[ARGUED SEPTEMBER 20, 2016; DECIDED JULY 25, 2017]

Nos. 16-7025, 16-7067

In the United States Court of Appeals for the District of Columbia Circuit

Brian Wrenn, et al., *Plaintiffs-Appellants*, v. District of Columbia, et al., *Defendants-Appellees*.	On Appeal from the United States District Court for the District of Columbia, No. 1:15-cv-162-CKK
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

Joint Response of Brian Wrenn, et al., and Matthew Grace, et al., to Petition for Rehearing En Banc

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES IN NO. 16-7025

A. PARTIES AND AMICI

Plaintiffs below were Brian Wrenn, Joshua Akery, Tyler Whidby, and Second Amendment Foundation, Inc. ("SAF"). Wrenn, Whidby, and SAF are Appellants before this Court.

Defendants below were Cathy Lanier and the District of Columbia. Peter Newsham has succeeded Cathy Lanier as the District of Columbia's Police Chief. Chief Newsham and the District of Columbia are Appellees before this Court.

Amici for Plaintiffs-Appellants before this Court are Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, Conservative Legal Defense and Education Fund, and Heller Foundation. Amici for Defendants-Appellees before this Court are DC Appleseed Center for Law & Justice, DC for Democracy, DC Vote, The League of Women Voters of the District of Columbia,Vincent C. Gray, Anthony A. Williams, Brady Center to Prevent Gun Violence, Maryland, California, Connecticut, Hawaii, Illinois, Iowa, Massachusetts, New York, Oregon, Washington, and Everytown for Gun Safety.

Amici in the District Court were Everytown for Gun Safety and Brady Center to Prevent Gun Violence.

B. RULINGS UNDER REVIEW

The ruling under review is the Memorandum Decision and Order of the United States District Court for the District of Columbia, per the Hon. Colleen Kollar-Kotelly, Dist. Ct. Dkt. 54, entered March 7, 2016, denying Plaintiffs-Appellants' motion for preliminary injunction. The decision, reported at 167 F. Supp. 3d 86, is printed at Joint Appendix ("JA") 379.

C. RELATED CASES

This case has been before this Court, No. 15-7057. A related case is pending before this Court: *Grace* v. *District of Columbia*, D.C. Cir. No. 16-7067.

This case was also related to *Palmer* v. *District of Columbia*, U.S. Dist. Ct., D.D.C. No. 09-1482-FJS. In *Palmer*, which involved the same Defendants, Plaintiff SAF, and Plaintiff SAF's members, the District Court held that individuals have a Second Amendment right to carry handguns in public, in Washington, D.C., for self-defense. *Palmer* v. *District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014). The District Court enjoined the City's handgun carrying prohibition pending adoption of a constitutional licensing system. Defendants appealed from that judgment to this Court, No. 14-7180, but dismissed their appeal.

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Second Amendment Foundation, Inc., ("SAF") has no parent corporations. No publicly traded company owns 10% or more of its stock.

SAF, a tax-exempt organization under § 501(c)(3) of the Internal Revenue Code, is a non-profit educational foundation incorporated in 1974 under the laws of the State of Washington. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing throughout the United States.

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES IN NO. 16-7067

A. PARTIES AND AMICI

Matthew Grace and Pink Pistols were Plaintiffs below and are Appellees in this Court. The District of Columbia and Metropolitan Police Department Chief Cathy Lanier were Defendants below. Peter Newsham has succeeded Cathy Lanier as the Metropolitan Police Department Chief. Chief Newsham and the District of Columbia are Appellants in this Court.

Amici curiae for Appellees include the National Rifle Association of America, Inc., the Western States Sheriffs' Association, the International Law Enforcement Educators and Trainers Association, the Law Enforcement Legal Defense Fund, the Law Enforcement Action Network, the Law Enforcement Association of America, the CRPA Foundation, Gun Owners of America, Inc., the Gun Owners Foundation, the U.S. Justice Foundation, the Heller Foundation, the Conservative Legal Defense and Education Fund, the Colorado Police Protective Association, the International Association of Law Enforcement Firearms Instructors, and the States of Arizona, Alabama, Arkansas, Indiana, Missouri, Montana, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, Wisconsin, and Wyoming.

Amici Curiae for Appellants include the D.C. Appleseed Center for Law and justice, the Brady Center to Prevent Gun Violence, Everytown for Gun Safety,

D.C. for Democracy, D.C. Vote, the League of Women Voters of the District of Columbia, Anthony A. Williams, Vincent C. Gray, and the States of Maryland, California, Connecticut, Hawaii, Illinois, Iowa, Massachusetts, New York, Oregon, and Washington.

Charles Nichols filed a Notice to Participate as amicus curiae in support of neither party, but he has not filed an amicus brief.

B. RULINGS UNDER REVIEW

The ruling under review is the Memorandum Opinion and Order entered by the United States District Court for the District of Columbia, Judge Richard J. Leon, on May 17, 2016. The Opinion and Order may be found on pages 530 and 576, respectively, of the Joint Appendix, Doc. 45, and the Opinion has been published in the Federal Supplement at 187 F. Supp. 3d 124 (D.D.C. 2016).

C. RELATED CASES

This case has not previously been heard on appeal before either this court or any other court. Counsel is aware of no related cases within the meaning of Circuit Rule 28(a)(1)(C). The appeal currently pending before this Court in *Wrenn v. District of Columbia*, No. 16-7025 (D.C. Cir.), was argued before the same panel and on the same day as this case, that panel decided both cases by a joint opinion entered on the same day, and this Court has instructed that the parties in the two cases file a joint response to the District's petitions for en banc rehearing in both

cases. But the two cases have not been consolidated, and they are not related cases within the meaning of Circuit Rule 28(a)(1)(C) because they do not involve substantially the same parties.

Dated: September 15, 2017

/s/ Charles J. Cooper
Charles J. Cooper

Counsel for Plaintiffs-Appellees in No. 16-7067

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 company owns a 10% or greater ownership interest in it, and no members of the association have issued shares or debt securities to the public.

Dated: September 15, 2017

/s/ Charles J. Cooper
Charles J. Cooper

Counsel for Plaintiffs-Appellees in No. 16-7067

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* Authorities upon which we chiefly rely are marked with asterisks.

Other

GLOSSARY

NRC—National Research Council of the National Academy of Sciences

Op.—Opinion, *Wrenn v. District of Columbia*, Nos. 16-7025, 16-7067 (D.C. Cir. July 25, 2017)

PFR—Petition of D.C. & Metro. Police Dep't Chief Peter Newsham for Rehearing En Banc (Aug. 24, 2017)

INTRODUCTION

When the People enshrined in the Constitution the right to "carry weapons in case of confrontation" for the "core lawful purpose of self-defense," *District of Columbia v. Heller*, 554 U.S. 570, 592, 630 (2008), they did not leave the freedom to exercise that right at the mercy of the very government officials whose hands they sought to bind. "The very enumeration of the right 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." *Id.* at 634. But the District of Columbia and its officials (the "District") assert *precisely* this power: to decide, on a case-by-case basis, whether an applicant for a license to carry firearms has, in their estimation, shown a "proper reason" that a license should issue. D.C. CODE § 22-4506(a).

Worse still, the District has determined that self-defense—the "central component" of the Second Amendment right—is not a sufficiently proper reason. *Heller*, 554 U.S. at 599. It has thus struck a balance *directly contrary* to the balance struck by the People of this Nation when they determined to codify the right to keep and bear arms in the Constitution. *See id.* at 635.

And in seeking to avoid meaningful judicial review of its action, the District argues that federal courts may do no more than acquiesce in the City Council's policy choices. But whatever its full scope may be, the Second Amendment does not confirm the District's free hand in this area. Nor does the Second Amendment

require this Court to approve or strike down laws based on whatever policy appears most sensible. Rather, the Second Amendment confirms a *right*—imposing real limits on the District's actions, and obligating courts to independently evaluate whether particular ordinances exceed the right's contours, even where courts might have hesitated to ratify the constitutional text.

Reasoning that the right to carry firearms in public "falls within the core of the Second Amendment's protections" and that the District's ask-permission-first restriction "destroys the ordinarily situated citizen's right to bear arms," a panel of this Court held the "proper reason" restriction invalid and ordered that it be permanently enjoined. Opinion at 19, 27, 31 (July 25, 2017) ("Op."). In its petition asking the en banc Court to rehear the case, the District charges that this opinion "conflict[s] with binding precedent." Petition of D.C. & Metro. Police Dep't Chief Peter Newsham for Rehearing En Banc at 1 (Aug. 24, 2017) ("PFR"). Not so. Although the District contends that the panel "failed to conduct its own historical analysis" to determine "the scope of the Second Amendment" as required by the Supreme Court's decision in *Heller*, *id.* at 12, the panel spent pages parsing the history of the Amendment—including each of the pieces of historical evidence relied upon by the District—ultimately concluding that "history matters, and here it favors the plaintiffs." Op. 13.

The District briefly suggests that the panel opinion also conflicts with this Court's precedents embracing the traditional "tiers of scrutiny" for ordinary Second Amendment challenges, but this supposed conflict proves illusory, too. In fact, as the panel recognized, *see id.* at 28, this case falls within an exception to this ordinary rule that this Court's previous case law foresaw and explicitly acknowledged: where a law infringes on Second Amendment rights so severely that it is akin to "the total prohibition of handguns at issue [in *Heller*]," this Court has instructed that it is to be treated categorically, not under one "of the familiar constitutional 'standards of scrutiny.' " *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1266 (D.C. Cir. 2011).

Instead, it is the District's position that conflicts with binding precedent. Time and again, it resorts to arguments—about its "unique" status, or about the imperatives of public safety—that were presented to, and rejected as irrelevant by, the Supreme Court in *Heller*. And the true justification of the challenged law—that by *reducing the number of firearms* in public, the government can indirectly increase public safety—cannot be squared with this Court's refusal to allow the government to impose a "quota" on Second Amendment conduct. *Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 280 (D.C. Cir. 2015).

The District spends a great deal of effort attempting to show that the panel's decision "will increase crime and cost lives." PFR 2. That argument is refuted by

the very study on which the District "primarily relie[s]," *id.* at 6, which 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." Abhay Aneja, John J. Donohue III, & Alexandria Zhang, *The Impact of Right to Carry Laws and the NRC Report* 80 (Dec. 1, 2014) (unpublished manuscript) (emphasis added) ("Donohue Paper"), *available at* http://goo.gl/UOzB9H.

But in any event, this Court has heard these arguments before. After a panel of this Court struck down the District's ban on handgun possession in *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), the District petitioned for en banc rehearing, arguing that its ban was necessary to "protect citizens and law-enforcement officers from gun violence and ultimately save lives." Petition for Rehearing *En Banc* for the District of Columbia 2, *Parker*, No. 04-7041 (D.C. Cir. Apr. 9, 2007). Consistent with its longstanding view that "it is only in the rarest of circumstances when a case should be reheard *en banc*," *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1244 (D.C. Cir. 1987) (Edwards, J., concurring in the denial of rehearing en banc), this Court denied the petition, *Parker*, No. 04-7041 (May 8, 2007). The Supreme Court, of course, granted certiorari and ultimately affirmed. *Heller*, 554 U.S. 570.

There is no doubt that this case—involving the latest in the District's series of attempts to curtail the Second Amendment rights of its citizens—raises

important questions. But those questions are no more important than the underlying issue of whether the Second Amendment even protects an individual right, which this Court declined to rehear en banc in *Parker*. And the panel disposed of those questions in the only way consistent with the binding precedent in *Heller*. The District may doubt the wisdom of the Supreme Court's case law, but that is an issue that it must present to that body, not this one.

STATEMENT

The law enjoined by the panel is the District's third attempt to prevent its citizens from exercising their "right … to … bear arms." U.S. CONST. amend. II. It generally banned the possession of handguns—including in the home—from 1976 until the Supreme Court struck that ban down in *Heller* as flatly unconstitutional. The District responded to *Heller*'s invalidation of its ban on *keeping* arms by enacting a new ban on *bearing* them. That ban was challenged in 2009, and the U.S. District Court for the District of Columbia struck it down too. *Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 183 (D.D.C. 2014).

The District replaced the ban invalidated in *Palmer* with the law at issue in this case. There can be no doubt that its aim in crafting these new restrictions was to achieve through legislative draftsmanship what it had been unable to defend in court: restricting the number of law-abiding citizens allowed to exercise their constitutional right to bear arms to the minimum number possible. Indeed, one

prominent Councilmember condemned *Palmer* during hearings on the new law as a "draconian, poorly defined, messy, destructive, constitutional decision," and noted that "there's no question" that "everyone on this council … want[s] to restrict the right of people to carry handguns in the District of Columbia." *Hearing on Bill 20-930 Before the Comm. on the Judiciary & Pub. Safety* at 45:57 (Nov. 25, 2014) (statement of Tommy Wells, Chairman) ("*Hearing on Bill 20-930*").[1]

The law the District enacted provides that "[n]o 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). Chief Newsham "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). The law elsewhere makes clear that "good reason to fear injury … at a minimum require[s] … 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). Similarly, "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

[1] A video of Chairman Wells' remarks is available at http://goo.gl/d2zv0p.

applicant's person." *Id.* § 7-2509.11(1)(B). And according to rules issued by the Police Department, "[t]he fact that a person resides in or is employed in a high crime area shall not by itself establish a good reason to fear injury to person or property for the issuance of a concealed carry license." D.C. Mun. Regs. tit. 24, § 2333.4.

ARGUMENT

I. The Panel Faithfully Applied Supreme Court and Circuit Precedent.

The District contends that en banc rehearing is necessary because the panel decision conflicts with "the Supreme Court's decision in *Heller I* and this Court's decision[ ] in … [*Heller II*]." PFR 12. Neither suggestion is correct.

a. "The majority misinterprets the Supreme Court's decision in [*Heller*]," the District says, because it "failed to conduct [a] historical analysis" into "the historical scope of the right codified in the Second Amendment." *Id.* at 2, 12. That is false, as discussed below. But more fundamentally, the District's framing of the issue errs at the outset, for it entirely ignores the principal determinant of the Amendment's scope: *its text*.

In *Heller*, the District argued that "bear Arms," as used in the Second Amendment, "refers idiomatically to using weapons in a military context." Br. for Pet'rs at *16, *Heller*, 554 U.S. 570 (No. 07-290) ("*Heller* Br."). The Supreme Court disagreed, defining "bear Arms" to include the carrying of arms for

individual self-defense and adding that "it in no way connotes participation in a structured military organization." *Heller*, 554 U.S. at 584. The District now ignores its previous litigation over the meaning of "bear Arms," but that effort's outcome remains controlling nonetheless.

Ignoring *Heller*'s textual holding the District moves straight to "historical analysis"—which, it says, the panel majority "failed to conduct," and which, on its telling, "demonstrates that public carrying has never been on equal legal footing with home possession." PFR 12, 15. Both parts of that argument are wrong. The panel in fact conducted a thorough historical analysis, carefully considering each of the District's purported pieces of historical evidence. It correctly concluded that "history matters, and here it favors the plaintiffs." Op. 13.

The Second Amendment's obvious textual applicability to public arms bearing, the panel held, "is reinforced by the history that *Heller I* deems essential." *Id.* at 11. "Most of the relevant nineteenth-century cases, for example, assume the importance of carrying as well as possessing." *Id.* at 12 (citing *Andrews v. State*, 50 Tenn. 165, 187 (1871); *Cockrum v. State*, 24 Tex. 394, 403 (1859); *State v. Chandler*, 5 La.Ann. 489 (1850); *Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Reid*, 1 Ala. 612, 616-17 (1840); *Johnson v. Tompkins*, 13 F. Cas. 840, 852 (C.C. Pa. 1833); and *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 93 (1822)). And this

interpretation is likewise demanded by its central, historic purpose—self-defense—because "the need for that might arise beyond as well as within the home." Op. 11

After carefully considering the District's two principal pieces of evidence—"Northampton laws and surety laws," *id.* at 13—the panel concluded that they could not bear the weight the District would place upon them. Whatever the original meaning of the Statute of Northampton in 1328, "by the time of the Founding, the 'preexisting right' enshrined by the [Second] Amendment had ripened to include carrying more broadly than the District contends based on its reading of the 14th-century statute." *Id.* at 15. That reading of Northampton (and the Northampton-analogues later adopted in America), the panel reasoned, is compelled by the works of "[e]arly commentators"—such as James Wilson and William Hawkins—whose influential treatises "spell out what early cases imply: the mature right captured by the Amendment was not hemmed in by longstanding bans on carrying in densely populated areas." *Id.* at 16-17.

Further, the panel reasoned that the surety-style laws Defendants cited—which required, in limited circumstances, that citizens post a bond before carrying arms publicly if another citizen reasonably felt threatened by the arms-bearing—also failed to support the District. To begin, "surety laws … only burdened someone reasonably accused of posing a threat," and even then they did not apply "if *he* needed self-defense." *Id.* at 18. Moreover, these laws at most imposed small

"civil burdens," not "criminal penalt[ies]," and they thus provide "poor evidence of limits on the Amendment's scope." *Id.* (citing *Heller*, 554 U.S. at 633-34).

Moreover, as the panel concluded, the District's reading of history is refuted by *Heller* itself, where the Supreme Court squarely held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. Further, the Court extensively cited and relied upon *Nunn v. State*, a case that "struck down a ban on carrying pistols openly" under the Second Amendment. *Id.* at 612. Indeed, the bulk of *Heller*'s textual and historical analysis treats with the Second Amendment right *to bear* arms, rather than the right to keep them. *See id.* at 584-91. And finally, *Heller*'s own historical analysis squarely refutes the District's reading of Northampton, by interpreting that medieval law as doing no more than "prohibiting the carrying of 'dangerous and unusual weapons,' "—weapons that did not constitute "arms" within the meaning of the Second Amendment. *Id.* at 625, 627. By contrast, *Heller* makes clear that firearms "in common use" for lawful purposes—the "arms protected by the Second Amendment"—were not subject to that statute. *Id.* at 623-24.

The District cites Judge Posner's decision in *Moore v. Madigan* for the proposition that *Heller* does not "address[ ] the question whether the Second Amendment creates a right of self-defense outside the home." 702 F.3d 933, 935

(7th Cir. 2012). But *Moore* refutes the District's reading of *Heller*. For as that decision also noted, "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home," and to "ignore the implication of [that] analysis," by confining the Second Amendment right within the home, would be "to repudiate the Court's historical analysis. That [a lower court] can't do." *Id.* at 935-36.

b. The District also suggests that the panel decision conflicts with this Circuit's own precedent, apparently because it invalidated the District's "proper reason" requirement categorically. PFR 12. But here again, the panel's disposition follows directly from the very decisions relied upon by the District.

To be sure, *Heller II* concluded that "restriction[s] *significantly less severe* than the total prohibition of handguns at issue [in *Heller*]" should be assessed under "the familiar constitutional 'standards of scrutiny.' " 670 F.3d at 1266 (emphasis added). But this careful language clearly implies that for laws that are *not* "significantly less restrictive" than those in *Heller*, the Supreme Court's categorical approach governs. *Id.* at 1267. As the panel recognized, "this caveat … was in fact required by *Heller I*'s example." Op. 28, There, the Supreme Court struck down the District's handgun ban categorically, 554 U.S. at 634-35, an approach based in part on the decisions striking down restrictions on carrying firearms in *Nunn*, 1 Ga. at 251, and *Andrews*, 50 Tenn. at 187—restrictions the

Court characterized as comparably "severe" to the District's handgun ban, *Heller*, 554 U.S. at 629.

Here, the District's draconian "proper reason" restriction is on a par with the ban struck down in *Heller*, not "significantly less restrictive" than it. *Heller II*, 670 F.3d at 1267. That is so because "the Second Amendment protects an individual right of responsible, law-abiding citizens to defend themselves," and this protection "for law-abiding citizens *as a rule* … must secure gun access at least for each *typical* member of that class." Op. 24, 25. The District's law is thus "necessarily a total ban on most D.C. residents' right to carry a gun in the face of ordinary self-defense needs," since "by design" that restriction "looks precisely for needs 'distinguishable' from those of the community." *Id.* at 27. The panel applied the categorical approach in precisely the type of circumstance spelled out by *Heller II*.

II. The District's Position, By Contrast, Conflicts with Both Supreme Court and Circuit Precedent.

Not only is the panel's opinion consistent with the binding precedent of the Supreme Court and this Circuit; it is the District's preferred approach that fatally conflicts with both *Heller* and this Court's cases applying it.

a. The District's petition is at war with *Heller* from its very first substantive paragraph. En banc rehearing is necessary, it claims, because "[t]he District of Columbia is unique," due to its "entirely urban and densely populated"

geography and its role hosting "thousands of high-ranking federal officials." PFR 1. This is not the first time the District has sought exemption from the Constitution based on these reasons. That argument was central to the District's defense of its handgun ban, *see, e.g.*, Heller Br. at *6, *37, *49, and it also featured prominently in Justice Breyer's dissent in *Heller*, 554 U.S. at 696 (Breyer, J., dissenting). But the *Heller* majority rejected this special pleading. *Id.* at 634 (majority opinion).

Heller also demolishes the District's argument that its unconstitutional "proper reason" restriction is justified because it "is critically important to the public safety of those who live in, work in, and visit the District." PFR 5. This contention is the foundation-stone of the District's entire petition, and it spends page upon page laboring to show the purportedly dire public safety implications of allowing vetted, law-abiding citizens to carry their commonly-owned firearms in public. (In other words, the legal regime that prevails in 42 of the 50 States, and in such "urban and densely populated," PFR 1, settings as Chicago, Houston, Miami, and Philadelphia. *See Gun Laws*, NRA-ILA, https://goo.gl/Nggx50.)

Again, this argument could have essentially been copied page for page from the District's briefing in *Heller*. *See Heller* Br. 50-55. Indeed, this public-safety argument was a key feature of Justice Breyer's dissent. *See Heller*, 554 U.S. at 693-704 (Breyer, J., dissenting). But *Heller* struck the District's handgun ban down in the teeth of the District's public-safety arguments, reasoning that "[t]he

Constitution leaves the District of Columbia a variety of tools for combating that problem," but that a ban on handgun possession is "off the table." *Id.* at 636 (majority opinion).

Even if the District's public-safety rationale were not foreclosed by *Heller*, it would fail on its own terms. Indeed, many of the sources that the District cites in support of its assertion that enjoining the "proper reason" restriction "will increase crime and cost lives," PFR 2, in fact *reject* that conclusion.

Comprehensive studies by respected research institutions have repeatedly failed to find any evidence that restricting the right to carry firearms in public causes any public-safety benefit. Most prominently, in 2004 the National Academy of Sciences' National Research Council concluded after an exhaustive review of the social-scientific literature that "with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2005), http://goo.gl/WO1ZNZ.

The study on which the District "primarily relie[s]," PFR 6—a 2014 unpublished article by John Donohue III and two co-authors—in fact explicitly affirms this view, for it expressly agrees with the NRC's "final judgment on the effects of [right to carry] laws" that no causal link between these laws and crime

rates has been demonstrated. Donohue Paper 2, 79-80. Similarly, another of the District's sources ultimately concludes that 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, 56 UCLA L. REV. 1041, 1082 (2009) (cited at PFR 10).

b. Upholding the District's "proper reason" requirement would also squarely conflict with *Heller III*. In that case, this Court struck down the District's prohibition on registering more than one pistol per month. The District defended that quota 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." 801 F.3d at 280. But this Court rejected the District's more-guns, more-crime syllogism, explaining that "taken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home." *Id.* In other words, the government may not adopt a law with the *design and direct effect of limiting the quantity* of Second Amendment conduct. The District petitioned for en banc rehearing in that case too, but the Court declined to rehear the case. 814 F.3d 480 (D.C. Cir. 2016).

Heller III's reasoning coheres with the lines the Supreme Court has drawn under the First Amendment. While the Supreme Court has upheld government restrictions on certain types of expressive conduct—most commonly, adult entertainment—it has done so only if the *purpose and effect* of the restrictions is to reduce the negative "secondary effects" of the expression rather than to suppress its quantity. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-51 (1986). The government "may not attack secondary effects indirectly by attacking speech." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 450 (2002) (Kennedy, J., concurring) (controlling opinion).

The District's "proper reason" requirement, by design and by effect, restricts *the quantity* of constitutionally protected conduct in the way condemned by these cases. To the extent the challenged law leads to any increase in public safety (and the District has failed to show that it does), that is only a byproduct of its direct effect: limiting the number of arms borne in public. Indeed, the District's officials have been quite explicit that the aim behind the law is to "to restrict the right of people to carry handguns in the District of Columbia." *Hearing on Bill 20-930* at 48:08. As the panel concluded, the challenged law "destroys the ordinarily situated citizen's right to bear arms not as a side effect of applying other, reasonable regulations … but *by design*." Op. 27 (emphasis added); *see also id.* at 25 (citing *Heller III*). The panel was right to strike down this law.

CONCLUSION

The District's petition for rehearing en banc should be denied.

Dated: September 15, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations set by the Court's August 31, 2017 Order because it contains 3,897 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: September 15, 2017

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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 September 15, 2017. I certify that service will be accomplished by the appellate CM/ECF system on all parties or their counsel, except for the following who will be served by First Class USPS Mail:

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