[ORAL ARGUMENT NOT YET SCHEDULED]

No. 16-7067

In The United States Court of Appeals
For the District of Columbia Circuit

MATTHEW GRACE, *et al.*,

Plaintiffs-Appellees,

v.

DISTRICT OF COLUMBIA, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA (No. 1:15-cv-2234-RJL)

APPELLEES' RESPONSE TO APPELLANTS' EMERGENCY MOTION FOR A STAY PENDING APPEAL AND MOTION TO HOLD THIS APPEAL IN ABEYANCE

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CORPORATE DISCLOSURE STATEMENT

Pink Pistols is an unincorporated association that advocates the use of lawfully owned, lawfully concealed firearms for the self-defense of the sexual minority community. Pink Pistols does not have a parent corporation, no publicly held corporation owns 10% or more of its stock, and no members of the association have issued shares or debt securities to the public.

Dated: June 2, 2016

/s/ Charles J. Cooper
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INTRODUCTION

The Supreme Court has instructed the District of Columbia that the enumeration of the right to keep and bear arms in the Second Amendment "takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). Yet it is precisely this forbidden power that the District has seized in determining which of its citizens will be permitted to exercise the right to publicly bear the arms that they keep in their homes or places of business. Only those few citizens who can prove to the District's satisfaction that they have a "good" or "proper" reason for carrying a handgun are eligible to obtain a carry license—and, in the District's view, the simple desire to exercise "the core lawful purpose of self-defense" by being "armed and ready for . . . defensive action in a case of conflict with another person" does not suffice. *Heller*, 554 U.S. at 584, 630.

The challenged law, of course, is the latest iteration of the District's decades-long effort to suppress Second Amendment rights, and it follows in the wake of the Supreme Court's invalidation in *Heller* of the District's flat ban on the possession of handguns and the invalidation of the District's follow-up law flatly banning carrying handguns in public. *See Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014). Despite these defeats the District doggedly continues to infringe Second Amendment rights. The District's conduct would be

unimaginable in the context of any other fundamental right, and the preliminary injunction issued by the district court should not be stayed. In addition, the District's request that this appeal be held in abeyance pending the appeal in *Wrenn v. District of Columbia*, No. 16-7025 (D.C. Cir.) (*Wrenn II*), should be denied.

BACKGROUND

"No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law . . . ." D.C. CODE § 22-4504(a). Appellant Lanier, as the Chief of the Metropolitan Police Department, "may" issue applicants a license to carry a firearm only "if it appears that the applicant has good reason to fear injury to his or her person or property or has any other proper reason for carrying a pistol . . . ." *Id.* § 22-4506(a). Moreover, the law expressly directs Chief Lanier to issue rules establishing that the phrase "good reason to fear injury to his or her person . . . shall at a minimum require a showing of a *special need for self-protection distinguishable from the general community* as supported by evidence of specific threats or previous attacks that demonstrate a special danger to the applicant's life." *Id.* § 7-2509.11(1)(A) (emphasis added). The phrase "any other proper reason for carrying a concealed pistol . . . shall at a minimum include types of employment that require the handling of cash or other valuable objects that may be transported upon the applicant's person." *Id.* § 7-2509.11(1)(B).

The District's laws and administrative rules define the "proper reason" a citizen must demonstrate to obtain a license in a way that *extinguishes* the right of an ordinary, law abiding citizen to bear arms outside of the home. That is so because *by definition* a *typical* citizen cannot *distinguish* his or her need for self-defense from that of the general community. For the vast majority of citizens subject to the District's scheme, then, the Second Amendment right to bear arms remains nothing more than a theoretical possibility. And those citizens appear to have gotten the message. Over 500,000 adults reside in the District, but as of February of this year only 324 carry license applications have been submitted—and of those 324, only 61 were granted. Transcript of Prelim. Inj. Hearing at 55:5–11, *Grace v. District of Columbia*, No. 15-2234 (D.D.C. Feb. 2, 2016).

The experience of Matthew Grace, the plaintiff in this case, typifies the ordinary citizen's treatment under the District's current law. Although Mr. Grace does not face specific threats, his desire to carry a firearm for self-defense is well-founded. For example, on one occasion gun shots were fired in front of his home; four shell casings were found directly in front of his home on the sidewalk. A person who robbed people at gunpoint in his neighborhood was never caught. And his wife was robbed on a public street in the District in broad daylight. *See* Decl. of Matthew Grace ¶ 5, *Grace v. District of Columbia*, No. 15-2234 (D.D.C. Dec. 28,

2015), ECF No. 6-3.[1] Like other residents of the District, then, Mr. Grace has reason to fear for his safety when travelling to and from his home. Accordingly, in August 2015, Mr. Grace applied for a District of Columbia carry license. On October 19, 2015, the District denied Mr. Grace's application. Though Mr. Grace meets all of the other requirements for a concealed carry license, the denial letter stated that he had failed to "[d]emonstrate a good reason to fear injury to person or property, or other proper reason for a concealed carry license." Concealed Carry Pistol License Application, Notice of Denial (Dec. 28, 2015), ECF No. 6-4.

When Mr. Grace's application was denied, an earlier challenge to the District's scheme was before this Court. Judge Frederick J. Scullin, Jr., who had presided over the *Palmer* case by designation, preliminarily enjoined enforcement of the District's current licensing law on May 18, 2015. *Wrenn v. District of Columbia (Wrenn I)*, 107 F. Supp. 3d 1 (D.D.C. 2015). On December 15, this Court vacated the injunction on the grounds that Judge Scullin had been improperly assigned to hear the case, and it withdrew the case from him. *See Wrenn v. District of Columbia*, 808 F.3d 81 (D.C. Cir. 2015).

Mr. Grace and Pink Pistols (an organization that advocates for the rights of sexual minority communities to bear arms for self-defense) promptly filed their

[1] All future citation references to documents filed in *Grace v. District of Columbia*, No. 15-2334 shall be noted by "ECF No.".

own complaint, on December 22, 2015, alleging that the District's scheme violates the Second Amendment. They simultaneously asked the district court for a preliminarily injunction prohibiting enforcement of the District's laws.

In the meantime, after briefing on Plaintiffs' motion for a preliminary injunction was complete, the *Wrenn* case, on remand from this Court, was reassigned to a new judge, Judge Kollar-Kotelly. The parties in that case filed supplemental briefs, and on March 7, 2016, Judge Kollar-Kotelly denied the *Wrenn* plaintiffs' motion for a preliminary injunction. An appeal of that order is currently pending before this Court.

On May 17, the Judge in the case below, Judge Leon, entered preliminary injunctive relief. The District noticed an appeal and filed the instant motion for a stay pending appeal, an immediate administrative stay, and an order holding the appeal in abeyance pending resolution of Defendants' second appeal in *Wrenn*. This Court granted an administrative stay.

ARGUMENT

A motion for a stay pending appeal is governed by four considerations:

> (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.

Nken v. Holder, 556 U.S. 418, 426 (2009). The District attempts to slant this

familiar standard in its favor in two ways. Neither succeeds.

First, citing language that originated in *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977), Defendants wrongly suggest that they are entitled to a stay so long as they raise "questions going to the merits so serious, substantial, difficult as to make them a fair ground of litigation and thus for more deliberative investigation," Emergency Mot. of Appellants for a Stay Pending Appeal & an Immediate Administrative Stay, & Mot. to Hold this Appeal in Abeyance at 13 (May 27, 2016), Doc. 1615224 ("Stay Br."). But this Court has cautioned against this "misreading . . . [of] *Holiday Tours*," *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1292 (D.C. Cir. 2009), emphasizing that by the *Holiday Tours* opinion's own terms a "lessor likelihood of success" warrants relief only "if each of the other three factors 'clearly favors' granting the [equitable relief]," *id.* (quoting *Holiday Tours*, 559 F.2d at 843). Further, the validity of the "sliding scale" approach adopted in *Holiday Tours* is in serious doubt after the Supreme Court's decision in *Winter v. NRDC*, 555 U.S. 7 (2008). *See Davis*, 571 F.3d at 1292.

The District next attempts to load additional weight onto Plaintiffs, suggesting that Plaintiffs should "bear an even higher burden" because the preliminary injunction sought and granted below "changes the status quo rather than preserving it." Stay Br. 8. But there is no precedent within this Circuit

requiring such a heightened showing. *See Minney v. United States Office of Pers. Mgmt.*, 130 F. Supp. 3d 225, 231 n.6 (D.D.C. 2015). And as this Court has noted, the "status quo" that preliminary relief is designed to preserve is "the last *uncontested* status which preceded the pending controversy." *District 50, United Mine Workers of America v. International Union, United Mine Workers of America*, 412 F.2d 165, 168 (D.C. Cir. 1969) (emphasis added). The Order on appeal enjoins Defendants from enforcing the very provisions of law that are *contested* in this controversy. Accordingly, it does not *change* the status quo; it *restores* it. *See Cobra N. America, LLC v. Cold Cut Sys. Svenska AB*, 639 F. Supp. 2d 1217, 1229 (D. Colo. 2008) (status quo is the "last peaceable uncontested status existing between the parties before the dispute developed . . . not necessarily the positions that [they] occupied at the time litigation began").

Regardless of how the scales are calibrated, the District is not entitled to a stay pending appeal because each factor strongly militates against this relief.

I. The District Is Unlikely To Succeed on the Merits.

This Court has established a "two-step approach to determining the constitutionality of the District's gun laws." *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1252 (D.C. Cir. 2011). First, courts must ask "whether a particular provision impinges upon a right protected by the Second Amendment." *Id.* Second, if the provision impinges upon such a right, courts must "go on to

determine whether the provision passes muster under the appropriate level of constitutional scrutiny." *Id.* Here, the application of that test is clear: the Second Amendment, by its plain text, protects the right to bear arms outside of the home; the District's restriction on that right is unconstitutional *per se* under the framework established by the Supreme Court in *Heller*; and even if this Court declines to adopt this *per se* approach, that restriction fails any level of heightened scrutiny. Accordingly, Plaintiffs are highly likely to succeed in this appeal.

a. The District Restricts Conduct Protected by the Second Amendment.

1. The Second Amendment protects not only "the right of the people to keep . . . Arms" but also the right "to . . . bear" them—a phrase the Supreme Court has interpreted as guaranteeing the right to "wear, bear, or carry" firearms "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 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). And because "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage," the Constitution's explicit inclusion of the "right to bear arms thus implies a right to carry a loaded gun outside the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). Limiting the Second Amendment to the home would do great violence to its text, effectively reading the term "bear" out of the Constitution altogether.

The history and purpose of the Second Amendment confirm the interpretation demanded by its text. The Supreme Court has held that "*the central component* of the right" to keep and bear arms is "individual self-defense." *Heller*, 554 U.S. at 599. And "one doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." *Moore*, 702 F.3d at 936. Indeed, as Judge St. George Tucker observed, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 WILLIAM BLACKSTONE, COMMENTARIES App. n.B, at 19 (St. George Tucker ed., 1803). And Tucker made clear that Congress would exceed its authority were it to "pass a law prohibiting any person from bearing arms." 1 WILLIAM BLACKSTONE, COMMENTARIES App. n.D, at 289. *See generally Peruta v. County of San Diego*, 742 F.3d 1144, 1166 (9th Cir. 2014), *reh'g en banc granted*, 2015 WL 1381752 (9th Cir. Mar. 26, 2015) (concluding after an exhaustive historical analysis that "the right to bear arms includes the right to carry an operable firearm outside the home for the lawful purpose of self-defense").[2]

Caetano v. Massachusetts, 136 S. Ct. 1027 (2016), provides further

[2] Although the 9th Circuit has granted en banc review in *Peruta*, the panel's opinion retains its persuasive authority.

confirmation that the Second Amendment protects the right to bear arms for self-defense in public. Caetano challenged her conviction for carrying a stun gun, illegal under Massachusetts law, in a public parking lot. The Massachusetts Supreme Judicial Court rejected Caetano's argument that *Heller* and *McDonald* "afford her a right under the Second Amendment to the United States Constitution to possess a stun gun *in public* for the purpose of self-defense," *Commonwealth v. Caetano*, 26 N.E.3d 688, 689 (Mass. 2015) (emphasis added), but the Supreme Court summarily vacated that judgment. And while the reasoning of both the state court and Supreme Court opinions primarily concerns whether stun guns are "Arms" protected by the Second Amendment, if that provision did not protect a right to bear arms outside the home, all that analysis would be utterly irrelevant. *Caetano* thus necessarily assumes that the Second Amendment is not home-bound.

2. The District argues that while the Second Amendment might apply outside the home, it does not fully protect "carrying [firearms] in the public concourse" in areas with a large "urban population." Stay Br. 12–13. This purported urban/rural distinction is reflected *nowhere* in the text of the Second Amendment, which protects "the right to bear arms" *simpliciter*, not "the right to bear arms in rural areas." Indeed, this distinction *makes no sense* in light of the Second Amendment's "core . . . purpose" of safeguarding the individual right of "self-defense." *Heller*, 554 U.S. at 630. As the court below found, "confrontations

that might necessitate self-defense are less likely to occur in the home than on the streets of a city with many dangerous neighborhoods." Memorandum Opinion at 14 (May 17, 2016) ECF No. 45 ("Memorandum Opinion"); *see also Moore*, 702 F.3d at 937.

Nor is the District's urban/rural distinction supported by the historical record. The chief piece of historical evidence cited by the District below was the medieval "Statute of Northampton," which provided that "no Man great nor small" shall "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." 2 Edw. 3, 258, c. 3 (1328). But that statute was enacted *over three-and-a-half centuries* before the right to keep and bear arms was recognized in England as having constitutional status. And by the time the right to arms was so recognized, the English courts had conclusively interpreted Northampton as regulating that right in a narrow and peripheral way—as applying only to the carrying of arms with an evil intent, or the carrying of "dangerous and unusual" arms—to the extent it had any continuing vitality at all. *See, e.g., Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686). Northampton was also narrowly interpreted on this side of the Atlantic. *See, e.g., Simpson v. State*, 13 Tenn. (5 Yer.) 356, 360 (1833). And importantly, *Heller* itself interprets the Statute as "prohibiting the carrying of 'dangerous and unusual weapons,' " 554 U.S. at 627 (citing the discussion of Northampton in Blackstone's Commentaries),

not the "quintessential self-defense weapon[s]" at issue here, *id*. at 629.

3. Finally, even if the District could show the existence of some longstanding tradition of tightly regulating the type of conduct prohibited by its law here, under this Court's precedent that merely raises a "presumption" that the law is outside the reach of the Second Amendment. *Heller II*, 670 F.3d at 1253. Plaintiffs may rebut that presumption "by showing the regulation does have more than a de minimis effect upon [their] right." *Id.* The District's law completely forecloses the exercise by ordinary citizens of a right that is explicitly guaranteed by the Second Amendment, that is necessary to its most fundamental purposes, and that has been central to its historical importance. That amounts to more than a *de minimis* effect on Plaintiffs' constitutional rights on any understanding.

b. The District's Restriction on Typical, Law-Abiding Citizens Carrying Arms Is Categorically Unconstitutional.

Because Defendants' licensing scheme flatly prohibits ordinary, law-abiding citizens of the District from exercising their core Second Amendment right to carry a firearm in public, it is *per se* unconstitutional. *Heller*, after all, expressly held that the Second Amendment "takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon," 554 U.S. at 634, the precise power the District illegitimately claims here.

To be sure, this Court has held that in a large category of Second Amendment litigation—cases involving "restriction[s] significantly less severe

than the total prohibition of handguns at issue [in *Heller*]"—judicial analysis should be guided by one "of the familiar constitutional 'standards of scrutiny.' " *Heller II*, 670 F.3d at 1266. But the clear implication of this careful language is that for laws that are not "significantly less restrictive than the outright ban on all handguns invalidated in [*Heller*]," the Supreme Court's categorical approach governs. *Id.* at 1267. The Seventh Circuit's decision in *Moore* is especially instructive on this point, since that case invalidated a ban on carrying arms categorically despite circuit precedent applying levels-of-scrutiny analysis in other Second Amendment cases. 702 F.3d at 942. The Ninth Circuit panel's decision in *Peruta* is to the same effect. *See* 742 F.3d at 1170.

c. The District's Law Fails Heightened Constitutional Scrutiny.

If not categorically unconstitutional, the District's law, which imposes a heavy burden on the right to bear arms, should be subject to strict scrutiny. In the end, however, the choice of standards matters little because the District's law fails *any level* of heightened constitutional scrutiny. That is so, as a threshold matter, because the central rationale of the District's restriction is that it purportedly will advance public-safety simply by *reducing the number of arms borne in public*, and this Court has held that this type of reasoning is impermissible. In *Heller v. District of Columbia (Heller III)*, this Court struck down the District's prohibition on registering "more than one pistol per registrant during any 30-day period." 801

F.3d 264, 280 (D.C. Cir. 2015). As here, the District defended that restriction as designed to "promote public safety by limiting the number of guns in circulation," based on its theory "that more guns lead to more gun theft, more gun accidents, more gun suicides, and more gun crimes." *Id.* But this Court rejected the District's more-guns, more-crime syllogism, since "taken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home." *Id.*; *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) (Kennedy, J., concurring in judgment) (controlling opinion). So too here; any argument that the District's restriction will increase public safety *by reducing the number of law-abiding citizens exercising their right to bear arms* is incapable of justifying the law under any level of scrutiny as a matter of law.

In all events, the District's restriction fails intermediate scrutiny because the empirical evidence fails to show any appreciable link between restrictions on public carrying and lower crime rates. As Judge Posner concluded in *Moore* after extensively surveying "the empirical literature on the effects of allowing the carriage of guns in public," the current data do not provide "more than merely a rational basis for believing that [a ban on public carry] is justified by an increase in public safety." 702 F.3d at 939, 942. Indeed, as several social scientists *in favor* of gun control have acknowledged, "based on available empirical data," there would be "relatively little public safety impact if courts invalidate laws that prohibit gun

carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand," since "[t]he available data about permit holders . . . imply that they are at fairly low risk of misusing guns." Philip J. Cook et al., *Gun Control After* Heller*: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1082 (2009). Even the study "primarily relied on" by the District in enacting its carry law, Stay Br. 15, concludes that "it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates," Defendants' Appendix at 212 (Jan. 15, 2016), ECF No. 19-1.

Finally, the District's law independently fails intermediate scrutiny because it is not properly tailored to the District's asserted goals. While laws subject to intermediate scrutiny "need not be the least restrictive or least intrusive means of serving the government's interests," they still must be narrowly tailored, possessing "a close fit between ends and means." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534–35 (2014) (quotation marks omitted). The District cannot show that "close fit," because its blanket restriction on the public carrying of arms reaches not only criminals but also—and predominantly—law-abiding citizens.

d. Neither the Out-of-Circuit Decisions Upholding Laws Similar to the District's nor this Court's Decision To Grant a Stay in *Wrenn I* Show that the District Is Likely To Succeed Here.

The District seeks support from the decisions of the Second, Third, and Fourth Circuits upholding laws like the one here. But each of those decisions rests

on the reasoning that *Heller III* expressly rejects—that the Constitution allows the government to seek to reduce gun violence simply by reducing the number of guns in the hands of law-abiding citizens. *See Drake v. Filko*, 724 F.3d 426, 439 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 879 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 98–99 (2d Cir. 2012). *Drake*'s erroneous, alternative conclusion that New Jersey's restriction was longstanding and therefore immune from scrutiny, *see* 724 F.3d at 431–34, is similarly foreclosed by *Heller II*'s holding that the presumption of constitutionality attending longstanding laws may be rebutted "by showing the regulation does have more than a de minimis effect" on the plaintiff's Second Amendments rights, 670 F.3d at 1253.

Nor should this Court grant a stay here merely because an earlier panel entered a stay in *Wrenn I*. The legal landscape has developed considerably since that stay. Since then, this Court has handed down its decision in *Heller III*, explicitly rejecting the only rationale the District has advanced for its law—its desire to ration its residents' Second Amendment rights. The Supreme Court also decided *Caetano* after the *Wrenn I* stay, further clarifying that the Second Amendment applies outside the home. Whether or not the District could show a likelihood of success in *Wrenn I*, that likelihood has now been eliminated.

II. The District Has Failed To Show Irreparable Injury.

The District says that it "will be irreparably harmed, and the public interest

obstructed, if a stay is denied." Stay Br. 14. But "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). And any risk of harm to the District's interest in public safety is entirely speculative. As noted above, the current empirical literature has been able to find *no causal link* between laws that respect the right of licensed and vetted law-abiding citizens to carry firearms outside the home and increased violent crime. And as the court below noted, the injunction it entered has

> *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 . . . ; (2) successful completion thereafter of a firearms training program; and (3) an in-person interview with the Metropolitan Police Department . . . . More importantly, perhaps, the requested injunction would have *no* impact on the District's complete prohibition of (1) carrying without a license; (2) carrying in specified places including government buildings, schools, the National Mall, the area surrounding the White House, public transportation vehicles, and stadiums; and (3) carrying by violent felons, drug addicts, and other prohibited persons.

Memorandum Opinion 43–44 (citations omitted).

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 Grace and any other members of Plaintiff Pink Pistols who, during the pendency of the District's appeal, can clear the regulatory hurdles that remain in place.

III. The Balance of the Equities Favors Plaintiffs.

The balance of the equities strongly disfavors Defendants' request for a stay

because Plaintiffs are irreparably harmed each day the District continues to enforce its law. The loss of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality). Accordingly, this Court has held that "[a]lthough a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes." *Gordon*, 721 F.3d at 653. Only if the Second Amendment is "a second-class right," *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (plurality), can that rule not apply here, *see Ezell v. City of Chicago*, 651 F.3d 684, 699–700 (7th Cir. 2011).

Defendants argue that any harm to Plaintiffs' Second Amendment rights is "intangible" and that an "intangible" harm in some unexplained way "does not weigh heavily in a balance of the equities." Stay Br. 17. The District cites *Chaplaincy of Full Gospel Churches v. England*, but that case simply and unremarkably concluded that when an intangible harm establishes irreparable injury "a preliminary injunction will not issue unless" the other three injunction factors are met. 454 F.3d 290, 304 (D.C. Cir. 2006).

IV. This Appeal Should Not Be Held In Abeyance.

Finally, the Court should deny the District's extraordinary request to hold this appeal in abeyance pending a decision in the *Wrenn II* appeal. The District

itself states that this Court's decision in that appeal will likely be dispositive of the questions raised in this appeal. *See* Stay Br. 19. Accordingly, what the District essentially has proposed is that *it* should be allowed to fully brief and argue its position on the issues raised in this appeal in *Wrenn II*, but *we should not*. That would plainly violate basic notions of due process and litigation fairness. Defendants have a right to appeal the district court's ruling against them, but they do not have a right to argue their appeal *without opposition from the other party*.

The District cites one instance in which this Court has held an appeal in abeyance pending the outcome in a pending appeal. Order, *AFGE v. Vilsack*, No. 15-5259 (D.C. Cir. Dec. 9, 2015). But in that case, the overlap between the two appeals was not so close that resolution of the first appeal *would essentially dispose* of the second appeal, as evidenced by the fact that the Court subsequently declined to summarily affirm once the first appeal was decided. *See* Order, *AFGE*, 2016 WL 3040960 (May 5, 2016). Here, by contrast, granting the District's motion would *gut* Plaintiffs' fundamental right to be heard in the appeal of *their case*.

In addition, by the time the appeal in *AFGE* was filed, the appeal in the earlier case had already been fully briefed, and it was argued the next day. *See* Motion to Hold in Abeyance at 2, *AFGE* (Oct. 20, 2015). Here, that is not the case. Indeed, there is no reason why allowing this appeal to go forward would hinder the "expedited pace" at which *Wrenn II* is proceeding. Stay Br. at 19. According to the

scheduling orders entered there, that appeal is due to be fully briefed by July 27, 2016, and slated for argument in September. Per Curiam Order, *Wrenn II* (D.C. Cir. May 4, 2016); Clerk's Order, *Wrenn II* (D.C. Cir. May 4, 2016). Even if this Court were to schedule the District's opening brief in this appeal to be due concurrently with its response brief in *Wrenn II*, on July 13, and retain its standard schedule for the remainder of the briefing, this appeal would be fully briefed by September. The cases could then be argued in tandem, with no delay and little duplication of effort on the part of either this Court or the District.

Finally, the District also implies that Plaintiffs *deserve* to have their appellate rights prejudiced because they delayed filing suit until "almost a year after the *Wrenn* plaintiffs." Stay Br. 20. But Plaintiffs acted promptly by filing suit within a week after this Court issued its opinion in *Wrenn I*, months before that case was reassigned to Judge Kollar-Kotelly.[3] And even if Plaintiffs had not acted promptly, that would not be grounds to hold their appeal in abeyance.

CONCLUSION

For the foregoing reasons, both the District's motion for a stay pending appeal and its motion to hold this appeal in abeyance should be denied.

[3] The District also states that Plaintiffs "incorrectly" argued that this case and *Wrenn* are not related under the district court's rules, *see* Stay Br. 20, but Plaintiffs explained the basis for their position below and the district court has not taken any action indicating a contrary understanding. *See* Objection to Notice of Related Cases (Feb. 11, 2016), ECF No. 35.

June 2, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on June 2, 2016. Service will be accomplished by the appellate CM/ECF system on all parties or their counsel.

Dated: June 2, 2016

/s/ Charles J. Cooper
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