IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MATTHEW GRACE and PINK PISTOLS,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 15-2234 (RJL)
DISTRICT OF COLUMBIA and CATHY LANIER, in her official capacity as Chief of Police for the Metropolitan Police Department,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR A STAY PENDING APPEAL AND FOR AN IMMEDIATE ADMINISTRATIVE STAY

The Founders enacted the Second Amendment to protect the right of ordinary, law-abiding citizens to "carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 646 (2008). Yet for nearly forty years, those citizens living in the seat of the government established *under* the Constitution have been denied the exercise of this fundamental right guaranteed *by* the Constitution. Indeed, the District in its latest brief *advertises* that it has successfully forced its residents to live for "decades (if not centuries) without" "the right to carry a handgun in public." Defendants' Memorandum of Points and Authorities in Support of Their Motion to Stay the Court's May 17, 2016 Order Pending Appeal & Motion for an Immediate Administrative Stay at 18 (May 19, 2016), Doc. 48 ("Stay Br."). And during this past decade, Defendants' refusal to recognize and honor that right has persisted *in the teeth* of repeated judicial decisions striking down as unconstitutional the District's protean but relentless attempts to snuff out the Second Amendment. *See, e.g.*, *Parker v. District of Columbia*, 478 F.3d 370

(D.C. Cir. 2007); *Heller*, 554 U.S. at 570; *Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014), *appeal dismissed*, No. 14-7180, 2015 WL 1607711 (D.C. Cir. Apr. 2, 2015); *Wrenn v. District of Columbia*, 107 F. Supp. 3d 1 (D.D.C.), *vacated*, 808 F.3d 81 (D.C. Cir. 2015). Enough is enough. This Court should not allow the District to continue denying its citizens this basic constitutional right; not for a few weeks and not even for a few days.

ARGUMENT

Federal Rule of Civil Procedure 62(c) grants the district courts discretion to stay an order granting preliminary injunctive relief pending appeal, discretion that should be guided by four familiar factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Since "these are the same factors the Court considers in deciding whether to grant a preliminary injunction," *Fullmer v. Michigan Dep't of State Police*, 207 F. Supp. 2d 663, 664 (E.D. Mich. 2002), courts rarely grant a request to stay the preliminary relief they have just granted. *See* 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2904 ("[C]ommonly stay requests will be found not to meet this standard and will be denied."). After all, "logic dictates that a court will seldom issue an order or judgment and then turn around and grant a stay pending appeal, finding, in part, that the party seeking the stay is likely to prevail on appeal, *i.e.* that it is likely that the court erred in issuing the underlying order or judgment." *Millennium Pipeline Co. v. Certain Permanent & Temp. Easements*, 812 F. Supp. 2d 273, 275 (W.D.N.Y. 2011) (brackets omitted).

The District's brief supporting the present motion vividly illustrates this logic. Indeed, the principal substantive difference between that brief and the District's brief opposing the *issuance* of the preliminary injunction is that the brief has been *re-captioned* as a request to *stay* the injunction the Court has just granted. The District argues that it has "a 'substantial likelihood of success,' " based principally on "the weight of the case law" from the "Second Circuit, Third Circuit, and Fourth Circuit." Stay Br. 8, 10. But only days ago, this Court expressly found that "*plaintiffs* are highly likely to succeed on the merits," and that the reasoning of these other circuits is "not . . . persuasive." Memorandum Opinion at 28 n.21, 45 (May 17, 2016), Doc. 45 ("Memorandum Opinion") (emphasis added). The District suggests that it faces irreparable harm because "the 'good reason' standard is necessary to prevent crime and promote public safety," Stay Br. 12; but this Court's opinion characterized that very contention as "hyperbole" and "unwarranted [and] irresponsible," given that "enjoining the District's 'good reason' requirement would have *no* effect whatsoever on a veritable gauntlet of other licensing requirements which would remain intact," Memorandum Opinion 43. And while the District dismisses the ongoing harm Plaintiffs and the rest of its residents are suffering at the hand of its ban on public carrying of firearms as "necessarily speculative," Stay Br. 17, this Court held, to the contrary, that this argument "sadly, miss[es] the point," since the Second Amendment "right to bear firearms *for* self-defense" is "infringed upon whether or not plaintiffs are ever actually called upon to use their weapons to defend themselves," Memorandum Opinion 41.

The District's attempt to re-litigate the very issues decided against it days ago in this Court's opinion granting a preliminary injunction should be denied.

I. The District Has Failed To Show a Strong Likelihood of Success on the Merits.

To be entitled to a stay pending appeal, the District bears the burden of making, first, "a strong showing that [it] is likely to succeed on the merits." *Nken v. Holder*, 556 U.S. 418, 434

(2009). While a stay applicant "need not establish an absolute certainty of success," *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986), it "must show more than a mere possibility of success on appeal," *Baker v. Socialist People's Libyan Arab Jamahirya*, 810 F. Supp. 2d 90, 97 (D.D.C. 2011). Indeed, since a court must also weigh each side's likelihood of success "in deciding whether to grant a preliminary injunction," a party seeking to *stay* a preliminary injunction will generally have *already failed* to show a strong likelihood of success, which means as a practical matter that "an applicant seeking a stay will have more difficulty establishing . . . likelihood of success on the merits, due to the difference in procedural posture." *Fullmer*, 207 F. Supp. 2d at 664.

That is precisely the situation here. After exhaustively analyzing both the District's and Plaintiffs' legal contentions, this Court concluded that "there is a strong likelihood plaintiffs will ultimately succeed in showing the law is . . . unconstitutional" and that plaintiffs therefore had shown that they were "highly likely to succeed on the merits." Memorandum Opinion 40, 45. By definition, the District thus cannot now show that it has a strong likelihood of success.

Indeed, each of the merits arguments pressed by the District in its brief was already *considered and resolved against it* by this Court. The District, for example, suggests that this Court's resolution "goes against the weight of the case law." Stay Br. 2. But this Court already quite properly found the decisions from the Second, Third, and Fourth Circuits unpersuasive because "they fail to recognize that the text and purpose of the Second Amendment indicate that carrying weapons in public for the lawful purpose of self-defense is a central component of the right to bear arms." Memorandum Opinion 28 n.21.

The District also makes much out of the decision of another judge of this Court declining to grant preliminary injunctive relief. That judge, Judge Kollar-Kotelly, concluded that the

District's ban ought to be subject to intermediate scrutiny and that the District had identified sufficient evidence supporting the constitutionality of its ban under that standard. Stay Br. 9 (citing *Wrenn v. District of Columbia ("Wrenn II")*, 2016 WL 912174 (D.D.C. Mar. 7, 2016)). With all due respect to Judge Kollar-Kotelly's conclusions in that case, however, this Court already weighed both of these arguments and found them wanting. After reasoning that "the right to carry arms for self-defense in public lies at the very heart of the Second Amendment" and that the ban's "intended effect is *to prohibit* the typical citizen from carrying a firearm outside his or her home for several legitimate and constitutionally protected purposes," this Court concluded that the ban "would most assuredly have to survive" strict, not intermediate, scrutiny—if it were not subject to *per se* invalidation. Memorandum Opinion 30, 34–35, 36 (emphasis added). And because all of the evidence that the District has offered proceeds on the *necessarily illegitimate premise* that it should be allowed to "reduce the alleged negative effects of a constitutionally protected right by simply reducing the number of people exercising the right," this Court rightly rejected its evidence that "more guns equals more crime" as "irrelevant." *Id.* at 36, 38.

Defendants turn to suggesting that the *very fact* that another judge of this Court has reached a different conclusion is a reason for granting a stay. Stay Br. 2. But that cannot be the law. After all, while the conclusions in the *Wrenn II* opinion differ on some points from this Court's holding, the District apparently forgets that an earlier valid decision by this Court *supports* the Court's reasoning here. In *Palmer*, this Court held that an earlier incarnation of the District's carry law was unconstitutional "under any level of scrutiny." 59 F. Supp. 3d at 183. And while *Wrenn II* reasoned that "regulations governing *public* carrying of handguns . . . merit no higher level of scrutiny than . . . intermediate scrutiny" because carrying arms in public is outside the Second Amendment's "core," 2016 WL 912174, at *7, the opinion in *Palmer*, like

this Court, held that "the 'core component' of the [Second Amendment is] self-defense, which necessarily take[s] place wherever [a] person happens to be, whether in a back alley or on the back deck." *Palmer*, 59 F. Supp. 3d at 181 (alterations in original) (quotation marks omitted); *cf.* Memorandum Opinion 13–26. In the end, then, the persuasive authority from within this district cuts both ways, and the opinion in *Wrenn II* cannot bear the weight the District would place upon it.

The District also seeks support from the fact that the Circuit Court granted a stay of the preliminary injunction entered in *Wrenn I*, Stay Br. 8–9, but to no avail. How to balance the factors guiding the grant of a stay is a matter committed to each individual court's discretion; the Circuit Court's balancing in *Wrenn I* does not conclude the matter in this Court. Indeed, once again this Court has already decided as much. The District relied on the Circuit Court's stay in opposing the grant of preliminary relief, too, urging that because the Circuit Court had stayed the injunction in that case pending appeal and the "same standards are applicable here, . . . this Court should follow the Circuit's lead" and deny injunctive relief. Defendants' Opp'n to Plaintiffs' Appl. for a Prelim. and/or Permanent Inj. at 43 (Jan. 15, 2016), Doc. 20. But this Court rightly rejected that argument, determining that whether a preliminary injunction was appropriate was a matter committed to *its* discretion. It should reject the District's attempt to constrict that discretion again here.

Necessarily unable to show a strong likelihood of success in light of this Court's determination that *Plaintiffs* "are highly likely to succeed on the merits," Memorandum Opinion 45, the District seeks to help itself to a lower standard. Rather than an actual likelihood of success, the District says, it only needs to "demonstrate a serious legal question on appeal." Stay Br. 8 (quoting *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 193 n.5 (D.D.C. 2005)). But that is only

true "where the balance of harms strongly favors a stay," *Al-Anazi*, 370 F. Supp. 2d. at 193 n.5; *see also Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("A stay may be granted with either a high probability of success and some injury, or *vice versa*.")—if indeed this "sliding scale" approach remains valid at all, *see Sherley v. Sebelius*, 644 F.3d 388, 392–93 (D.C. Cir. 2011) (questioning whether the sliding scale approach remains good law after *Winter v. NRDC*, 555 U.S. 7 (2008)). And as shown below, the balance of harms emphatically *does not* favor staying the injunctive relief this Court has already determined is urgently demanded.

Having failed to lighten its own burden, the District next attempts to load additional weight onto Plaintiffs', suggesting that "[b]ecause the relief here changed the status quo, plaintiffs should have had to satisfy an even heavier burden." Stay Br. 7. But as we demonstrated when refuting the exact same argument when the District made it in opposing the preliminary injunction, there is no precedent within the D.C. Circuit requiring such a heightened showing for a "mandatory" injunction that purportedly changes the status quo. *See Minney v. United States Office of Pers. Mgmt.*, 130 F. Supp. 3d 225, 231 n.6 (D.D.C. 2015). And as courts elsewhere have recognized, since "in borderline cases injunctive provisions containing essentially the same command can be phrased either in mandatory or prohibitory terms," *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 835 (1994), it is unclear whether "the distinction between mandatory and prohibitory injunctive relief is . . . meaningful," *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348 (6th Cir. 1998). The very injunction this Court entered bears this reasoning out. While this Court's order that Defendants modify their concealed carry license application materials could be seen as mandatory, the core provision of the injunction—forbidding Defendants "from denying

concealed carry licenses to applicants who meet all eligibility requirements" other than the challenged one, Order at 1 (May 17, 2016), Doc. 46—is obviously "prohibitory".

Ultimately, the District has come forward with no reason why this Court should reconsider its conclusion, after exhaustive briefing and analysis, that Plaintiffs are highly likely to prevail on the merits.

II. The District Has Failed To Show Irreparable Injury.

The District also fails to show that it would suffer irreparable harm in the absence of a stay. The District opines that it "offered considerable evidence that the 'good reason' standard is necessary to prevent crime and promote public safety" because of "the risks inherent in converting this crowded city to a right-to-carry jurisdiction," and because of "the many ways public carrying increases the risk to the public *even when the carrier is not at fault*." Stay Br. 12–13. But that is merely a re-write of "the mantra 'more guns equals more crime,' " which this Court rejected *as a matter of law* because "it is not a permissible strategy to reduce the alleged negative effects of a constitutionally protected right by simply reducing the number of people exercising the right." Memorandum Opinion 36, 38 (quotation marks omitted). The District continues to press the point, arguing that this "harm" to its efforts to reduce the number of guns carried in public remains relevant "for purposes of the stay analysis." Stay Br. 13. Not so. The fact that this Court's injunction impedes the District's attempt *to deliberately suppress the exercise of a constitutional right as such* cannot count as a "harm" cognizable on the scale of equity. *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest."); *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) ("[T]he city has no legitimate interest in enforcing an unconstitutional ordinance."). The District has no legitimate interest in targeting the

exercise of its residents' constitutional rights *because it does not like those constitutional rights*. And that is precisely what its ban does.

Next, the District says irreparable harm is likely because "[e]njoining the 'good reason' requirement would have a negative impact on District residents and visitors," since that provision is "at the very heart of its statutory regime." Stay Br. 11, 14. But as this Court held in rejecting *that very argument*, the District's concern appears to be

> based on the assumption that automatic issuance of concealed-carry licenses would result from the requested injunction. Defendants' hyperbole, however, is not only unwarranted but irresponsible. As plaintiffs point out, they are not seek[ing] an unfettered right to bear arms free from any regulation or oversight by the District. Indeed, enjoining the District's "good reason" requirement would have *no* effect whatsoever on a veritable gauntlet of other licensing requirements which would remain intact, including: (1) compliance with a wide range of requirements to even qualify to register a firearm in the District, *e.g.*, age, criminal history, mental health, personal history, and certain physical requirements; (2) successful completion thereafter of a firearms training program; and (3) an in-person interview with the Metropolitan Police Department.

Memorandum Opinion 43 (alteration in original) (quotation marks omitted) (citations omitted). In addition, Plaintiffs have thoroughly rebutted any purported empirical basis for the District's "good reason" standard on public safety grounds. *See* Reply Mem. in Supp. of Pls.' Appl. for a Prelim. and/or Permanent Inj. at 17–21 (Jan. 22, 2016), Doc. 23 ("PI Reply"). For these same reasons, Defendants cannot show that they are likely to suffer irreparable harm in this context.

The District has also failed to show that it should be relieved of the Order's requirement that it modify its application materials to be consistent with this Court's ruling. The District argues that "[i]f the application does not invite an applicant to demonstrate his or her ability to satisfy the 'good reason' standard," then "every license issued under the modified application will be presumptively invalid," should the injunction ultimately be stayed or lifted. Stay Br. 20 (emphasis omitted). That difficulty could easily be solved, however, by notifying applicants that any licenses granted under the authority of the injunction are contingent on that injunction

remaining in force, and that to the extent the applicant wishes to obtain a permit that is *not* provisional in that way, they should also submit materials demonstrating that they are entitled to a permit under the "good reason" standard. (In any event, since only 61 applications have been approved under the current, restrictive regime, Decl. of Twana V. Smalls ¶ 3 (Feb. 24, 2016), Doc. 39-2, the number of applicants who would be entitled to a permit under the "good reason" standard is unfortunately likely to be quite small.) Nor can the District seriously complain about the administrative costs of making "changes to official forms that may well have to be changed back if a stay is granted." Stay Br. 20. After all, if this Court's injunction *is* ultimately lifted, the District will obviously not have to start from scratch in designing materials implementing the "good reason" regime, since those materials already exist and were in use until the injunction issued. The Court's order states that the District is to modify and reissue its application materials so that they are consistent with the Court's decision; it does not say that the District has to throw the old materials in the trash.

Finally, at a bare minimum, the District has failed to show that it will be irreparably injured by issuance of concealed-carry permits to Plaintiff Matthew Grace and any other members of Plaintiff Pink Pistols who, during the pendency of the District's appeal, can clear the regulatory hurdles that will remain in place even absent the "good reason" requirement. The District has focused its attention on the fact that "[t]he Court has enjoined the District from enforcing, as to *all* concealed-carry applicants (not just the plaintiffs), a provision at the very heart of its statutory regime." Stay Br. 11. As explained above, the District's argument fails on its own terms. But even if that were not so, the District has failed to show that it would suffer irreparable harm from an injunction applicable only to Mr. Grace and members of the Pink Pistols. Indeed, Defendants have expressly admitted that Mr. Grace has satisfied every

requirement for a public carry permit except for the unconstitutional "good reason" requirement. *Compare* Complaint for Declaratory Judgment and Injunctive Relief ¶ 22 (Dec. 22, 2015), Doc. 1, *with* Answer ¶ 22 (Jan. 12, 2016), Doc. 16. There is no longer any legitimate reason to deny him a provisional concealed carry permit valid so long as this Court's injunction remains in place.

III. The Balance of the Equities Favors Keeping the Preliminary Injunction in Place.

The public interest and balance of the equities also militate in favor of denying the District's request for a stay. As to the former point, this Court expressly held that "the public interest weighs heavily in favor of granting [a preliminary] injunction," Memorandum Opinion 42, and the District offers no reason to disturb that conclusion. Moreover, since depriving the preliminary injunction of force "will substantially injure" Plaintiffs, the balance of the equities tips in favor of leaving the injunction intact. *Hilton*, 481 U.S. at 776. That follows directly from this Court's conclusion that Plaintiffs "have more than adequately demonstrated irreparable injury," absent injunctive relief, because "their Second Amendment rights are being infringed each and every day the District continues to enforce the 'good reason' requirement." Memorandum Opinion 42.

The District continues to characterize Plaintiffs' harm as "speculative." Stay Br. 16. That contention comes with no little irony. As noted above, it is the harm that *the District* claims it may suffer by reason of the preliminary injunction that is wholly speculative, given both the utter lack of credible empirical support for the District's suggestion that honoring the right to bear arms will negatively impact public safety and the "veritable gauntlet of other licensing requirements" that are left untouched. Memorandum Opinion 43. By contrast, as this Court held, the District's claim that *Plaintiffs'* harm is speculative "sadly, miss[es] the point":

> The Second Amendment protects plaintiffs' right to bear firearms *for* self-defense—a right that can be infringed upon whether or not plaintiffs are ever actually called upon to use their weapons to defend themselves. The right to bear arms enables one to possess not only the means to defend oneself but also the self-confidence—and psychic comfort—that comes with knowing one could protect oneself if necessary.

Id. at 41 (citation omitted).

The District persists, arguing that because any harm to Plaintiffs' Second Amendment rights is intangible, it "does not, in and of itself, weigh heavily in any balance of the equities." Stay Br. 17. The District cites *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290 (D.C. Cir. 2006), for that imagined rule, but that case says nothing of the sort. Instead, that case—in the course of finding that the mere allegation of an Establishment Clause violation, even though intangible, "may suffice to satisfy the irreparable harm prong"—merely emphasized that "a preliminary injunction will not issue unless" the other three injunction factors are met. *Id.* at 304. And while the case did indicate that "[u]nsupported or undeveloped allegations of government establishment, . . . while sufficient to make out irreparable injury," would naturally "not withstand scrutiny concerning the movant's likelihood of success on the merits," *id.*, it *nowhere says or even suggests* that the intangible harm caused by the deliberate violation of constitutional rights "does not, in and of itself, weigh heavily in any balance of the equities," Stay Br. 17.

IV. An Administrative Stay Is Not Appropriate.

The District's request for an administrative stay should also be denied. The District complains that absent an immediate administrative stay it "will likely be . . . forced to issue licenses—absent 'good reason'—while its motion to stay is pending before this Court." Stay Br. 21. But this Court *already* considered the costs and benefits of requiring the District to begin honoring its residents' Second Amendment rights immediately, while the ultimate merits of this

case are litigated more fully; weighing those costs and benefits in an effort to determine the state of affairs that ought to prevail during the pendency of the action is the *very purpose* of its preliminary injunction analysis. *See District 50, United Mine Workers of America v. International Union, United Mine Workers of America*, 412 F.2d 165, 168 (D.C. Cir. 1969). The District has thus already been heard on the question whether it should "be forced to issue licenses . . . while its motion to stay," or any other motions it might file, are "pending before this Court." Stay Br. 21. It lodged three briefs on that question, collectively spanning over 75 pages (not to mention the briefing of supporting amici); but this Court ultimately decided the matter against it. It can hardly claim to be harmed if the injunction this Court put in place *remains* in place while the District attempts to convince the Court *a second time* that interim injunctive relief is not really appropriate.

CONCLUSION

For the foregoing reasons, this Court should deny the District's motion for a stay pending appeal and an immediate administrative stay.

Dated: May 23, 2016

Respectfully submitted,

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