NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 16-7067

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MATTHEW GRACE, *et al.*,
APPELLEES,

V.

DISTRICT OF COLUMBIA, *et al.*,
APPELLANTS.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

EMERGENCY MOTION OF APPELLANTS FOR A STAY PENDING APPEAL AND AN IMMEDIATE ADMINISTRATIVE STAY, AND MOTION TO HOLD THIS APPEAL IN ABEYANCE

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On May 17, 2016, the district court (Leon, J.) entered a preliminary injunction barring the District of Columbia and Metropolitan Police Department Chief Cathy Lanier ("District") from enforcing a key provision in local legislation regulating the issuance of licenses to carry concealed handguns in public. The injunction requires the District to issue a license to any applicant regardless of whether he has "good reason" for carrying a handgun outside the home, so long as he is otherwise qualified.

The District moves this Court to stay the preliminary injunction pending appeal. And because the District faces irreparable harm immediately, it additionally moves for the Court to enter a brief administrative stay while it receives briefing on and considers whether to grant a full stay pending appeal. The District has moved for a stay in the district court, but was unable to secure timely relief. *Cf.* Fed. R. App. P. 8.

When this Court last considered an injunction against the District's "good reason" law, it entered an administrative stay and then a full stay pending appeal. *Wrenn v. District of Columbia* ("*Wrenn I*"), No. 15-7057, 6/12/15 and 6/29/15 Orders (appeal from 107 F. Supp. 3d 1 (D.D.C. 2015)). It should do the same here. A stay will preserve the status quo—allowing the District to enforce a scheme that balances public safety with the safety of individuals especially at risk of assault—while this Court considers whether plaintiffs have justified their request for the extraordinary relief of a preliminary injunction. Indeed, there is *more* need for a stay than in *Wrenn I* given that this injunction applies to all applicants (not just plaintiffs) and another

judge (Kollar-Kotelly, J.) declined to enjoin the same law in another case currently on appeal to this Court, *Wrenn v. District of Columbia*, No. 16-7025 ("*Wrenn II*").

Three federal circuits have upheld the "good reason" standard against Second Amendment challenge. No circuit holds otherwise. The District has offered considerable evidence that barring its enforcement will likely increase violent crime. Especially given the weakness of plaintiffs' claim of irreparable harm—their theory is that they need not show *any* special need to carry in public—a stay is warranted.

Once a stay is entered, the Court should hold this appeal in abeyance pending a decision in *Wrenn II*. That case, which will be argued in September, will significantly inform this appeal, if not resolve it altogether. If a stay is granted, any prejudice to plaintiffs from abeyance will be minimal as the case can proceed in the district court.

BACKGROUND

1. The District Of Columbia Enacts A Licensing Scheme Carefully Crafted To Balance Public Safety With An Individual's Need For Self-Defense.

After a district judge invalidated the District's longstanding prohibition on the public carrying of handguns in *Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014) (Scullin, J.), the Council of the District of Columbia enacted legislation to authorize the issuance of licenses to publicly carry if, among other things, 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." D.C. Code § 22-4506(a). To show "good reason," an applicant must "show[] … 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). "[O]ther proper reason" "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 Council based the "good reason" standard on similar provisions in New York, Maryland, and New Jersey, all of which "have withstood constitutional challenges." ECF Record Document ("RD") 19-1 at 5, 12 & n.39. After considering expert testimony and reviewing comprehensive empirical studies, the Council concluded that "right-to-carry laws are associated with substantially higher rates of aggravated assault, rape, robbery and murder." RD 19-1 at 20 (citing studies). It found "undeniable" that "introducing a gun into any conflict can escalate a limited danger into a lethal situation," and this "danger extends to bystanders and the public at large." RD 19-1 at 21. Finding that the District has a "substantial governmental interest in public safety and crime prevention," the Council concluded that the "good reason" standard "offers a reasonable, balanced approach to protecting the public safety and meeting an individual's specific need for self-defense." RD 19-1 at 21-22.

2. The "Good Reason" Standard Is Challenged In Two Different Lawsuits.

In February 2015, in *Wrenn*, a group of plaintiffs sued to challenge the District's "good reason" standard. 107 F. Supp. 3d at 3. They designated the case as

"related" to *Palmer*, which had been assigned to visiting Senior District Court Judge Frederick J. Scullin, and *Wrenn* was also assigned to him. *See Wrenn v. District of Columbia*, 808 F.3d 81, 83 (D.C. Cir. 2015). He preliminarily enjoined the District from enforcing the "good reason" standard against those plaintiffs. *Id.*

The District appealed and moved to stay the injunction. This Court granted the District's motion for an administrative stay to "give the [C]ourt sufficient opportunity to consider the merits of the motion for stay." No. 15-7057, 6/12/15 Order. It later found that the District had "satisfied the requirements for a stay," and authorized the District to continue enforcing its law pending appeal. 6/29/15 Order.

In December 2015, the Court held that Judge Scullin had not been properly designated to preside over the case. 808 F.3d at 84. It vacated the injunction he had issued and returned the case to the district court for reassignment. *Id.*

Plaintiffs Matthew Grace and Pink Pistols brought this lawsuit one week later, raising the same challenge as the *Wrenn* plaintiffs and seeking virtually identical preliminary relief. RD 1, 6. They claimed that the cases are not related because they "ha[ve] different plaintiffs." RD 1-1 at 4. *But see* LCvR 40.5(a)(3) (defining "related cases"). This case was assigned to District Court Judge Richard J. Leon.

In February 2016, the *Wrenn* mandate issued and the case was assigned to District Court Judge Colleen Kollar-Kotelly. *Wrenn* RD 37; 2/9/15 Docket Entry. The District and the *Wrenn* plaintiffs notified the judges that the cases were related.

RD 34; *Wrenn* RD 42, 43. The *Grace* plaintiffs objected. RD 35 at 2. Judge Leon did not transfer the case to Judge Kollar-Kotelly, and the two cases—with their pending motions for preliminary injunction—proceeded on separate tracks.

3. Judge Kollar-Kotelly Denies The *Wrenn* Preliminary Injunction Motion.

On March 7, 2016, Judge Kollar-Kotelly denied the *Wrenn* plaintiffs' motion for a preliminary injunction. *Wrenn* RD 54. She held that, even assuming the "good reason" standard impinges on a Second Amendment right, it should be measured under intermediate scrutiny. RD 54 at 12-16. Her conclusion was "[g]uided by [this Court's] analysis in [*Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"),]" as well as "the thorough analysis of" the Second, Third, and Fourth Circuits—"the *only* Courts of Appeals to have, thus far, addressed and definitively resolved the constitutionality of 'good reason' handgun licensing laws." RD 54 at 12, 14-15 (citing *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96-97 (2d Cir. 2012); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Drake v. Filko*, 724 F.3d 426, 435 (3d Cir. 2013)). The District had "identified what appears to be substantial evidence of connections between public carrying of guns … and public safety," and plaintiffs offered little in response, instead urging a more rigorous test. RD 54 at 22.

Judge Kollar-Kotelly also found that the equities favored continued enforcement of the law. RD 54 at 28-31. Although she found that, by alleging a constitutional violation, plaintiffs "satisfied the irreparable harm prong of the

preliminary injunction analysis," this was "not determinative of … the balance of the equities." RD 54 at 27-28. Instead, the equities favored the District and the public, based on their "strong interest" in "the promotion of public safety and the prevention of crime," an interest that is "heightened" because "the alleged constitutional violation pertains to the public carrying of operable handguns, which poses a potential risk to others—carriers and non-carriers alike—far greater than the risk of possessing a handgun within the home." RD 54 at 28-29. Indeed, she noted, "[b]ecause the entirety of the District of Columbia is an urban area, the carrying of operable handguns in public may further tip this factor in [the District's] favor." RD 54 at 29.

The *Wrenn* plaintiffs appealed, and this Court expedited the case and ordered argument to be held in September 2016. No. 16-7025, 5/4/16 Order.

4. Judge Leon Grants The *Grace* Preliminary Injunction Motion.

On May 17, 2016, Judge Leon in *Grace* preliminarily enjoined the District from enforcing the "good reason" standard against any applicant (including the *Wrenn* plaintiffs). RD 46. Applying strict scrutiny, he held that the Second Amendment "protects a right to carry arms for self-defense in public" and the "good reason" standard "substantially burdens" that right. RD 45 at 20, 28. He found the standard unlikely to survive strict scrutiny no matter its efficacy: "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." RD 45 at 38.

Judge Leon also found that "the balance of the equities weigh heavily in favor of granting … a preliminary injunction." RD 45 at 44. He explained that "the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" RD 45 at 40. And, he found, "[b]ecause plaintiffs are likely to prevail in showing that their Second Amendment rights are being violated, the public interest weighs heavily in favor of granting their requested injunction." RD 45 at 42.

The District promptly moved Judge Leon for an administrative stay and a full stay pending this appeal. RD 48. He has not yet ruled on the motion.

MPD reports that the injunction has already caused an immediate upswing in public-carry applications—it has received 85 applications in the 10 days since the injunction issued, in comparison to only 61 in the previous 6 months.

DISCUSSION

I. This Court Should Issue A Stay Pending Appeal To Preserve The Status Quo And Protect The Public While The Parties Litigate This Case.

The preliminary injunction bars the District from enforcing a critical element of its public-carrying regime. One year ago, when Judge Scullin granted this same relief to the *Wrenn I* plaintiffs, this Court stayed the injunction and allowed the District to enforce the law pending appeal. The standards that applied then remain applicable now, and the same result should obtain here.

Indeed, there is even more reason to stay Judge Leon's injunction because it applies to *all* public-carry applicants, not just plaintiffs, and therefore is more likely to

affect the safety of the public. It also effectively nullifies Judge Kollar-Kotelly's denial of the *Wrenn* plaintiffs' request on the same law even though, as a coordinate judge, she is equally entitled to determine who will likely prevail on the merits and whether the equities favor an injunction. A stay will temporarily resolve this internal conflict while this Court determines whether this extraordinary relief is warranted.

In determining whether to issue a stay, the Court considers whether: (1) the appellant is likely to prevail on the merits; (2) it will suffer irreparable injury; (3) a stay will work irreparable harm on others; and (4) the public interest favors a stay. *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982). "These considerations are interdependent"—"[t]he persuasiveness of [the] threatened irreparable harm is greatly diminished when its prevention will visit similar harm on other interested parties," and "the required likelihood of success will vary with the balance of other factors." *Id.*

The district court was required to consider these same factors, but it was plaintiffs who bore the burden of proof. *Va. Petroleum Jobbers v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958). And, where, as here, the relief changes the status quo rather than preserving it, this Court may well find that plaintiffs bear an even higher burden—several circuits require proponents of mandatory injunctions to demonstrate that the facts and law "clearly favor" an injunction. *Stanley v. USC*, 13 F.3d 1313, 1320 (9th Cir. 1994); *see, e.g.*, *Tom Doherty Assocs. v. Saban Entm't*, 60 F.3d 27, 34 (2d Cir. 1995); *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980);

Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976); *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301 (10th Cir. 2012). Plaintiffs cannot meet their burden under either test.

Judge Kollar-Kotelly's denial of the same injunctive relief awarded by Judge Leon will make it especially difficult for plaintiffs to defend his order in this appeal. A district court's balancing of the equities is due deference, but Judge Leon's findings are not entitled to *more* deference than those of Judge Kollar-Kotelly. And this Court has not yet had an opportunity—as it will after full briefing and argument—to rule on the complex and novel questions at the heart of plaintiffs' constitutional challenge.

As the Supreme Court explained in *Nken v. Holder*, 556 U.S. 418 (2009), "[t]he authority to hold an order in abeyance pending review allows an appellate court to act responsibly." *Id.* at 427. "A reviewing court must bring considered judgment to bear on the matter before it, but that cannot always be done quickly enough to afford relief to the party aggrieved by the order under review." *Id.* The District needs relief quickly, and a stay will give this Court time to exercise its considered judgment on the important constitutional question at issue without jeopardizing public safety.

A. The District is likely to succeed on the merits of its appeal.

The weight of authority favors Judge Kollar-Kotelly's view on the merits, and in particular her conclusion that, assuming the "good reason" standard implicates the Second Amendment, it should be measured under intermediate scrutiny. This Court

has found this test appropriate for gun registration laws because they do "not severely limit" the core Second Amendment right, *Heller II*, 670 F.3d at 1257; a ban on assault weapons because it does not "prevent a person from keeping a suitable and commonly used weapon for protection in the home," *id.* at 1262; and a ban on firearm possession by convicted criminals because, although the burden "is certainly severe, it falls on individuals who cannot be said to be exercising the core of the Second Amendment right identified in *Heller*, *i.e.*, 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home,'" *Schrader v. Holder*, 704 F.3d 980, 989 (D.C. Cir. 2013). Indeed, in *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015) ("*Heller III*"), this Court found intermediate scrutiny appropriate for the one-pistol-per-thirty-day limitation, even though the Court found that the law burdened core Second Amendment conduct. *Id.* at 280. "[T]he overwhelming majority of cases from [this Court's] sister circuits" also have "applied intermediate scrutiny to various statutes regulating firearms." *Dearth v. Lynch*, 791 F.3d 32, 39 (D.C. Cir. 2015) (Henderson, J., dissenting) (remanded for unrelated findings).

The District's "good reason" standard is not an outlier—New York, New Jersey, Maryland, and California, which make up 23 percent of this country's population, employ the same standard. The Second, Third, and Fourth Circuits all have found this law subject to nothing more rigorous than intermediate scrutiny because it does not completely prohibit the exercise of any core Second Amendment

right. *Drake*, 724 F.3d at 430; *Woollard*, 712 F.3d at 876; *Kachalsky*, 701 F.3d at 93 & n.17. The Supreme Court has denied certiorari in all three cases. *Drake v. Jerejian*, 134 S. Ct. 2134 (2014); *Woollard v. Gallagher*, 134 S. Ct. 422 (2013); *Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013). And, as no circuit holds otherwise, plaintiffs are left to rely on the "persuasive" authority of a Ninth Circuit panel decision that has been vacated pending rehearing *en banc*. RD 6-1 at 17 & n.3, 20, 24, 26, 28, 39, 41, 42, 43 (citing *Peruta v. Cty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *vacated*, 781 F.3d 1106 (9th Cir. 2015)). This authority is not sufficient to warrant preliminarily enjoining the District from enforcing its standard, crafted to follow the example of the three states whose laws were upheld by circuit courts. *See* RD 19-1 at 5, 12 & n.39.

The analyses of these circuit courts apply *a fortiori* to the District, an entirely urban jurisdiction with unique public-safety concerns. Despite this, Judge Leon disposed of these cases in a footnote, finding them 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." RD 45 at 28-29 n.21. He applied strict scrutiny, reasoning that, because "the Second Amendment protects the right to keep and bear arms *for the purpose of self-defense*," and "[t]he need for self-defense is, of course, greater *outside* the home," "it logically follows that the right to carry arms for self-defense in public lies at the very heart of the Second Amendment." RD 45 at 29-30. But this

incorrectly assumes that a "need for self-defense" is the only factor governing the scope of the right to keep and bear arms. To be sure, the Supreme Court instructs that "the inherent right of self-defense," rather than participation in a militia, is "central to the Second Amendment." *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) ("*Heller I*"). But it does not hold that an inviolable right follows *any* "need for self-defense." If it did, the Court would not have singled out as "presumptively lawful" "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places." *Id.* at 626. After all, felons and the mentally ill also may need self-defense, and there are certainly some "sensitive places"—which include government-building parking lots, *see Bonidy v. USPS*, 790 F.3d 1121, 1125 (10th Cir. 2015)—where a self-defense need may arise.

The Second Amendment "codified a *pre-existing* right." *Heller I*, 554 U.S. at 592. The Framers were practical statesmen, and the rights they codified were shaped by centuries of practical considerations, including the public safety risks inherent in the possession and use of firearms. This is not the "freestanding 'interest-balancing'" approach rejected by *Heller I*, 554 U.S. at 634, as Judge Leon suggests, RD 45 at 39 n.24. Rather, the Second Amendment "is the very product of an interest balancing by the people." *Id.* at 635. As the District demonstrated in its district court filings, the Framing-era public recognized the need for strict regulation of public carrying in cities—a huge segment of the urban population was governed by laws banning

carrying in the public concourse because that is where carrying poses the greatest public risk. RD 20 at 19-25. This interest-balancing was codified in the Second Amendment, and provides context to the words "bear arms."

The Council found the "good reason" standard necessary to protect a compelling government interest. *See* RD 19-1 at 20-22. The District offered considerable evidence supporting this finding. *See* RD 19-1 at 136-307. Under any level of scrutiny, the Council's finding is entitled to deference. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 29, 33 (2010); *Schrader*, 704 F.3d at 990. This Court is therefore unlikely to adopt Judge Leon's categorical rejection of this evidence, RD 45 at 38, and instead find—as Judge Kollar-Kotelly did—that the merits analysis favors denial of a preliminary injunction.

Plaintiffs have brought a novel constitutional challenge to a key provision in the District's licensing scheme, and they bore the burden to show a likelihood of success on the merits—meaning success after consideration of a full record. They have not done so. At minimum, as this Court has explained, for a stay pending appeal "[i]t will ordinarily be enough that the [appellant] has raised serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation and thus for more deliberative investigation.'" *Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986). The District has raised such substantial questions here.

B. The balance of the equities favors staying the preliminary injunction—and the status quo—during this appeal.

The balance of the equities strongly favors staying the injunction—thereby preserving the status quo—pending the District's appeal of the preliminary injunction. *Ambach*, 686 F.2d at 979. The District will suffer irreparable harm if it must issue licenses in the absence of "good reason," while plaintiffs affirmatively deny having any particularized need to carry a handgun in public while this appeal is pending. Moreover, given the District's strong likelihood of success on appeal, it would be entitled to a stay regardless. *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985).

1. Absent a stay, the District and public will suffer irreparable harm.

The District will be irreparably harmed, and the public interest obstructed, if a stay is denied. *Cf. Nken*, 556 U.S. at 435 (recognizing that "[t]hese factors merge when the Government" is opposing a stay). "'[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.'" *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers); *see also Strange v. Searcy*, 135 S. Ct. 940, 940 (2015) (Thomas, J., dissenting from denial of stay) ("When courts declare state laws unconstitutional and enjoin state officials from enforcing them, our ordinary practice is to suspend those injunctions from taking effect pending appellate review."). District residents, through their elected representatives, have decided that public carrying without "good reason" is inconsistent with public safety. This decision was based on empirical studies,

expert testimony, and the reasoned analysis of other state legislatures and courts that have upheld those legislative judgments. RD 19-1 at 7-22. This Court should defer to those findings. *Heller II*, 670 F.3d at 1258-59.

The Council primarily relied on a 2014 Stanford University study led by Professor John Donohue III, an economist, legal scholar, and leading empirical researcher, who explained that "[t]he totality of the evidence based on educated judgments about the best statistical models suggests that right-to-carry laws"—like what the injunction requires—"are associated with substantially higher rates of aggravated assault, rape, robbery and murder." RD 19-1 at 20; *see* RD 19-1 at 136-243, Donohue, *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy* (2014). The District also cited studies showing that "shall-issue laws have resulted, if anything, in an increase in adult homicide rates," RD 19-1 at 244, Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 Int'l L. Rev. L. & Econ. 239, 241(1998); that "[f]or robbery, many states experience increases in crime" after enacting right-to-carry laws, RD 19-1 at 265, Dezhbakhsh & Rubin, *Lives Saved or Lives Lost? The Effects of Concealed-Handgun Laws on Crime*, 88 Am. Econ. Rev. 468, 473 (1998); and that gun-related deaths are over four times higher in jurisdictions with lax (or non-existent) controls on public carrying, Isenstein, *The States With The Most Gun Laws See The Fewest Gun-Related Deaths*, National Journal (Aug. 28,

2015), *available at* http://www.nationaljournal.com/s/53345/states-with-most-gun-laws-see-fewest-gun-related-deaths. The District also cited the expert testimony relied on by the Fourth Circuit in *Woollard*, explaining the many ways public carrying increases the risk to the public. 712 F.3d at 879-80. Judge Leon disregarded this evidence, finding that the injunction "would have no effect whatsoever on a veritable gauntlet of other licensing requirements." RD 45 at 43. But many "right-to-carry" states have similar licensing requirements; they nevertheless are associated with higher rates of violent crime. *See* RD 19-1 at 136-243.

The "good reason" standard is critically important to the public safety of those who live in, work in, and visit the District. It is the heart of the plaintiffs' challenge and—as *Kachalsky*, *Woollard*, and *Drake* demonstrate—is the essential component of a scheme crafted to balance public safety with the needs of individuals particularly at risk. Without this standard, the District becomes a "right-to-carry" regime, despite the Council's legislative judgment, based on empirical studies, that such regimes are "associated with substantially higher rates of aggravated assault, rape, robbery and murder." RD 19-1 at 20. The district court was not free to disregard these harms.

2. Even if plaintiffs' irreparable harm is presumed, it carries little weight because they cannot claim a likelihood of tangible injury.

Although the District is the moving party here, it seeks only to maintain the status quo—a status altered by the preliminary injunction. This Court should therefore take particular note of the plaintiffs' inability to demonstrate that they will

suffer tangible harm if the status quo is maintained while this appeal is pending. *See CFGC v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) ("The moving party must show '[t]he injury complained of is of such imminence that there is a "clear and present" need for equitable relief to prevent irreparable harm.'").

The district court found that "the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'" RD 45 at 40. But even assuming this is so as a general matter, such "presumed" harm does not weigh heavily in a balance of the equities. Rather, when no *tangible* harm is imminent, "[i]t is the[] other prongs"—"a substantial likelihood of success on the merits, that the injunction would not substantially injure other interested parties, and that the public interest would be furthered by the injunction"—"that will ultimately determine" whether the relief is warranted. *CFGC*, 454 F.3d at 304; *see id.* at 298-99 (distinguishing tangible from intangible harm in Establishment Clause context). A claim of *intangible* harm flowing from an alleged constitutional violation does "not … in any way lessen[] the burden for" the moving party. *Id.* "It merely focuses greater attention on the three other factors that indisputably enter into the preliminary injunction determination." *Id.*

If plaintiffs' injury can be presumed, it is intangible. Their standing to challenge the "good reason" standard rests on their claim that they cannot demonstrate that they are likely to suffer tangible harm from denial of a public-carry license. RD 1 at 8, 9. But it is "the inherent right of self-defense" that is "central to the Second

Amendment." *Heller I*, 554 U.S. at 628. If no occasion arises where a handgun is needed for self-defense, its absence cannot cause tangible harm. The balance of the equities should thus focus on the other three factors: the likelihood of success on the merits, the harm the District will suffer if it cannot enforce this critical public safety law, and the public interest, which is aligned with the District's. As Judge Kollar-Kotelly explained, the public's interest in enforcing this important law outweighs plaintiffs' intangible interest in obtaining a public-carry license before a final determination that the law infringes on a constitutional right. *Wrenn* RD 54 at 28-30.

Moreover, the public interest favors protecting the integrity of the district court, in which two coordinate judges have issued conflicting orders regarding the District's ability to enforce this critical public safety law while litigation is pending. A stay would eliminate the ill effects of this internal conflict while this Court takes the time to consider the merits of this novel and important constitutional question.[1]

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[1] At minimum, the Court should stay the injunction as it applies to non-plaintiff applicants, as "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). It also should stay the provision that the District "modify and reissue, forthwith, all … concealed carry license application materials to be consistent with this Order," RD 46 at 2, which could harm applicants who *can* demonstrate "good reason." If the application does not invite the applicant to demonstrate "good reason" and the District prevails in this appeal, every new license will be invalid—even those issued to people who *do* have "good reason" to carry but did not demonstrate it because of Judge Leon's injunction. The District can comply with both the letter and the spirit of the injunction without modifying its application materials.

II. This Court Should Enter An Immediate Administrative Stay While It Considers The District's Motion To Stay Pending Appeal.

The District also requests that this Court immediately issue an administrative stay while it considers whether to grant a full stay pending appeal. Granting an administrative stay would minimize unnecessary disruption and confusion. Absent an administrative stay, the District will likely be forced to issue licenses to those who lack "good reason" while its motion to stay is pending before this Court. Thus, absent an administrative stay, the District may have to withdraw licenses that need never have been issued. Given that the proceedings on the District's motion to stay likely will be brief, the requested relief is warranted.

III. After It Enters A Stay, This Court Should Hold This Appeal In Abeyance Pending A Decision In *Wrenn II*.

If this Court enters a stay, the District also moves the Court to hold this appeal in abeyance pending a decision in *Wrenn II*. Plaintiffs oppose this request. This appeal hinges on two central questions: whether plaintiffs are likely to prevail on the merits of their constitutional challenge and whether the equities favor barring enforcement of the "good reason" standard while their lawsuit is pending. *Wrenn II* will likely answer at least one of these questions, and may well answer both. No matter how *Wrenn II* is decided, it will substantially affect the outcome of this appeal.

Holding this appeal in abeyance would allow *Wrenn II* to proceed at its expedited pace, as this Court has ordered. It also would conserve party and judicial

resources and prevent the possibility of conflicting rulings. This Court has previously held appeals in abeyance, over opposition, when they are likely to be affected by rulings in earlier-filed, pending appeals. *E.g.*, *AFGE v. Vilsack*, No. 15-5259, 12/9/15 Order.

Plaintiffs waited until mid-December 2015 to file their lawsuit and seek a preliminary injunction, almost a year after the *Wrenn* plaintiffs filed suit and more than a year after the challenged law was enacted. Then, they declined to agree that this case and *Wrenn* should proceed together, incorrectly characterizing the two cases as not being "related" because they "ha[ve] different plaintiffs." RD 1-1 at 4. (The district court's rules actually deem civil cases related where, among other things, they "involve common issues of fact" or "grow out of the same event or transaction"—regardless of whether they have different plaintiffs. LCvR 40.5(a)(3).) *Wrenn II* is currently in briefing and should be decided before this appeal. Moreover, because the *Grace* case can proceed to final judgment in the district court without regard to what happens in this Court, plaintiffs here should suffer no meaningful prejudice from having this appeal held in abeyance should this Court grant a stay. Thus, assuming a stay is entered, this Court should hold this case in abeyance pending a decision in *Wrenn II.*

CONCLUSION

This Court should enter an immediate administrative stay while it considers this motion. It should then enter a full stay pending appeal and hold this appeal in abeyance pending a decision in *Wrenn II*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 27, 2016, this motion was served by hand, by email, and through the Court's ECF system, to:

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/s/ Holly M. Johnson
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