IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREGORY T. ANGELO, ET AL.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 22-cv-1878 RDM
	)	
DISTRICT OF COLUMBIA, ET AL.	)	
	)	
Defendants.	)	
_____	)	

OPPOSITION TO MOTION FOR EXPEDITED DISCOVERY

Plaintiffs, by counsel, oppose Defendants' motion for expedited discovery (ECF Doc. 12), and state as follows.

Defendants argue the need for expedited discovery on standing and irreparably harm. ECF 12.1 at 2-3. Standing in this case is clear and irreparable harm is presumed where a violation of a constitutional right is pled. At best, Defendants' interrogatories go to the issue of the extent of damages Plaintiffs may recover once this case reaches the damages stage, not to whether they have made the case for issuance of a preliminary or permanent injunction.

Plaintiffs' standing in this case is clear from the Complaint. Plaintiffs hold licenses to carry concealed handguns in the District. The regulation at issue plainly applies to them. Plaintiffs' have averred under oath that they are regular users of the Metro system in DC. Plaintiffs have averred under oath that they would carry their concealed handguns on the Metro system in the District if DC Code Section 7-2509.07(a)(6) is enjoined. *See* ECF Doc. 6.2-6.5. That is all the showing they need to make. The interrogatories the District propounds may go to the issue of the ultimate damages Plaintiffs have incurred and for which the District is liable as a result of the Defendants' violation of Plaintiffs' Second Amendment rights, but not as to their standing. Plaintiffs need not

even be riders of the Metro system at all to have standing. They would have standing if they stated they would ride the Metro, but avoid doing so in light of DC Code Section 209.07(a)(6), because they cannot legally carry their concealed firearm on the system in order to protect themselves from a possible lethal force confrontation. The burden to establish standing rest on Plaintiffs and they have plainly met that burden.

Nor are any of the interrogatories relevant or material to the issue of irreparable harm. Where the defendant's actions violate the plaintiff's constitutional rights the requirement of "irreparable injury" is satisfied. As the D.C. Circuit has explained, "[s]uits for declaratory and injunctive relief against the threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (brackets omitted) (hereinafter *"Gordon"*) (quoting *Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998)). Thus, "although 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." *Id.* (brackets omitted) (quoting *Davis*, 158 F.3d at 1346). *See also Berg v. Glen Cove City School District*, 83 F.Supp. 651 (E.D.N.Y. 1994); *Doe v. Shenandoah County School Board*, 737 F.Supp. 913 (W.D.Va. 1990); *Joynes v. Lancaster*, 553 F.Supp. (M.D.N.C. 1982). The Supreme Court in the First Amendment context made this clear in *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") *See Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (applying *Elrod* to Second Amendment violations). Defendants make no showing why this Court should ignore the weight of this precedent.

Review of Defendants' proposed interrogatories confirms this analysis. Interrogatory 1 seeks Plaintiffs to identify their employment (if employed) and the methods used to travel to and from their places of employment for the last five (5) years. This interrogatory bears perhaps on the issue of damages – when we get there – but not on prospective relief. Of course, employment is not the only reason someone would ride public transportation so even if a Plaintiff walked to work for the past five years the answer to this interrogatory would not bear on whether he actually used the Metro system, which all four Plaintiffs have averred under oath that they do.

The same analysis applies to interrogatory 2 which asks Plaintiffs to rank, the top three means used to travel to and from employment over the past five years and the cost thereof. Possibly relevant to damages, but not to prospective relief. Apparently, Defendants seek to determine if Plaintiffs can get to work other than by using the Metro. *See* ECF 12.1 at 3 ("whether they could travel by other means"). The existence of available alternative transportation is irrelevant. In essence DC is saying if you do not like the public transportation carry ban, ride something else or get out and walk. That argument could be used to shield any purported sensitive places restriction from judicial review. The 7th Circuit rejected Chicago's similar argument in *Ezell v. Chicago,* 651 F.3d at 694-700, that gun owners did not show irreparable injury by a ban on ranges in Chicago because they could go out of the city to practice with their firearms. The Court pointed out that

> In the First Amendment context, the Supreme Court long ago made it clear that "'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Schad v. Borough of ML Ephraim*, 452 U.S. 61, 76-77, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (quoting *Schneider v. State of New Jersey*, 308 U.S. 147, 163, 60 S.Ct. 146, 84 L.Ed. 155 (1939)).

Id. at 697. *See also New York State Rifle & Pistol Association v. City of New York,* 140 S.Ct. 1525, 1540-44 (Alito J., dissenting).

Moreover, like *Ezell*, this case involves a facial challenge to the statute.

> In a facial constitutional challenge, individual application facts do not matter. Once standing is established, the plaintiff's personal situation becomes irrelevant. It is enough that "[w]e have only the [statute] itself" and the "statement of basis and purpose that accompanied its promulgation." *Reno v. Flores*, 507 U.S. 292, 300-01, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *see also* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1238 (2010) ("[F]acial challenges are to constitutional law what res ipsa loquitur is to facts — in a facial challenge, *lex ipsa loquitur*: the law speaks for itself."); David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. 41, 58 (2006) ("A valid-rule facial challenge asserts that a statute is invalid on its face as written and authoritatively construed, when measured against the applicable substantive constitutional doctrine, without reference to the facts or circumstances of particular applications."); Mark E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 387 (1998) ("[A] valid rule facial challenge directs judicial scrutiny to the terms of the statute itself, and demonstrates that those terms, measured against the relevant constitutional doctrine, and independent of the constitutionality of particular applications, contains a constitutional infirmity that invalidates the statute in its entirety.").

Ezell v. City of Chicago, 651 F.3d at 697-98.

Interrogatory 3 asks the Plaintiffs to estimate how many times they have ridden public transportation in the District of Columbia, including the Metro system, on a monthly basis, for each month during the years 2019 through and including 2022 to date. The answer to that interrogatory – putting aside whether anyone can reliably estimate how many times they did something ranging back to 2019 – is immaterial. Whether they ride public transportation a lot or a little is not the issue with respect to irreparable harm. The irreparable harm is that whenever they ride the Metro system, their Second Amendment right to be armed in the event of confrontation is abridged by DC Code 7-2509.07(a)(6).

Nor do Interrogatories 4 or 5, asking whether the Plaintiffs have been assaulted on public transportation, or interrogatory 6, asking whether Plaintiffs have been the victim of a violent crime, without regard to whether they were using public transportation, bear on irreparable injury in this case. The District apparently is seeking to have the Court make a judgement whether the Plaintiffs

actually need to be armed on public transportation. One would have thought that *Wrenn*, 864 F.3d 650 (D.C. Cir. 2017), and *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. __, Case No. 20-843, slip op. (June 23, 2022), resolved the question of whether it is appropriate for the court to evaluate whether the Plaintiffs actually need the right to be armed for confrontation. The irreparable injury is the infringement of their Constitutional right to be armed *in the event* of a violent confrontation. Past attacks against Plaintiffs again may be relevant, at least in terms of interrogatory 4 and 5 to the damages for which the District is liable when we get to that point in this litigation, but they are irrelevant to the continuing injury Plaintiffs face in being denied the ability to carry on public transportation for self-protection when and if the need so arises.

Plaintiffs hope they will never be in a situation where they must use their concealed carry handgun to protect themselves; however, they know that a potentially lethal attack could happen anywhere. As one noted firearms trainer who reports that he has had more than 60 students involved in a gun fight[1] pointed out recently, "It is not the odds we are concerned with; it is the stakes." Hayes, *Consistency in Concealed Carry An Interview with Tom Givens*, Journal of Armed Citizens Legal Defense Network (July 2022), available at https://armedcitizensnetwork.org/tom-givens-on-consistency-in-concealed-carry. Plaintiffs will continue to suffer irreparable injury for as long as the regulation remains enforceable. Every time they take the Metro or decide against taking the Metro because of D.C. Code Section 7-2509.07(a)(6) disarms them, they suffer this unconstitutional restriction on their Second Amendment rights as a new and substantial injury; and

[1] Givens, "Finding Relevant Training," published in Ayoob, ed., *Straight Talk on Armed Defense, What the Experts Want You to Know*, p. 134 (Gun Digest Books 2017) (Author had 65 students involved in gun fights. Those who were armed survived in most cases without injury. The three who were unarmed were murdered.)

the ramifications should they be attacked while traveling on public transportation are potentially catastrophic.

Because the proposed discovery is irrelevant to any question bearing on the decision to grant the requested preliminary or permanent injunction, the request for expedited discovery should be denied.

Respectfully submitted

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Dated: July 18, 2022

CERTIFICATE OF SERVICE

I, George L. Lyon, Jr., a member of the bar of this court, certify that I served the foregoing document on all counsel of record for Defendants through the court's ECF system, this 18th day of July, 2022.

/s/ George L. Lyon, Jr., DC Bar 388678