Good morning Chairman Allen and members of the Committee. My name is Tiffany Wright, and I am a Senior Associate in the Washington, D.C. office of Wilmer Cutler Pickering Hale and Dorr LLP, also known as WilmerHale. Thank you for convening this hearing and for the opportunity to share my thoughts on the proposed legislation.

My testimony will address three topics. First, I will discuss and make one recommendation regarding Bill 22-0400, the “Extreme Risk Civil Protection Order Amendment Act of 2017.” Second, I will offer recommendations on the collection of data necessary to craft additional gun-safety legislation that can withstand legal challenges. Finally, I will make two suggestions for legislation supported by existing data.

The Extreme Risk Civil Protection Order Amendment Act of 2017 (Bill 22-0400)

The Supreme Court’s opinion in *Heller* makes clear that “the right secured by the Second Amendment is not unlimited”—there is no “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The D.C. Circuit’s opinion in *Wrenn* leaves open the door to restricting access to firearms for those “prone to misuse” them and those who are proven “more dangerous with a gun than the next law-abiding citizen.” *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017).

By prohibiting firearm possession by individuals proven to present a significant danger of injury to themselves or others, the Extreme Risk Civil Protection Order Act is on firm Second Amendment ground. Those who pose a present danger to themselves or others as evidenced by the criteria set forth in the proposed legislation are likely prone to misuse firearms and fall outside the behavior typical of law-abiding citizens. The Act thus falls within the door left open in *Wrenn* and is consistent with the Supreme Court’s recognition in *Heller* that some dangerous individuals—such as felons and the mentally ill, see *Heller*, 554 U.S. at 626—may be precluded from firearm possession.

But that is not the only constitutional hurdle the proposed law must surmount. Because the Act involves seizure of lawfully owned property, it must ensure that such seizures are done...
consistent with the Constitution’s Due Process Clause. Whether a law provides sufficient due 
process requires balancing of (1) the importance of the interest at stake; (2) the risk of an erroneous 
deposition of the interest because of the procedures used, and the probable value of additional 
procedural safeguards; and (3) the District’s interest. Mathews v. Eldridge, 424 U.S. 319, 335 
(1976). Given the nature of the individual’s interest, any law permitting the deprivation of the 
right—even for a limited time—should provide procedural protections to avoid erroneous 
deprivation.

In nearly every respect, the District’s proposed law does just that. Persons subject to an 

extreme risk civil protection order are notified and entitled to a hearing. The proposed legislation 
also provides additional protections, such as the right to consult an attorney and the ability to seek 
termination of the order prior to its statutory expiration date. As for ex parte protection orders 
issued prior to a hearing, such orders are permitted only upon proof of an imminent and significant 
danger, and are immediately followed by full process.

I offer one suggestion for improvement. As drafted, the legislation permits issuance of an 

extreme risk civil protection order if the petitioner proves the necessary criteria by a preponderance 
of the evidence. This is a comparatively low standard; it simply means more likely than not. Of 
the five states that enacted similar laws prior to the Parkland shooting, all but one required proof 
by clear and convincing evidence. See Cal Penal Code § 18175(b); Conn. Stat. § 29-38c(d); Or. 
Stat. Ch. 737, § 2(6)(a); Ind. Stat. § 35-47-14-6(a). The District would join the State of 

Washington in requiring only a preponderance of the evidence. See Wash. Stat. § 7.94.040(2). 
Although a preponderance of the evidence standard might survive a constitutional due process 
challenge, given the compelling nature of the District’s interest in avoiding gun violence, the 
District may want to avoid such a challenge. A clear and convincing standard would provide 
heightened due process protections without significant effect on the ability of petitioners to prove 
the facts necessary to obtain an extreme risk civil protection order.

Finally, if the law is enacted, I urge the District to collect data regarding the number of 

petitions, the issuance of orders, and outcomes as a result of the Act. This will permit the District 
to demonstrate the effectiveness of its law and might provide an example for other jurisdictions to 
follow.

**Data Collection**

The Extreme Risk Civil Protection Order Act is an important and laudable first step toward 

improving gun safety in the District in the wake of Heller and Wrenn. Wrenn leaves open the door 
to restrict firearm access by those “prone to misuse” guns. But depending on the contours of such 
restrictions, they may be subject to intermediate constitutional scrutiny; that is, the District may 
have to demonstrate that its laws are “substantially related to an important governmental 
objective.” Wrenn, 864 F.3d at 666, 670. This is a demanding standard that requires a “tight fit
between the registration requirements and an important or substantial governmental interest.” *Id.* at 670.

Since late last year, I have worked with DC Appleseed to develop recommendations for gun-safety legislation that will survive judicial scrutiny. A major impediment to such proposals is the lack of data regarding gun use in the District. To prove the “tight fit” demanded by *Wrenn*, the District should be prepared to show more than a probable or hypothetical need for its firearm regulation—it should stand ready to show that data support the need for its laws. But, as recognized by the D.C. Circuit in *Heller III*, existing data “is either incomplete or influenced by partisanship.” *Heller v. District of Columbia*, 801 F.3d 264, 282 (D.C. Cir. 2015). Thus, I would recommend the collection and analysis of pertinent District of Columbia data to answer such questions as:

- Who are those “prone to misuse” firearms?
- How often are guns used negligently or recklessly by lawful gun owners?
- What behaviors lead to accidental shootings?
- What factors account for the rise in violent crime after adoption of right-to-carry laws? Increased crime by lawful gun owners? Perpetrator responses to the presence of a firearm?
- Are criminals deterred by guns during attempted crimes? What are common responses to the use of a gun for self-defense?
- What percentage of legal gun owners commit violent crimes involving their firearms?
- Aside from licensing and registration, what state laws have been most effective at curbing gun violence?

A useful next step after passage of the Extreme Risk Civil Protection Order Amendment Act would be to work with law enforcement and authorities both here and in other jurisdictions to gather this data.

**Potential Reforms**

Finally, D.C. might consider potential improvements to its gun-safety laws on the basis of existing research. As noted above, the D.C. Circuit’s decision in *Wrenn* recognizes that the government may restrict the possession of firearms by those “prone to misuse” them and those who are proven “more dangerous with a gun than the next law-abiding citizen.” As for some traits widely recognized as reducing competence and responsibility to bear arms—such as illegal drug use and history of violent crime—D.C. already prohibits or restricts issuance of firearm registration certificates. See DC Code § 7-2502.03. This provision makes the District a leader among jurisdictions in sensible regulation of firearms safety and usage. There are two potential improvements that the Council might consider.
First, the District could impose additional restrictions on gun possession by those with a history of drug or alcohol abuse. Research supports this change. Unsurprisingly, research demonstrates that alcohol consumption reduces shooting accuracy and impairs judgment about firearm use. See, e.g., Brendan Carr, *A Randomized Controlled Feasibility Trial of Alcohol Consumption and the Ability to Appropriately Use a Firearm*, 15 Inj. Prev. 409 (2009). Among men, deaths from alcohol-related firearm violence equals those from all alcohol-related motor vehicle crashes. See Garen J. Wintemute, *Alcohol Misuse, Firearm Violence Perpetration, and Public Policy in the United States*, Prev. Med. (2015). Moreover, research consistently shows that illegal drug use is associated with a heightened risk of violence—the physical and psychological effects of drugs impair decision-making and make violence more likely. See Consortium for Risk-Based Firearm Policy, *Guns, Public Health and Mental Illness* 22 n.171-175 (2013) (collecting sources). The District currently prohibits issuance of registration certificates to persons convicted of narcotics crimes, convicted of driving under the influence on two or more occasions, or found to be a chronic alcoholic by any court. Other states—such as Hawaii, Hawaii Rev. Stat. § 134-7(c); Kansas, Kan. Stat. Ann. §21-6301(a)(13); and Massachusetts, Mass. Stat. 140 § 129B(1)(iii)—restrict firearm access for individuals who have been committed or are otherwise subject to involuntary treatment for alcohol or drug abuse. Given the data confirming the dangerous combination of firearms and substance abuse, D.C. might consider adopting similar legislation.

Second, the District could expand its prohibition on issuance of registration certificates to felons to include juvenile offenders. Several states—including Florida, Fla. Stat. § 790.23(1)(b); Kentucky, Ky. Stat. § 527.040(3); and Maine, Me. Stat. Tit. 15 § 393—prohibit firearm access for juveniles convicted of crimes that would be felonies had they been committed by adults. D.C. might consider expanding its restrictions to include juvenile offenders.

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The Extreme Risk Civil Protection Order Amendment Act is an excellent first step toward strengthening the District’s gun-safety laws. I urge the Council to pursue similar legislation that will both keep the city’s residents safe and withstand legal challenges. I am happy to answer any questions that the Committee may have.