "proper showing of need" fails constitutional scrutiny as an impermissible prior restraint. The right to carry a firearm for self-defense is plainly among the "freedoms which the Constitution guarantees." *Staub*, 355 U.S. at 322. Accordingly, the government bears the burden of proving that an applicant may not have a permit, for some constitutionally-compelling reason defined by application of standards that are "narrow, objective and definite." *Shuttlesworth*, 394 U.S. at 151; See also *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569-71 (1972) (internal citation omitted) ("to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake. We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property").

The same analysis is likewise compelled by the equal protection clause. The Second Amendment secures a fundamental right. *McDonald*, 130 S. Ct. at 3042 (plurality opinion) & 3059 (Thomas, J., concurring). "[C]lassifications affecting fundamental rights are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citation omitted). Under this analysis, the government carries the burden of proving the law "furthers a compelling interest and is narrowly tailored to achieve that interest," *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (citation omitted), a burden that cannot be met where less restrictive alternatives are available to achieve the same purpose. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); see also *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1331-32 (D. Utah 2009) (applying strict scrutiny in Second Amendment analysis).

"The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." Niemotko v. Maryland, 340 U.S. 268, 272 (1951). Likewise, with the exercise of fundamental Second Amendment freedoms.

Unless construed to mean merely that an applicant wishes to exercise his or her constitutional right to keep and bear arms for self-defense and does so without an improper purpose – that is to say, without intending to employ the firearm in the commission of a crime, the determination that Gendreau, or others, do not have a "need" for wanting to exercise their constitutional rights is insufficient to deprive individuals of this important right. Indeed, in the absence of the broadest possible reading of the proper reason requirement suggested by *Mosby*, the utter lack of legislatively proscribed standards utilized in making this determination means that an applicant's right is subject to evaluation criteria that are plainly not narrow, objective, or definite. Moreover, under the doctrine of constitutional avoidance, the ordinary rule that statutes are to be read to avoid serious constitutional doubts, if that course is possible, *Jones v. United States*, 529 U.S. 848, 857 (2000), and here it is readily possible. See e.g. *Kuck v. Danaher*, 822 F. Supp. 2d 109, 128 (D. Ct. 2011) ("although the term "suitable" as used in Section 29-28(b) is not statutorily defined, Connecticut courts have made clear that the purpose of imposing a suitability requirement is to ensure that persons who potentially would pose a danger to the public if entrusted with a handgun do not receive a permit.")

Here, despite the plain statutory language requiring issue upon a finding of suitability and proper reason, Bristol's "policy" governing the issuance of CCW invites a searching inquiry into, inter alia:

> 1. Has the applicant demonstrated a specific articulable risk to life, limb or property? If so, has the applicant demonstrated how a pistol permit will decrease the risk?
>
> 2. Can the applicant readily alter his or her conduct, or undertake reasonable measures other than carrying a firearm, to decrease the danger to life, limb or property?
>
> 3. Are there means of protection available to the applicant other than the possession of a firearm that will alleviate the risk to his or her person or property?
>
> 5. Has the applicant presented a plan to properly secure the firearm so that it does not fall into unauthorized hands?
>
> 6. How greatly will the possession of a firearm by the applicant increase the risk of harm to the applicant or to the public?
>
> 7. Has the applicant demonstrated that he or she will not use the firearm for an unlawful or improper purpose, and that he or she has not used a firearm for n (sic) unlawful or improper purpose in the past?

Yet,

> [t]he existence of standards does not in itself preclude a finding of unbridled discretion, for the existence of discretion may turn on the looseness of the standards or the existence of a condition that effectively renders the standards meaningless as to some or all persons subject to the prior restraint.

Beal v. *Stern*, 184 F.3d 117, 126 n.6 (2d Cir. 1999).

As this court has itself noted "[o]ne does not need to be an expert in American history to understand the fault inherent in a gun-permitting system that would allow a licensing body carte blanche authority to decide who is worthy of carrying a concealed weapon." *Mosby*, 851 A.2d at 1050-51. Bristol's extensive list of 'criteria' demonstrate that carte blanche is exactly the scope of authority it claims. Putting aside, for a moment, that the criteria listed are well beyond the scope of any legislative delegation or charge, they are also irrational. As an initial matter, criteria 1

(articulable threat), 2 (measures to alter conduct, and 3 (alternate means of protection) are premised on the faulty assumption that a licensing official is capable of predicting whether and the extent to which an applicant will be a victim of a crime. This is pure fantasy. Defendants are plainly incapable of predicting when, where, and how, a particular law abiding citizen will become a victim of violent crime. Defendants cannot predict who will face, much less when or where, a situation in which the right to self-defense would be desperately needed. Crime is largely random and unpredictable. Individuals victimized once may never be victimized again, while an individual's first encounter with a violent criminal often leads to death or seriously bodily harm. The right to self-defense at the Second Amendment's core does not depend for its existence on a history of previous victimization. The Second Amendment provides that individuals, not Defendants, retain the ability to determine whether they wish to carry a gun to protect against "fear [of] an injury to his or her person or property." § 11-47-11(a).

Similarly, the availability of alternative means of protection criterion does not lessen an applicant's claim to the protection of a handgun. The Second Amendment prohibits Bristol from compelling a twenty-two year old co-ed to train for years in the Israeli martial art of Krav-Maga or to walk with her rape whistle at the ready in order to feel safe walking home from her job as a waitress at a local Thames street pub. Criterion number 6 too, is problematic, in that it invites exactly the type of balancing test one might expect the attorney general to use in making a determination under § 11-47-18 but which is forbidden to the licensing authorities under the limited "shall issue" discretion provided by the general assembly. Bristol's "policy" is hardly a model of an appropriate prior restraint, applying "narrow, objective, and definite" standards. The lack of "standards" results in a determination that is entirely arbitrary, subjective, and boundless. Against them stands both a federal and a state constitutional provision guaranteeing individuals

the right to carry a gun for self-defense. The desire for self-defense, regardless of Defendants' opinions on the subject, is all the "proper reason" required of Plaintiffs by the Second Amendment.

b. Any Prohibition on Law-Abiding Citizens Carrying Handguns for Self-Defense Without First Demonstrating A Necessity to do so Does Not Survive Any Level of Scrutiny More Demanding Than The Rational Basis Test.

Even if this court rejects the application of prior restraint doctrine and applies traditional means-end scrutiny, the challenged provision cannot withstand the application of either intermediate or strict scrutiny. While Circuit Courts of Appeal have reasoned that strict scrutiny should apply to regulations that limit "the core right identified in Heller--the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense" those courts have often concluded that intermediate scrutiny should be applied to time place and manner restrictions on the exercise of second amendment rights the firearms restrictions they have considered. *Chester*, 628 F.3d at 683, 685 (suggesting that any abridgement of the "core right" would be subject to strict scrutiny but finding the appellant outside the scope of the core right by virtue of his criminal history as a domestic violence misdemeanant). For example, in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir.2010), the Third Circuit applied intermediate scrutiny to a statute making it unlawful to possess a handgun with an obliterated serial number. *Id.* at 97. The Third Circuit formulated the applicable test as whether the asserted governmental interest was "significant," "substantial," or "important," and whether the fit between the challenged regulation and the asserted objective is "reasonable, not perfect." *Id.* at 97-98. Likewise, in *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010), the Tenth Circuit adopted the Third Circuit's approach in *Marzzarella* and applied intermediate scrutiny to a statute prohibiting the possession of a firearm by a person subject to a domestic protection order. *Id.* at 801-02.

Similarly, in *Masciandaro*, 638 F.3d at 458, the Fourth Circuit applied intermediate scrutiny to a regulation prohibiting the carrying or possession of a loaded handgun in a motor vehicle inside a national park. *Id.* at 469-70. The Fourth Circuit contemplated that courts "will employ different types of scrutiny in assessing burdens on Second Amendment rights, depending on the character of the Second Amendment question presented." *Id.* at 470. The Fourth Circuit explained that, under such an approach, "we would take into account the nature of a person's Second Amendment interest, the extent to which those interests are burdened by government regulation, and the strength of the government's justifications for the regulation." *Id.* But See *Nordyke v. King*, 644 F.3d 776, 784-85 (9th Cir.2011) (employing a "substantial burden" framework for the analysis of firearm regulations, under which "heightened scrutiny does not apply unless a regulation substantially burdens the right to keep and to bear arms for self-defense.")

Here, the record is clear that Gendreau is exactly the type of law abiding, responsible citizen who falls within the core of the self-defense right identified in *Heller*. Unquestionably, the "proper reason" requirement burdens this "the core right" by completely preventing its very exercise. Accordingly, with regard to application to Gendreau, Bristol should be required to defend its interpretation of the law on strict scrutiny grounds. *Chester*, 628 F.3d at 683, 685 (emphases omitted) (suggesting that any abridgement of the "core right" would be subject to strict scrutiny). However, though strict scrutiny may be the test that the Supreme Court ultimately mandates for those like Gendreau, there can be no dispute that this restriction is subject, at minimum, to intermediate scrutiny under which the defendant "bears the burden of demonstrating (1) that it has an important governmental 'end' or 'interest' and (2) that the end or interest is substantially served by enforcement of the regulation." *United States v. Carter*, 669 F.3d 411, 417 (4th Cir. 2012); *see also, Masciandaro*, 638 F.3d at 470, 475 (applying

intermediate scrutiny to a citizen's claim of right to bear arms in a public park). In doing so, defendant "may not rely upon mere 'anecdote and supposition'" in discharging their burden to show that the claimed ends are substantially served by the "good and substantial reason" requirement. *Carter*, 669 F.3d at 418 (quoting *United States v. Playboy Ent'mt Grp., Inc.*, 529 U.S. 802, 822 (2000)). The requirement, under an intermediate standard, need not be the "least restrictive means" to pass muster but it may not "substantially burden more" of the exercise of Second Amendment rights "than is necessary to further the government's legitimate interests" or "regulate . . . in such a manner that a substantial portion of the burden on [Second Amendment rights] does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *see, e.g., Carter,* 669 F.3d at 418-19. Under this standard, the "degree of fit - between the regulation and the well-established goal of promoting public safety need not be perfect; it must only be substantial." *Heller v. Dist. of Columbia*, 698 F. Supp. 2d 179, 191 (D.D.C. 2010).

Here, Bristol cannot demonstrate any legitimate governmental interest substantially advanced by the arbitrary issuance of concealed carry permits and it certainly cannot demonstrate that the regulation at issue does not burden substantially more of the exercise of second amendment rights than is needed to advance such an interest. Courts considering analogous need provisions in other state's licensing schemes are split but it is clear that those rejecting the "need" requirement rest on sounder reasoning. In *Woollard v. Sheridan*, the U.S. District Court for the District of Maryland, applying intermediate scrutiny, held unconstitutional that state's licensing scheme that required applicants demonstrate that they have a "good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger" Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii). Faced with the argument that the restriction advanced the state's interest in public

safety, The District Court properly held the "citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs." *Woollard v. Sheridan*, No. 10-2068, 2012 U.S. Dist. LEXIS 28498, at *21, *34; 2012 WL 695674, at *7, *12 (D. Md. Mar. 2, 2012) (to be published in 863 F.Supp.2d __). The court explained,

> The Maryland statute's failure lies in the overly broad means by which it seeks to advance this undoubtedly legitimate end. The requirement that a permit applicant demonstrate "good and substantial reason" to carry a handgun does not, for example, advance the interests of public safety by ensuring that guns are kept out of the hands of those adjudged most likely to misuse them, such as criminals or the mentally ill. It does not ban handguns from places where the possibility of mayhem is most acute, such as schools, churches, government buildings, protest gatherings, or establishments that serve alcohol. It does not attempt to reduce accidents, as would a requirement that all permit applicants complete a safety course. It does not even, as some other States' laws do, limit the carrying of handguns to persons deemed "suitable" by denying a permit to anyone "whose conduct indicates that he or she is potentially a danger to the public if entrusted with a handgun."

Id. (citing *Kuck, 822 F. Supp. 2d at 128.)*

In contrast, the U.S. Second Circuit Court of Appeal concluded that New York's "proper cause" requirement for a concealed carry permit withstood constitutional scrutiny. *Kachalsky v. County of Westchester*, Docket Nos. 11-3642 (Lead), 11-3962 (XAP) (2nd Cir. Nov 27, 2012). Myopically concentrating on the Supreme Court's pronouncement that the second amendment right was at its zenith in the home, the court analogized to the invalidity of prohibitions on obscenity and sexual conduct in the home, and applied "substantial deference to the predictive judgments of [the legislature]" (brackets in original) announcing in conclusory fashion that "Restricting handgun possession in public to those who have a reason to possess the weapon for

a lawful purpose is substantially related to New York's interests in public safety and crime prevention."

Yet, less than a month after the Second Circuit issued its opinion in *Kachalsky*, faced with a similar matter, the Seventh Circuit rejected both the reasoning and the conclusions reached by the second circuit. In Moore v. Madigan the court was faced with a ban on the public carry of handguns outside the home with the exception of a few broad categories. The court began its analysis by recognizing that

> the implication of the analysis [in heller] that the constitutional right of armed self-defense is broader than the right to have a gun in one's home. The first sentence of the *McDonald* opinion states that "two years ago, in *District of Columbia v. Heller*, we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense," *McDonald v. City of Chicago*, *supra*, 130 S. Ct. at 3026. . . .

Moore v. Madigan, Docket Nos. 12-1269 (Lead), 12-1788 (7th Cir. Dec 12, 2012) at 4.

After exploring the historical use of firearms in Illinois, including the public carry and use of such tools by frontiersmen and settlers to defend from attacks by native peoples, the court explained,

> Twenty-first century Illinois has no hostile Indians. But a Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress. But Illinois wants to deny the former claim, while compelled by *McDonald* to honor the latter. That creates an arbitrary difference. To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*. It is not a property right—a right to kill a houseguest who in a fit of aesthetic fury tries to slash

> your copy of Norman Rockwell's painting *Santa with Elves*. That is not self-defense, and this case like *Heller* and *McDonald* is just about self-defense.

Id. at 8.

Though recognizing that "[a] gun is a potential danger to more people if carried in public than just kept in the home" the court also recognized that "the other side of this coin is that knowing that many law-abiding citizens are walking the streets armed may make criminals timid." *Id*. "Given that in Chicago, at least, most murders occur outside the home" the court noted that "the net effect on crime rates in general and murder rates in particular of allowing the carriage of guns in public is uncertain both as a matter of theory and empirically." The Seventh Circuit panel then proceeded to review and discuss a number of scientific studies on the impact of the Illinois ban on crime rates before concluding that "[i]n sum, the empirical literature on the effects of allowing the carriage of guns in public fails to establish a pragmatic defense of the Illinois law." *Id*. at 13. Notably the court observed,

> Anyway the Supreme Court made clear in Heller that it wasn't going to make the right to bear arms depend on casualty counts. If the mere possibility that allowing guns to be carried in public would increase the crime or death rates sufficed to justify a ban, Heller would have been decided the other way, for that possibility was as great in the District of Columbia as it is in Illinois.

Id.

Though the court failed to expressly engage in an analysis based on degrees of scrutiny, analogizing to its prior decision in *Skoien*, 614 F.3d at 643–44, the court noted that in that case, when presented with a challenge to the federal gun law, 18 U.S.C. § 922(g)(9), prohibiting anyone "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm in or affecting interstate commerce it had required the government to make "'a

strong showing' that a gun ban was vital to the public safety" *Id.* at 14. Because Illinois could not make that showing the Court found that the wide sweeping ban was unconstitutional. *Id.*

As explained above, Defendants' whims and personal opinions as to who should enjoy Second Amendment rights impermissibly classifies individuals in the exercise of these rights in a completely arbitrary, standardless fashion. Though the "policy" purports to contain standards, in reality those standards are so broad and vague as to vest unbridled discretion in the Licensing Authority. For example, when, during the interview process, Gendreau explained that part of his rationale for seeking a Rhode Island permit was that possession of a Rhode Island permit was a prerequisite for issuance of a Massachusetts permit, which he hoped to seek in order to increase his employment opportunities, A member of the Board indicated "[t]hat's interesting because most, I would say this heavily weighs on need and if you have a need in Massachusetts and not a need in Rhode Island how can they make you get one?" TR. at 9-11. In reading the whole transcript it becomes clear that the Board viewed the desire to obtain employment in Massachusetts as going to "a proper showing of need" in Massachusetts but not Rhode Island. This is despite the fact that a Rhode Island permit is a prerequisite to the issuance of a Massachusetts non-resident permit. If one accepts that enhanced employment opportunities are a proper reason for issuance of a permit, there is no reason why the geographical location of those opportunities is relevant to the determination. Particularly, when the permit is a necessary predicate. Moreover, the decision completely ignores the uncontroverted testimony that Petitioner is a collector of guns and that he often travels with large sums of cash in the course of collecting the rents for the family business. Thus, like the "good and substantial reason" requirement invalidated in *Woollard*, the "proper reason" requirement, as applied by Bristol is far to overbroad. As the *Woollard* court found with respect to the "good and substantial reason"

requirement at issue in that case, nothing in a "proper reason" requirement that allows for unbridled discretion serves to rationally further the end of public safety without completely trouncing the core right of self-defense. This becomes all the more clear when one considers how legitimate restrictions are already served by other aspects of the Rhode Island or federal law. For example, 18 U.S.C. § 922(g) already ensures that guns are kept out of the hands of those adjudged most likely to misuse them, such as criminals or the mentally ill. Rhode Island already attempts to reduce accidents by imposing a requirement that permit applicants complete a training and marksmanship requirement. § 11-47-15. Likewise the proper reason element does not ensure the suitability of an applicant as that is a separate element in the statute. Rather, the ability to arbitrarily decide who is entitled to exercise his or her second amendment rights compels the conclusion that any ends reached by the regulation are so divorced from the State's legitimate interest in public safety as to fail the substantially related and overburdening prongs of intermediate scrutiny. Furthermore there is no legitimate state interest in depriving people of the means of self-defense. The state may have an interest in reducing gun violence and accidents, but it cannot presume that the exercise of a constitutional right will cause the sort of harm it is allowed to curtail. Defendants cannot point to the impact of their practice – the deprivation of constitutional rights – as their interest. *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991). McDonald's instructions bear repeating:

> [T]here is intense disagreement on the question whether the private possession of guns in the home increases or decreases gun deaths and injuries. The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category.

McDonald, 130 S. Ct. at 3045 (citations omitted).

Nor is the arbitrary licensing practice narrowly or substantially tailored to any interest in public safety. The 'proper reason' requirement, as applied by Bristol,

> does not, for example, advance the interests of public safety by ensuring that guns are kept out of the hands of those adjudged most likely to misuse them, such as criminals or the mentally ill. It does not ban handguns from places where the possibility of mayhem is most acute . . . It does not even, as some other States' laws do, limit the carrying of handguns to persons deemed "suitable" by denying a permit to anyone "whose conduct indicates that he or she is potentially a danger to the public if entrusted with a handgun."

Woollard, No. 10-2068, 2012 U.S. Dist. LEXIS 28498, at *18.

Other courts are in accord. Striking down North Carolina's prohibitions on carrying handguns during "states of emergency," the court in *Bateman v. Perdue* found the laws

> do not target dangerous individuals or dangerous conduct. Nor do they seek to impose reasonable time, place and manner restrictions by, for example, imposing a curfew to allow the exercise of Second Amendment rights during circumscribed times. Rather, the statutes here excessively intrude upon plaintiffs' Second Amendment rights by effectively banning them (and the public at large) from engaging in conduct that is at the very core of the Second Amendment at a time when the need for self-defense may be at its very greatest . . . .

*2012 U.S. Dist. Lexis 47336 at *16-*18 (E.D.N.C. Mar. 29, 2012).* Likewise, Massachusetts' statute disarming legal aliens failed intermediate scrutiny, as it

> fail[ed] to distinguish between dangerous non-citizens and those non-citizens who would pose no particular threat if allowed to possess handguns . . . Any classification based on the assumption that lawful permanent residents are categorically dangerous and that all American citizens by contrast are trustworthy lacks even a reasonable basis.

Fletcher v. Haas, No. 11-10644-DPW, 2012 U.S. Dist. LEXIS 44623, at *46-*47 (D. Mass. Mar. 30, 2012).

Finally, even if the right at issue—the ability to carry arms for self-defense—could somehow constitute an evil that Defendants are entitled to address, less-restrictive alternatives are plainly available to Defendants. Statues or regulations that require officials to issue gun carry licenses to applicants who meet non-discretionary standards can and often are enacted. In some states, a license is required only if a gun is carried concealed. Others, do not require permits to carry handguns at all although, they issue permits for reciprocity purposes. See A.R.S. § 13-3112. Yet another Wisconsin – prohibits concealed carry, but allows citizens to carry exposed handguns without a license. Wis. Stat. Ann. § 941.23.

Defendants already conduct background checks on permit applicants, require applicants to complete approved training, and remain free to ban guns from being carried in sensitive places or in a dangerous manner. Defendants have many narrowly-tailored tools at their disposal for addressing compelling public safety interests in the regulation of firearms without arbitrarily depriving individuals of their fundamental rights. The practice thus fails all aspects intermediate and strict scrutiny analysis.

C. BRISTOL'S REQUIREMENT THAT APPLICANTS FOR A CONCEALED CARRY PERMIT DEMONSTRATE A PROPER SHOWING OF NEED IS ULTRA VIRES.

Bristol's Policy requiring an applicant demonstrate a "proper showing of need" is troubling for yet another reason. As a local licensing authority the scope of the chief's authority is wholly a function of state law. In *Marro v. General Treasurer of City of Cranston*, 108 R.I. 192, 273 A.2d 660 (R.I. 1971), this Court held that a "municipal corporation, in the absence of a special constitutional provision, was a creature of the state having no inherent right of self-government and deriving all of its authorities and powers from its creator." *Marro*, 273 A.2d at 660 (citing *City of Providence v. Moulton*, 52 R.I. 236, 160 A.2d 75, (R.I. 1932)). Consequently,

the Town's licensing authority is utterly without authority in the State of Rhode Island to declare the intent of § 11-47-11(a) when that intent is clearly contrary to the plain language of the statute.

Here, Defendant's policy clearly evidences his misunderstanding of the express statutory and case law regarding the role and authority of licensing authorities, by repeatedly emphasizing the unlimited nature of the town's discretion and the requirement that an applicant demonstrate a proper showing of need. It is one thing for an agency regulation or "policy" to faithfully interpret an ambiguous statute, but it is another thing altogether when an agency incorrectly reflects the wording of the statute. An inaccurate recitation of a statute is not tantamount to a considered interpretation worthy of deference. "Although factual findings of an administrative agency are afforded great deference, a dispute involving statutory interpretation is a question of law to which [courts] apply *de novo* review." *Rossi v. Employees Ret. Sys. of R.I.*, 895 A.2d 106, 110 (R.I. 2006) (citing *In re Advisory Opinion to the Governor*, 732 A.2d 55, 60 (R.I. 1999)).

It would strain credulity for Bristol to assert that a showing of need is reasonably contained within the "proper reason" language. Certainly, it is clear that a municipality may not, like Bristol, consistent with the dictates of constitutional law or the legislature's "shall issue" requirements, limit the issuance of permits to those with a fear of imminent harm or bodily danger upon a showing of need. It is well settled that all parts of a law are to be read together so as to avoid rendering any provision as surplusage. *Kramer v. W.C.A.B. (Rite Aid Corp.)*, 794 A.2d 953 (Pa. Commw. Ct. 2002) aff'd 820 A.2d 700. Because the statute already requires a licensing official to issue a permit "if it appears that the applicant has good reason to fear an injury to his or her person or property" that is to say, if the applicant has made a showing of need, to require of applicants that they make a showing of need is to ignore and effective re-write the statute to eliminate the availability of permits for "any other proper reason." § 11-47-11(a). Likewise

Bristol's Policy expressly considers whether "the applicant demonstrated that he or she will not use the firearm for an unlawful or improper purpose" as one of only ten criteria used in its evaluation. The consideration of the additional criteria enumerated in Bristol's policy ultimately invites a standardless determination by the Chief and plainly ignores the General Assembly's decision to cabin the discretion of licensing officials under § 11-47-11(a) by requiring that those officials to issue a permit for concealed carry upon a lesser showing of "proper reason" than that of "need" required for issuance of an open carry permit § 11-47-18. If the General Assembly had desired to impose the requirement that an applicant for a permit under § 11-47-11(a) demonstrate the same elevated showing of need required of applicant for a permit under § 11-47-18 it could have done so. But it is not the province of a municipal authority to rewrite a statute in order to impose a heightened licensing requirement than that required by the General Assembly.

CONCLUSION

This case presents nothing to suggest that Petitioner is unsuitable or seeks a permit for an improper purpose and there is ample evidence demonstrating that he satisfies those constitutional requirements. Gendreau is a firearms collector, needs a firearm for self-defense, and to advance his career. There is nothing in the record to indicate that Gendreau's professed reasons for seeking a permit are not credible. This court has already indicated that gun collecting is a proper reason for seeking a permit, and no lesser an authority than the United States Supreme Court has declared that the core of the Second Amendment right is self-defense. Defendants' arbitrary denial of Second Amendment rights must be enjoined. This Honorable Court should grant the Petition for Certiorari and reverse the decision of the Bristol Police Chief.

Dated: 2/25/2013

Petitioner, Jarren Ray Gendreau,
By and through his Attorney,

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