No. _____

In The
Supreme Court of the United States

ALLEN WHITAKER,

Petitioner,

v.

CONCEALED PISTOL LICENSING REVIEW BOARD,

Respondent.

On Petition For Writ Of Certiorari
To The District Of Columbia Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District of Columbia revoked a license to carry a pistol that it had previously granted to petitioner Allen Whitaker on the grounds that he had allegedly exhibited "a propensity for violence or instability" based on a police encounter in which Mr. Whitaker did nothing wrong, was not arrested, and was never charged with any offense. When Mr. Whitaker appealed this administrative determination to the District of Columbia Court of Appeals, the District twice attempted to get the matter remanded; then, to avoid a decision on Mr. Whitaker's claims, it reinstated his license and successfully moved to dismiss the appeal as moot.

The questions presented are:

1. Can the government render moot a fully briefed appeal challenging the denial of a license to carry a pistol by granting the license – though not confessing error – when the license must later be renewed under the same assertedly illegal standard?

2. Is a regulation that disqualifies applicants for gun licenses who have exhibited an undefined "propensity for violence or instability" unconstitutionally vague?

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Whitaker v. District of Columbia Concealed Pistol Licensing Review Board*, No. 20-AA-427 (D.C. 2022) (granting Respondent's motion to dismiss for mootness; decision issued March 9, 2022).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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This Court's landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) established that the Second Amendment confers an individual right to keep and bear arms, but permits some limitations such as the "longstanding prohibitions on the possession of firearms by felons and the mentally ill." *Heller*, 554 U.S. at 626. Subsequent litigation has generated divergent rulings about what regulatory limitations are permissible, causing "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*." *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S.Ct. 1525, 1527 (2020) ("*NYSPRA*") (Kavanaugh, J., concurring).

The Court is currently addressing the unresolved question whether the Second Amendment secures the individual right to bear arms outside the home. *New York State Rifle & Pistol Association, Inc. v. Bruen*, No. 20-853. This case raises two other issues that also are vital to the proper exercise of individuals' rights under the Second Amendment.

The first issue involves tactical efforts to manufacture mootness to forestall judicial review of gun restrictions, an issue that was previously before the Court in *NYSPRA*. When Mr. Whitaker appealed the revocation of his license to carry a pistol, the District twice attempted to have the case remanded for further administrative proceedings. After these attempts to derail the appeal failed, the District ultimately

reinstated Mr. Whitaker's license without conceding the merits of his claims. It then successfully moved to dismiss the appeal as moot, although the underlying dispute had not been resolved and Mr. Whitaker must renew his license every two years. The Court should rule that the mid-appeal grant of a license does not moot a challenge to licensing provisions where it does not remedy the asserted illegality and the license must be renewed.

The second issue presented by this case is the constitutionality of the regulation that the District invoked to revoke Mr. Whitaker's license. The District, by statute, disqualifies anyone from possessing a firearm who has certain criminal convictions or has been committed to a mental health facility. In addition, the Metropolitan Police Department ("MPD"), by regulation, imposes an additional, subjective disqualification on applicants for a license to carry a pistol in public: they must not have exhibited "a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger to the person or another." DCMR 24-2335.1(d). But nowhere has the MPD ever defined what conduct exhibits this forbidden propensity. Being undefined, it is whatever the MPD says it is. The administrative decision in this case, which is appended, demonstrates that reality clearly. The Court should rule that this unfettered, subjective restriction is unconstitutional and cannot be used to deny an individual's Second Amendment right.

OPINIONS BELOW

The District of Columbia Court of Appeals' order dismissing Mr. Whitaker's appeal, (Pet.App. 1), is unreported.

The District of Columbia Concealed Pistol Licensing Review Board's Final Decision, (Pet.App. 4), which was the order on appeal to the District of Columbia Court of Appeals, is also unreported.

JURISDICTION

The Court of Appeals dismissed Mr. Whitaker's appeal on March 9, 2022. This Court has jurisdiction under 28 U.S.C. § 1257.

PROVISIONS INVOLVED

The relevant regulatory provisions (DCMR 24-2332.1, 24-2335.1, and 24-2341.5) are at Pet.App. 47.

STATEMENT

A. Factual Background[1]

Mr. Whitaker, a long-time resident of the District of Columbia and an employee of the city government,

[1] The facts in this Petition are drawn from the Agency Record on Review submitted to the District of Columbia Court of Appeals by the D.C. Pistol Licensing Review Board.

obtained a D.C. license to carry a pistol in November 2018. Mr. Whitaker has two college degrees and is a single parent raising a teenaged daughter. He is also a large Black man with dreadlocks. These last facts apparently caused Mr. Whitaker to be stopped and detained for several hours by the Prince Georges County, Maryland police in April 2019 before they released him without charges. This unjustified detention led to the revocation of his license to carry a pistol in D.C., in violation of his Second Amendment rights.

On the day of the detention, Mr. Whitaker, his cousin, and his girlfriend visited a gun range in Maryland, where he fired his pistol. Afterwards, he placed his pistol in a lockbox in the trunk of his car, but did not remove his holster from his hip. He then picked up his teenaged daughter at her mother's house and started to drive home.

Because his daughter was thirsty, Mr. Whitaker stopped at a gas station to purchase water. He observed a group of men engaging in a verbal altercation at the entrance and so parked a short distance away. His girlfriend and his daughter stayed in the car while he and his cousin went inside to purchase the water.

As Mr. Whitaker and his cousin returned to the car, a police car pulled in front of it. A police officer got out, pointed a gun at the two men, and yelled for them to put their hands up or he would shoot. With the gun drawn, the officer approached and patted down Mr. Whitaker, and noticed that Mr. Whitaker was wearing

a holster. The officer then handcuffed both Mr. Whitaker and his cousin, and called for assistance.

When additional officers arrived, they proceeded to search Mr. Whitaker's car without his consent. They asked Mr. Whitaker about the holster, and he told them that his pistol was in the car. He advised the officers that he had documentation of his right to possess the firearm, but they did not examine it to verify his claim.

The officers searched the car but could not locate the pistol. An officer asked Mr. Whitaker where the gun was located, and he replied that it was in a lockbox in the trunk. The police again searched but still could not find the pistol. An officer then asked Mr. Whitaker to retrieve the pistol. He found the lockbox in the trunk, retrieved his gun from the lockbox, and handed it to the police.

The officers also searched Mr. Whitaker's girlfriend and his cousin while they were searching the car. His girlfriend had a small amount of marijuana in her purse, an amount which is legal in both D.C. and in Maryland. Mr. Whitaker did not know she had the marijuana.

Mr. Whitaker and his family were detained for a total of three hours before they were finally released. No arrests were made and no charges were ever filed. However, the police seized Mr. Whitaker's pistol and his girlfriend's marijuana.

B. The Revocation of Mr. Whitaker's License

Mr. Whitaker was unable to recover the seized pistol and so he applied to register a new firearm in D.C. This triggered the revocation at issue here.

Under D.C. law, a person must register each firearm that he possesses or controls. D.C. Code § 7-2502.01(a). Registration is handled by the MPD and is controlled by a statute that specifies objective factors that disqualify a person from possessing a firearm, including certain criminal convictions or commitment to a mental health facility. D.C. Code § 7-2502.03.

In addition, a person must have a license to carry a pistol in any place other than his dwelling, his place of business, or on other land possessed by him. *See* D.C. Code § 22-4504(a)(1). Licensing is also handled by the MPD pursuant to statutory requirements established by D.C. Code § 7-2509.02. One of these requirements is that the applicant have "complied with any procedures the [MPD] Chief may establish by rule." *Id.* MPD has promulgated a regulation that establishes "suitability" criteria for an applicant to receive a license. As relevant here, one criterion is that the person "[h]as not exhibited a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger to the person or another." DCMR 24-2335.1(d). But nowhere has the MPD ever defined what conduct "exhibit[s] a propensity for violence or instability."

On September 24, 2019, the MPD issued a notice to Mr. Whitaker proposing to revoke his license to carry

a pistol pursuant to D.C. Code § 7-2509.05. The notice alleged that, based on the April incident in Prince Georges County combined with Mr. Whitaker's past criminal history, "it has been determined that your concealed carry pistol license be revoked . . . due to exhibiting a propensity to violence or instability. . . ." Pet.App. 7-8.

D.C. law requires a person facing the proposed revocation of his license to carry a pistol to appeal to an administrative body, the Concealed Pistol Licensing Review Board ("Board"). D.C. Code § 7-2509.05(a)(4). Mr. Whitaker did so and made three arguments: (1) his past criminal history had been evaluated by the MPD before it granted his license;[2] (2) the April 2019 incident did not establish a propensity to violence or instability on this part;[3] and (3) the revocation would deprive him of due process because it is based on an unconstitutionally vague regulation. Pet.App. 15-18.

In responding to Mr. Whitaker's arguments, the MPD asserted for the first time that "the revocation decision was the result of a deliberate and principled change in the Chief's position on what it means to have

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[2] Mr. Whitaker has two misdemeanor convictions: one for possession of a sound amplifying device in 2007 and the other for possession of a controlled substance in 2012. He has three other arrests, in 2011, 2014, and 2015, for marijuana possession. Also, he is reported to have been a "suspect" (*i.e.*, he was not arrested) on two other occasions in 2015, one for assault and one for marijuana possession.

[3] Mr. Whitaker included a sworn statement recounting the events of that day.

'exhibited a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger to the person or another,' under D.C. Mun. Regs. tit. 24, § 2335.1(d)." Pet.App. 27. MPD asserted that, "[u]nder the Chief s new interpretation of the regulation, conduct that is violent or criminal demonstrating low self-control, regardless of whether it results in a criminal conviction, may be grounds for denial, revocation, or suspension of a [license] on the basis of unsuitability." [*Id.*]

The Board upheld the revocation of Mr. Whitaker's license. Pet.App. 40-46. It concluded that the MPD could revoke his license using a new interpretation of the suitability standard and that the MPD had provided an adequate explanation "as to why Mr. Whitaker's criminal history records demonstrate propensity for violence or instability." Pet.App. 42.

C. Mr. Whitaker's Appeal

Mr. Whitaker filed a petition for review of the Board's decision with the D.C. Court of Appeals. He argued that there was no evidence that he had exhibited a propensity for violence or instability, either in his criminal record (which had previously been examined by the MPD when it issued his license) or during the April 2019 incident. Mr. Whitaker also argued that the regulation on which the revocation was based is unconstitutionally vague, both on its face and as applied to him, because it confers standardless discretion on the

MPD to disqualify anyone based on the agency's subjective judgment.

After Mr. Whitaker filed his opening brief, the Board sought a voluntary remand to "ascertain whether the matter can be resolved without any reliance on the 2019 Prince George's County incident or, if it cannot, to hold an evidentiary hearing to resolve the disputed material facts." (Motion for Remand at 6). The Court of Appeals denied that motion and required the Board to file a responsive brief.

In its brief, the Board admitted that the revocation depended on the 2019 episode in Prince Georges County. It purported to confess error only in that it should have conducted a further hearing and sought a remand to "resolve the questions surrounding April 2019 incident – including whether Whitaker engaged in any criminal misconduct – to conclude that he demonstrates a prohibited propensity [for violence or instability] rendering his possession of a concealed pistol a threat to public safety." (Board's Br. of Aug. 30, 2021, at 9-10).

Mr. Whitaker opposed the remand. His reply brief pointed out that a further hearing would be a fruitless waste of time because the April 2019 incident simply did not demonstrate *any* propensity for violence or instability on his part. He also pressed his argument that the "propensity for violence or instability" standard is unconstitutionally vague because it is not clarified by any statutory provision and the MPD has never defined it. Thus, the regulation gives fundamentally

unfettered discretion to the MPD to decide what it means on a case-by-case basis.

At that juncture, with the appeal fully briefed, the MPD issued a "Notice of Voluntary Reversal" in which, "[a]fter further review . . . [it] decided to reverse the initial revocation decision and approve Mr. Whitaker's [license]." The Board then moved to dismiss Mr. Whitaker's appeal on the ground it was moot.

Mr. Whitaker opposed dismissal. He noted that, for a case to be rendered moot through the defendant's voluntary cessation of a challenged practice, it must be clear that the allegedly wrongful behavior could not reasonably be expected to recur. He argued that his appeal was not moot for three reasons. First, the MPD had not yet in fact provided him with a reinstated license. (This defect was quickly cured).

Second, the Board had not established that the challenged conduct cannot reasonably be expected to recur. Neither the Board nor the MPD had ever conceded that the April 2019 incident does not provide cause to deny Mr. Whitaker a license. The Board confessed only that it had erred by failing to conduct an evidentiary hearing about that incident. Since Mr. Whitaker's license must be renewed every two years, D.C. Code § 7-2509.03, the MPD might again seek to strip him of his license based on the 2019 incident. Indeed, the MPD had staked out the position that it is free to change its position on what conduct exhibits a propensity for violence or instability.

Third, the appeal was not moot because Mr. Whitaker's constitutional challenge to the validity of the MPD regulation was unresolved. The vague "propensity for violence or instability" standard remains in place and continues to give the MPD virtually unfettered discretion to determine, and re-determine, what past conduct precludes Mr. Whitaker (and others) from receiving a license.

The Court of Appeals dismissed Mr. Whitaker's appeal as moot in a two-page order. It reasoned that, since the MPD had reversed the revocation, it could provide Mr. Whitaker no effective relief. The court held that the possibility that MPD might again revoke Mr. Whitaker's license in the future did not constitute a live controversy and was unlikely to evade review in the event it did recur. The court "decline[d] to permit this otherwise moot appeal to proceed under the exception for matters 'capable of repetition, yet evading review.'" Pet.App. 2.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Questions Of Federal Law That Have Not Been, But Should Be, Settled By This Court

The mootness and vagueness issues presented by this case are both important questions of federal law that have not been, but should be, settled by this Court. Both issues greatly affect the ability of individuals to

exercise their Second Amendment rights pursuant to this Court's decisions in *Heller* and *McDonald*.

A. The mootness issue should be settled by this Court

Licensing or permitting schemes are the predominant method used in this country to restrict individuals' ability to possess or carry firearms. Twenty-five states and the District require a license or permit to carry concealed weapons in public. *See Concealed Carry*, Giffords Law Center to Prevent Gun Violence ("Giffords Law Center") (listing states).[4] Thus, whether an applicant's challenge to a licensing law can be mooted in the midst of litigation by granting the license potentially impacts judicial review of all these laws.

NYSPRA involved a particularly blatant example of the tactical manipulation of mootness to insulate gun control laws from judicial review. That case was exceptional because New York City actually amended its ordinance to avoid review of the challenged provision. This case is much more typical – the District seeks to avoid judicial review by simply granting the particular license at issue, while leaving the law unchanged to be applied to everyone else and to that particular licensee again on renewal. Whether such a maneuver moots the case is an important issue of federal law because it affects the ability of this Court, and

[4] Available at https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/#footnote_26_5601.

lower courts, to adjudicate the legality of gun licensing schemes.

B. The vagueness issue should be settled by this Court

The permissibility of the "propensity for violence or instability" standard is also a major issue affecting the exercise of Second Amendment rights because this type of subjective criterion is utilized in a number of licensing regimes.

Eight states and the District have "may issue" gun licensing laws, which grant the issuing authority wide discretion to deny a permit to an applicant. An additional seven states have "shall issue" laws that provide the issuing authority some limited discretion to deny permits to applicants. *See Concealed Carry*, *supra*. These licensing regimes employ subjective standards that take two basic forms: a "good cause" requirement and a requirement that the applicant be of good character. *See id.*[5] These two requirements are not mutually exclusive, and some of the states with discretionary schemes impose both. Seven such states require permit applicants to demonstrate good cause to carry a weapon. Ten states require the applicant to be of good character before a permit is issued. *See id.* (listing states).

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[5] The remaining ten states have "shall issue" schemes that do not involve any discretionary component. *Id*.

The "propensity for violence or instability" standard at issue here is a species of the "good character" requirement. Maryland and Indiana have similar "propensity" provisions. *See* Md. Code Ann., Pub. Safety § 5-306(a)(6)(i) ("a propensity for violence or instability"); Ind. Code Ann. § 35-47-1-7(6) ("a propensity for violent or emotionally unstable conduct"). Several states limit licenses to individuals found "suitable" to be so licensed. *See* Conn. Gen. Stat. § 29-28(b); Hawaii Rev. Stat. Ann. § 134-9(b)(2); Mass. Gen. Laws ch. 140, § 131(d)(x); R.I. Gen. Laws 11-47-11(a). Other states require that applicants be "of good moral character." *See*, *e.g.*, N.Y. Penal Law § 400.00;[6] Cal. Penal Code § 26150(a). The validity of all these provisions will be affected by deciding whether the subjective "propensity for violence or instability" standard satisfies constitutional strictures.

For all of these reasons, this case warrants review.

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[6] The Second Circuit recently rejected a facial vagueness challenge to New York's "good moral character" requirement on the ground that there were some circumstances under which that requirement would be valid. *See Libertarian Party of Erie County v. Cuomo*, 970 F.3d 106, 125-127 (2020). That decision appears to be in tension with this Court's holding that a vague provision is not constitutional merely because some conduct might properly fall within its grasp. *See Johnson v. United States*, 576 U.S. 591, 602 (2015). In any event, this case involves an as-applied as well as a facial challenge.

II. The Reinstatement Of Mr. Whitaker's License Did Not Moot His Appeal

"A defendant's voluntary cessation of a challenged practice usually does not deprive a federal court of its power to determine the legality of the practice." *Knox v. Serv. Employees Int'l Union*, 567 U.S. 298, 307 (2012). "If it did, the courts would be compelled to leave the defendant free to return to his old ways." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000).

"[A] case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Id*.

This Court's standard "for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: 'A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Friends of the Earth*, 528 U.S. at 189 (citation omitted). And "[t]he 'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.* (citation omitted). This standard plainly is not satisfied here.

A. The MPD and the Board continue to defend their unlawful conduct

This Court "ha[s] been particularly wary of attempts by parties to manufacture mootness in order to evade review." *NYSPRA*, 140 S.Ct. at 1533 (Alito, J., dissenting). That is exactly what the MPD and the Board did in this case. Having revoked Mr. Whitaker's license to carry a pistol, they were loath to have the Court of Appeals rule on the merits of their actions. Thus, the Board twice tried to have the matter remanded to it for further proceedings. After the first attempt failed and it appeared that the second would, too, the MPD reinstated Mr. Whitaker's license in order to avoid judicial review.

Moreover, the behavior of the MPD and the Board must be evaluated in the broader context of the District's well-known hostility to Second Amendment rights. In 1976, the District banned all handgun possession. D.C. Code §§ 7-2502.01(a), 7-2502.02(a)(4) (2001). When this Court struck down that ban in *Heller*, the District responded by enacting a ban on carrying handguns. D.C. Code § 22-4504 (2009). "And when that was struck down in [2014], the [D.C.] Council responded with [a] law . . . which confine[d] carrying a handgun in public to those with a special need for self-defense." *Wrenn v. District of Columbia*, 864 F.3d 650, 655 (D.C. Cir. 2017) (discussing D.C. Code § 22-4506(a)-(b)). The D.C. Circuit ultimately struck

down this requirement as a violation of *Heller*. *Id.* at 667.[7]

In sum, "[a]fter *Heller*, . . . D.C. seemed not to heed the Supreme Court's message. Instead, D.C. appeared to push the envelope again. . . ." *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). The District and its agencies, the MPD and the Board, continue to push the envelope through the regulatory regime they have created for licensing persons to carry a pistol. And, as demonstrated in this case, they are unrepentant about that regime at the same time that they strive mightily to avoid judicial review of it.

Neither the Board nor the MPD ever conceded that Mr. Whitaker's license could not be revoked based on the April 2019 incident. Much less did they concede that the "propensity for violence or instability" standard is invalid because it gives the MPD essentially unfettered discretion to determine, and re-determine, what past conduct precludes Mr. Whitaker (and others) from receiving a license. To the contrary, both the Board and the MPD asserted that the MPD is free to change its position on what conduct exhibits a

[7] The District's hostility to Second Amendment rights appears to be shared by the Court of Appeals, which "has consistently held, contrary to *Wrenn*, that 'there is no Second Amendment right to carry a concealed firearm in public.'" *Hooks v. United States*, 191 A.3d 1141, 144 n.3 (D.C. 2018) (citations omitted).

propensity for violence or instability in the course of considering whether Mr. Whitaker can keep his license.

Under these circumstances, Mr. Whitaker's case is clearly not moot. The situation is akin to *Knox*, where the Court reasoned that, "since the union continues to defend the legality of the Political Fight-Back fee, it is not clear why the union would necessarily refrain from collecting similar fees in the future." 567 U.S. at 307. "When a challenged policy is repealed or amended mid-lawsuit . . . the case is not moot if a substantially similar policy has been instituted or is likely to be instituted." *Smith v. Executive Director of Indiana War Memorials Com'n*, 742 F.3d 282, 287 (7th Cir. 2014). "[I]f the policy change does not actually correct the asserted constitutional problem, the appeal is not moot and should go forward." *Id.*; *see also Saba v. Cuomo*, 535 F.Supp.3d 282, 296 (S.D.N.Y. 2021) (case is not moot where the policy and practice that led to the alleged constitutional violation is still in place).

Here, although the MPD restored Mr. Whitaker's license, neither the MPD nor the Board conceded any of the issues that he had raised about why the revocation of the license was unlawful. Thus, it is not "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 189. To the contrary, "[t]he essential controversy is therefore not moot, but very much alive." *Allee v. Medrano*, 416 U.S. 802, 811 (1974).

B. Mr. Whitaker's need to renew his license means that his claims are not moot

This case is also not moot because Mr. Whitaker's license must be renewed every two years. *See* D.C. Code § 7-2509.03. In an analogous case, the Eleventh Circuit held that an applicant's challenge to the application form and process for a state firearms license was not rendered moot by the issuance of a license. It reasoned that there was a sufficient imminence of future harm "[b]ecause [licenses] are valid for only five years, *see* Ga. Code Ann. § 16-11-129, [and] [plaintiff] will have to continually renew his license and fill out the [license] application form." *Camp v. Cason*, 220 F. App'x 976, 981 (11th Cir. 2007).

Similarly, "[t]he expiration of a license will not moot the controversy if the appeal arises from the renewal or refusal to renew a license under a statutory scheme that contemplates a continuous cycle of license renewals." 2 Am. Jur. 2d Administrative Law § 256 (citing *Harris County Bail Bond Bd. v. Blackwood*, 41 S.W.3d 123, 126 n.2 (Tex. 2001)).

Challenges to licensing regimes are not moot as long as there is a reasonable possibility that the plaintiff will again be subject to that regime in the future. Thus, the Ninth Circuit ruled that a First Amendment challenge to a permit requirement by the organizer of a "barter fair" was not moot, even though the organizer had not applied for a permit, or engaged in any other preparations for a fair, for several years. The court held that the organizer had a sufficient ongoing interest in

the outcome of case because it was a still-active corporate entity and hoped to hold a fair if it could obtain funding and an appropriate site. *See Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1133-1134 (9th Cir. 2004). And this Court ruled that a mandamus action by an oyster packer seeking to compel the grant of a license was not moot in view of the plaintiff's intention to continue in the packing business. *See Leonard v. Earle*, 279 U.S. 392, 398 (1929).[8]

Likewise, in other contexts, this Court and lower courts have held that cases are not moot where the issues may well recur. *See Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 97 n.2 (1958) (resolution of the underlying picketing and signing of a collective bargaining agreement with a no-strike clause did not moot the case because picketing could resume); *Church of Scientology of Hawaii v. U.S.*, 485 F.2d 313, 317-318 (9th Cir. 1973) (tax refund suit was not mooted by government's tender of payment because underlying issue of plaintiff's tax-exempt status was a continuing one that recurs each year).

Accordingly, the MPD's reinstatement of Mr. Whitaker's license did not moot this case.

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[8] In contrast, a case is moot when a regulated business *voluntarily removes itself* from the ambit of government oversight. *See Munsell v. Dept. of Agriculture*, 509 F.3d 572, 582 (D.C. Cir. 2007) (citing *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001)).

III. The "Propensity For Violence Or Instability" Standard Is Unconstitutionally Vague

The MPD regulation at issue here is unconstitutionally vague. The Due Process Clause "prohibits the Government from taking away someone's life, liberty, or property under a [regulation] so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Beckles v. United States*, ___ U.S. ___, 137 S.Ct. 886, 892 (2017) (citation omitted). "[T]he due process protection against vague regulations 'does not leave [regulated parties] . . . at the mercy of noblesse oblige.'" *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 255 (2012).

"What renders a [law] vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). If a provision requires "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings," it is unconstitutionally vague because it encourages arbitrary and discriminatory enforcement. *Id.* Nor is a vague provision constitutional "merely because there is some conduct that clearly falls within the provision's grasp." *Johnson v. United States*, 576 U.S. 591, 602 (2015).

When the government licenses constitutionally protected activity, clarity is at a premium. Yet the "propensity for violence or instability" standard is

fundamentally amorphous. *See Medina v. Whitaker*, 913 F.3d 152, 159-160 (D.C. Cir. 2019) (recognizing that "dangerousness" would be an amorphous standard by which to delineate Second Amendment rights on a case-by-case basis).

This indeterminate regulatory standard is not clarified by any statutory provision. To the contrary, it muddies the water by tacking on an additional, subjective factor to the objective statutory factors that disqualify a person from possessing a firearm. Those objective factors include specified criminal convictions or commitment to a mental health facility. D.C. Code § 7-2502.03. Beyond those factors, the regulation requires that persons seeking a license to carry a pistol not have engaged in any conduct – regardless of whether it constitutes a crime or results in a conviction – that, in the MPD's view, shows a propensity for violence or instability.

Nor has the MPD ever defined what conduct exhibits "a propensity for violence or instability." Being undefined, it is whatever the MPD says it is. Moreover, the MPD claims that it is free to re-interpret and expand the ambit of this restriction.

This provision is impermissibly vague on its face and as applied in this case because it gives effectively unfettered discretion to the MPD. *See Bynum v. U.S. Capitol Police Bd.*, 93 F.Supp.2d 50, 59 (D.D.C. 2000) (regulation prohibiting demonstration activity that "has the *intent, effect or propensity* to attract a crowd of onlookers" was unconstitutionally vague because it

gave "virtually standardless, broad discretion . . . to the Capitol Police.") (emphasis added). The MPD regulation displays "the classic defects of vagueness in that it fails to give clear notice of what conduct is forbidden and invests the police with excessive discretion to decide, after the fact, who has violated the law." *District of Columbia v. Walters*, 319 A.2d 332, 335 (D.C. 1974).

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

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