

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

SHELLY PARKER, *et al.*, :
 :
 Plaintiffs, : Case No. 03-CV-0213 (EGS)
 :
 v. :
 :
 DISTRICT OF COLUMBIA, *et al.*, :
 :
 Defendants. :

**REPLY BRIEF TO PLAINTIFFS’ OPPOSITION
TO DEFENDANTS’ MOTION TO DISMISS THE
COMPLAINT AND OPPOSITION TO PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

Preliminary Statement

Plaintiffs’ opposition to defendants’ motion to dismiss the complaint asks this Court to depart from settled law and hold that D.C. Official Code § 22-4504(a) (2001) (carrying a pistol without a license) violates the Second Amendment to the United States Constitution. Plaintiffs’ opposition also invites this Court to engage in a debate regarding the interpretation of the Second Amendment – a debate most recently fueled by the Attorney General’s letter to the National Rifle Association and the Fifth Circuit’s decision in *United States v. Emerson*, 270 F.3d 203 (2001).¹ However enthralling and topical the debate may be, the Supreme Court and virtually all federal appellate courts have decided that the Second Amendment guarantees a limited right

¹ John Ashcroft, Attorney General, to James Jay Baker, Executive Director, NRA Institute for Legislative Action (May 17, 2001). In this letter the Attorney General endorses the minority view that the Second Amendment guarantees an individual right to possess firearms.

of the people – individually or collectively – to be armed as part of an organized and well-regulated State militia.² Simply put, plaintiffs’ complaint does not present a cognizable claim.

Specifically, plaintiffs proclaim that they are law abiding citizens of the District of Columbia who wish to possess guns in their home for self-defense.³ Only one of the four plaintiffs has actually applied for and been denied a license to do so.⁴ All plaintiffs claim they fear prosecution under the D.C. Official Code § 22-4504(a) should they defy the law and possess firearms for personal purposes.⁵ That is the factual predicate for plaintiffs’ civil rights claim for which they seek injunctive and declaratory relief. Such relief cannot be granted.

First, according to plaintiffs, the Second Amendment secures an inherent individual right to possess handguns that is as fundamental as the right of privacy or ones’ choice of religion. Since the right is fundamental, the state must have a compelling interest to restrict or regulate that right.⁶ Any law restricting that right must be narrowly tailored to achieve that end. To the contrary, if the Second Amendment secures any such right, it does not qualify as a fundamental right - a principle of justice long rooted in the conscience of this country.

Second, this jurisdiction has never adopted plaintiffs’ errant analysis. The leading case in the District of Columbia is *Sandidge v. United States*, 520 A.2d 1057 (D.C. 1987) which holds that the Second Amendment guarantees a collective rather than an individual right to possess

² “There have been two interrelated and problematic developments in the ongoing debate over the meaning of the Second Amendment of the United States Constitution. Pared down to its essence, this debate pits those who believe that the Second Amendment protects an expansive, fundamental individual right to keep and bear arms for personal use . . . against those who maintain that the Second Amendment secures only a limited right of the people – individually or collectively – to be armed as part of an organized and well-regulated State militia.” Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29:4 Northern Kentucky L. Rev 706 (2001).

³ Plaintiffs Opposition at 2.

⁴ *Id.*

⁵ *Id.*

⁶ Not all individual rights are necessarily treated as fundamental so even if plaintiffs’ “individual right” theory was correct, which it is not, defendants would nonetheless prevail. For example, “the right to vote, *per se*, is not a constitutionally protected right.” *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35, n. 78. (1973).

firearms in relation to an organized and well regulated militia. That position is consistent with the opinions of the Supreme Court and all but one federal appellate court.

Third, as plaintiffs acknowledge, rights secured by the Constitution have historically been subject to regulation under the police power of the government. Thus, even if the Amendment is held to extend personal rights to individuals, the government is still entitled to regulate dangerous commodities, such as firearms. The test of whether legislation is authorized under the police power is whether the legislation addresses a problem relating to the safety and welfare of the citizens, and whether the means chosen are reasonable. The District's gun control laws are a reasonable regulation of this inherently dangerous commodity. Consequently, as discussed below, dismissal of plaintiffs' complaint with prejudice is appropriate.

I. Plaintiffs' Opposition Relies on Dicta, Is Contrary to Prevailing Law and Irrelevant.

A. The Fifth Circuit

Plaintiffs argue that the opinion in *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) supports their view that the Second Amendment guarantees an individual right to own guns, such as those prohibited by D.C. Official Code § 22-4504(a) (2001).⁷ *Emerson* is a two-to-one opinion, in which the concurring judge pointed out that all of the opinions on the individual versus collective rights were unnecessary to the decision in the case, and were therefore dicta. He stated that the majority opinion "amounted to at best an advisory treatise" on the subject. *Id.*, 270 F.3d at 272.

Further, *Emerson* is the only circuit court to espouse a view that the Amendment creates an individual right.⁸ As defendants noted in their motion to dismiss, federal appellate courts

⁷ Plaintiffs' Opposition at 4, 6, 7, 10, 13, 21, 24, 27, 30, 36, 37.

⁸ Former Solicitor General Erwin Griswold stated that the Second Amendment was "perhaps the most settled proposition in American Constitutional law." Erwin N. Griswold, *Phantom Second Amendment "Rights,"* Washington Post, November 4, 1990, at C7.

have consistently rejected the argument that the Second Amendment guarantees an individual right. See, e.g., *Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (“Established case law makes clear that the federal Constitution grants appellant no right to carry a concealed handgun.”); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (gun possession not a fundamental right); *United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977) (dicta) (*Miller* controlling on individual rights question); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (Second Amendment “does not confer an absolute individual right to bear any type of firearm”); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (because Second Amendment right applies only to state militias, “there can be no serious claim to any express constitutional right of an individual to possess a firearm”); *Gillespie v. City of Indianapolis*, No. 98-2691, 1999 WL 463577, at *14 (7th Cir. July 9, 1999) (Second Amendment “establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia”) (upholding 18 U.S.C. 922(g)(9)); *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988) (no plausible claim that challenged statute “would impair any state militia”); *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996) (Second Amendment “is a right held by the states, and does not protect the possession of a weapon by a private citizen”); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (individual right to gun possession “has long been rejected”); see also *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997) (Second Amendment limited to “the possession or use of weapons that is reasonably related to a militia actively maintained and trained by the states”), cert. denied, 118 S. Ct. 584 (1997); *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (no evidence presented on statute’s “material impact on militia”).

Faced with this overwhelming body of contrary authority, plaintiffs nonetheless persist that they have a Second Amendment claim. It is not even clear that *Emerson* is the rule in the Fifth Circuit. The rule in the Fifth Circuit is that a subsequent panel is precluded from disregarding the holding of an earlier panel unless it is changed by an *en banc* decision or a decision by the United States Supreme Court. *United States v. McFarland*, 264 F.3d 557, 559 (5th Cir. 2001); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425-26 (5th Cir. 1987). In *Montesano*, the court disagreed with an earlier case, but bowed to it, urging that the *en banc* court reverse it.

Prior to *Emerson*, two divisions of the Fifth Circuit had upheld convictions for possession of unregistered sawed-off shotguns contrary to the National Firearms Act of 1986, 26 U.S.C. § 5861(d): *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971) and *United States v. Williams*, 446 F.2d 486, 487 (5th Cir. 1971). They applied *Miller v. United States*, 307 U.S. 174 (1939) and held that the defendants' possession of those shotguns had no relationship to the "preservation or efficiency of a well regulated militia," and the Second Amendment did not guarantee their right to possess them. Instead of applying the prior precedent, as did the panel in *Montesano*, the majority in *Emerson* mentioned these two cases, but brushed them aside without any real attempt to distinguish them. *Emerson*, 270 F.3d at 226 n. 21.

Cases since *Emerson* include *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), which stated that *Emerson* "is contrary not only to *Miller* but to the basic purpose and effect of the Second Amendment." *United States v. Miles*, (D. Me. Dec. 2, 2002) 2002 U.S. Dist. LEXIS 23658, refers to *Emerson* as "70 pages of dicta." *Id.*, *8 n. 3. *United States v. Hinostroza*, 297 F.2d 924, 927 (9th Cir. 2002) also refused to follow *Emerson*.

In short, *Emerson* stands alone. It deserves to be called, as Justice Frankfurter called another case, “an isolated deviation from the strong current of precedents – a derelict on the waters of the law.” *Lambert v. California*, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).

B. The District of Columbia

In *Sandidge v. United States*, 520 A.2d at 1058-59, the court held that: “The purpose of the second amendment is ‘to preserve the effectiveness and assure the continuation of the state militia.’ ”⁹ *Id.*, 520 A.2d at 1059, quoting *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 936 (1978). The right secured is “a collective rather than an individual right,” quoting *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.) *cert. denied*, 426 U.S. 948 (1976). Therefore, the Second Amendment

protects a state’s right to raise and regulate a militia by prohibiting Congress from enacting legislation that will interfere with that right. The second amendment says nothing that would prohibit a state (or the legislature for the District of Columbia) from restricting the use or possession of weapons in derogation of the government’s own right to enroll a body of militiamen “bearing arms supplied by themselves” as in bygone days. *United States v. Miller*, 307 U.S. 174, 179, 59 S.Ct. 816, 818, 83 L.Ed. 1206 (1939).

Id., 520 A.2d at 1058.

The Court concluded: “The right to keep and bear arms is not a right conferred on the people by the federal constitution.” *Id.* at 1058; citations and internal quotation marks omitted. Further, the court held that D.C. Official Code § 6-2311 (1981)(possession of an unregistered firearm), § 6-2361 (1981)(possession of unregistered ammunition); and §

⁹ The District of Columbia Code provides for a militia. D.C. Official Code § 49-406 (2001). That section provides: “The organized militia shall be composed of volunteers, and shall be designated the National Guard of the District of Columbia.” It is armed and equipped by the United States Army. D.C. Code § 49-201 (2001).

22-3204 (1981) (carrying a pistol without a license) did not violate the Second Amendment to the United States Constitution.

Further, the District of Columbia Court of Appeals has followed and cited *Sandidge* in two subsequent cases. In *Brown v. United States*, 546 A.2d 390, 399 n. 8 (D.C. 1988), the Court found that there was “no merit to the contention that D.C. Code § 22-3204 (1981) is unconstitutional.” In *Mitchell v. United States*, 746 A.2d 877, 885 n. 11 (D.C. 2000) the Court noted that “this court has previously ruled . . . that § 22-3204 does not violate the second amendment.” *Sandidge* was consistent with *Miller v. United States*, 307 U.S. 174 (1939). *Miller* was the first case to address the application of the Second Amendment to federal gun control laws.¹⁰ *Sandidge* was indicted for transporting in interstate commerce an unregistered sawed-off shotgun, in violation of the National Firearms Act, 18 U.S.C. 1132. The District Court agreed with the defendant that the statute violated the Second Amendment, and dismissed the indictment. The Supreme Court held that the “obvious purpose” of the Second Amendment was “to assure the continuation and render possible the effectiveness of” state militias. *Id.*, 307 U.S. at 178. Therefore, the Second Amendment “must be interpreted and applied with that in view.” *Id.*, emphasis added. Because *Sandidge*’s possession of this shotgun did not have any “reasonable relationship to the preservation of a well regulated militia, [the Court could not] say that the Second Amendment guarantees the right to keep and bear such an instrument.” *Id.*

The Supreme Court has, albeit obliquely, reaffirmed its holding in *Miller* on two occasions. First, in *Lewis v. United States*, 445 U.S. 55 (1980) the defendant raised an equal protection challenge to the statute which prohibited convicted felons from possessing a firearm.

¹⁰ Previous to *Miller*, the Court had concluded that the Amendment limits only the power of the federal government, not the states. *Miller v. Texas*, 153 U.S. 535, 538 (1894); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875).

The Court used a rational-basis test¹¹ for evaluating the equal protection claim because the statute did not “trench upon any constitutionally protected liberties.” *Id.*, 445 U.S. at 65 n. 8 & text. The Court cited *Miller* and three circuit court cases for the proposition that “the Second Amendment guarantees no right to keep and bear arms that does not have ‘some reasonable relation to the preservation or efficiency of a well-regulated militia.’ ” *Id.*

One of the cases cited was *United States v. Johnson*, 497 F.2d 548 (4th Cir. 1974) in which the court stated: “The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a ‘reasonable relationship to the preservation or efficiency of a well regulated militia.’ ” *Id.* 497 F.2d at 550, quoting *Miller*, 307 U.S. at 178. Another case cited was *Cody v. United States*, 460 F.2d 34, 37 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1972), which held: “Since *United States v. Miller*, it has been settled that that the Second Amendment is not an absolute bar to congressional regulation of the use or possession of firearms.”

Second, the Court dismissed an appeal from a decision of the New Jersey Supreme Court for failure to raise a federal question. *Burton v. Sills*, 394 U.S. 812 (1969). That case *Burton v. Sills*, 248 A.2d 521 (N.J. 1968), was an action asking for an injunction against the enforcement of New Jersey’s Gun Control Law (N.J. Stat. Ann. § 2A:151-1 *et seq.*). The New Jersey court held that because of fear of a standing army controlled by the federal government, the Second Amendment guaranteed a collective right of the people to keep and bear arms in connection with a well-regulated militia. *Id.*, 248 A.2d at 96-97. The New Jersey court concluded that its Gun Control Act did not violate any right granted by the Second Amendment. The Supreme Court

¹¹By applying this test, the Court was implicitly deciding that the right to bear arms was not a “fundamental constitutional right.” If it was, the Court would have had to use a “strict scrutiny” test. *See Marshall v. United States*, 414 U.S. 417, 421-22, 431 (1974)(in equal protection cases, the courts use a “strict scrutiny” test when

found that this decision did not present “a substantial federal question.” *Id.*, 394 U.S. 812. Such a finding could only mean that the Court could not interpret the Second Amendment as guaranteeing a personal right to own firearms.

Sandidge cited the cases of *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir.), *cert. denied*, 426 U.S. 928 (1976); and *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 936 (1978). These cases firmly establish the principle, relied on in *Sandidge*, that the Second Amendment does not guarantee an individual a right to carry a gun, but protects the states in their efforts to establish and maintain a militia.

Cases v. United States, *supra*, was one of the first cases to interpret *Miller*. It involved a conviction for transporting and receiving a firearm in interstate commerce, proscribed by 15 U.S.C. § 901-909. That court held: “The right to keep arms is not a right conferred on the people by the federal constitution [T]he only function of the Second Amendment is to prevent the federal government . . . from infringing that right.” *Id.*, 131 F.2d at 921. But that limitation on the federal government is not absolute, as shown by *Miller*; the rule in *Miller* is not limited to the kind of weapon involved. The court looked to the use to which *Cases* was putting the weapon, and found that he was using the gun “purely and simply on a frolic of his own and without any thought or intention of contributing to the efficiency of the well regulated militia which the Second Amendment was designed to foster as necessary to the security of a free state.” *Id.* at 922. It therefore affirmed the conviction.

Warin involved a conviction for possessing a submachine gun not registered to the defendant in violation of 26 U.S.C. § 5801 *et seq.* It was stipulated that the gun was used in the

fundamental constitutional rights are involved, but only a “rational basis” test for other cases) (cited by *Lewis*, *supra*).

United States military forces, and even that it bore “some . . . reasonable relationship to the preservation or efficiency of the military forces.” *Id.*, 530 F.2d at 105. Warin was an able-bodied male citizen, subject by Ohio law to be called up into the Ohio militia. *Id.*

The court first held that the Second Amendment guaranteed a collective rather than an individual right, and that it was the right of the state to maintain a militia. 530 F.2d at 106, citing *Miller*. Further, that collective right was the right of the militia to possess a weapon, the possession of which has a reasonable relationship to the efficiency of the militia. *Id.* There was no evidence that an ordinary person having a submachine gun would have a reasonable relationship to the preservation or efficiency of a well-regulated militia. Therefore, Warin had no right to bear arms that would prevent a prosecution and conviction under 26 U.S.C. § 5801 *et seq.* *Id.*, at 106-7.

Oakes was also convicted of possessing an unregistered machine gun in violation of 26 U.S.C. § 5861(d). The court held that the purpose of the Second Amendment, as stated in *Miller*, “was to preserve the effectiveness and assure the continuation of the state militia.” *Id.*, 564 F.2d at 387. Further, the Supreme Court ruled in *Miller* “that the amendment must be interpreted and applied with that purpose in mind.” *Id.* Therefore, the Second Amendment did not guarantee Oates’ right to keep a weapon, even if he was technically a member of the state militia, when the firearm he possessed had not been shown to have any connection to the militia.

Cases and *Warin* were both based on *United States v. Tot*, 131 F.2d 261 (3rd Cir. 1942, *rev’d on other grounds*, 319 U.S. 463 (1943)). That case proceeded from the premise that the Second Amendment was adopted as a result of the prevalent feeling that a standing army controlled by the federal government was a dangerous thing, and that the states needed to have militias to counterbalance that power. For instance, the Federalist paper No. 46 expresses fears

that a tyrannical federal government might dominate one or a few states, but expresses confidence that state militias could prevent such dominance. The Federalist No. 46 (James Madison). Federalist paper No. 28 explains that states will resist any attempt by the federal government to invade or tyrannize their people. The Federalist No. 28 (Alexander Hamilton). Accordingly, *Tot* holds, the Second Amendment “was not adopted with individual rights in mind, but as a protection for the States in the maintenance of their militia organizations against possible encroachments by the federal power.” *Id.*, 131 F.2d at 266. This need to give the states enough strength to stand against possible encroachment by the federal government is seen throughout the debates on the adoption of the Constitution and of the Bill of Rights.

For instance, Luther Martin, in his letter to the Maryland Legislature, noted that the "militia was the only deference and protection which the state can have for the security of their rights against arbitrary encroachments of the general [that is, federal] government." 1 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 371 (Jonathan Eliot ed. 1836). Because the purpose of the Amendment was to enable the states to defend "their rights," the Amendment was intended to provide for a collective, or state, right. *Sandidge* draws upon this entire body of law for its authority and its conclusion that the Second Amendment does not guarantee an individual right to possess firearms.

Plainly, plaintiffs’ arguments are dicta, contrary to prevailing law and irrelevant because they have failed to show any logical relationship between their possession of handguns and the District’s maintenance of an organized and well trained militia. See *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (no evidence presented on statute’s “material impact on militia”).

II. The Challenged District Legislation is Valid under the “Rational Basis” Test.

Even if the Second Amendment were held to create or recognize an individual right of gun ownership or possession, the District statutes challenged here would survive attack because they satisfy the “rational basis” standard for evaluating the constitutionality of legislation in this area of the law. Even the plaintiffs acknowledge in their Memorandum of Points and Authorities in support of their Motion for Summary Judgment that: “Plaintiffs have no quarrel with the notion that some regulation of private firearm ownership is constitutional as well as desirable, nor do plaintiffs doubt that some weapons may be forbidden to private individuals.” (Plaintiffs’ Memorandum at 1). And as they further state: “The rights guaranteed by the Second Amendment are not absolute . . . so too does the Second Amendment allow defendant District of Columbia to make necessary use of its police power to ban certain categories of weapons and regulate rights in others.” (*Id.* at 8-9).

It is well settled that the “rational basis” test is the appropriate standard for measuring gun control legislation against constitutional attack. The U.S. Supreme Court so held in *Lewis v. United States*, 445 U.S. 55, 65-66 (1980). The Court upheld the restrictions on firearms possession at issue in the case, stating that they were: “neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties. [citing *United States v. Miller, supra*, 307 U.S. at 178]” 445 U.S. at 65 n. 8. The Court thus declined to apply the so-called “strict scrutiny” test of constitutional review when suspect classifications or infringements of fundamental constitutional rights are alleged. Nor did it suggest that any other heightened standard of review was necessary or appropriate in such cases. Our Court of Appeals, like the Supreme Court, has opted for “rational basis” review of gun legislation rather than “strict

scrutiny” or some other standard. *Fraternal Order of Police v. United States*, 173 F.3d 898, 903-04 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 928.

This ruling is in accord with that of other circuits considering the appropriate standard of review. *See, e.g., Quilici v. Village of Morton Grove*, 695 F.2d 261, 268-69 (7th Cir. 1983), *cert. denied*, 464 U.S. 863 (ban on possession of handguns within municipality upheld); *Gillespie v. City of Indianapolis*, 185 F.2d 3d 693, 708-09 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116; *United States v. Warin*, 530 F.3d 103, 107-08 (6th Cir. 1976), *cert. denied*, 426 U.S. 928; *Silveira v. Lockyear*, 312 F.3d 1052, 1087-88 (9th Cir. 2002). *Cf. Jordan v. District of Columbia*, 362 A.2d 114, 117 (D.C. 1976); *McIntosh v. Washington*, 395 A.2d 744, 755 (D.C. 1978).

Even the Fifth Circuit panel decision in *Emerson v. United States*, *supra*, while not free from ambiguity on the point, may be consistent with the “rational basis” test. See 270 F.3d at 273. The “rational basis” standard was articulated by a unanimous Supreme Court in *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993) as a “paradigm of judicial restraint.” The Court summarized the applicable principles as follows:

- (a) statutes are accorded a strong presumption of validity;
- (b) a party challenging the constitutionality of a statute has the burden to negate every conceivable basis which might support the act;
- (c) the legislature is “never require[d] to articulate its reasons for enacting a statute;
- (d) a legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data;
- (e) a statute is not invalid simply because the legislature has taken one step at a time, first addressing itself to the phase of the problem which seems most acute to the legislative mind.

508 U.S. at 314-316. *See also Heller v. Doe*, 509 U.S. 312, 319-21 (1993).

The legislative efforts to deal with the problems presented by ownership or possession of firearms within the borders of the District of Columbia go back many years; indeed, they include

Congressional action long antedating the Home Rule Act. The D.C. Court of Appeals commented in *Billinger v. United States*, 425 A.2d 1304, 1305 (D.C. 1981):

When Congress promulgated this [former D.C. Code Section 22-3204, a predecessor of one of the statutes attacked by the plaintiffs in the present case] and related enactments, it confronted menacing statistics which reflected substantial injury and loss of life attributable to the unlawful use of firearms in the District of Columbia. In an effort to curtail the flow of arms on the public streets, and thereby reduce the number of resultant injuries and deaths, the law was enacted.

See also *Cooke v. United States*, 275 F.2d 887, 889 (D.C. Cir. 1960), in which our Court of Appeals stated that the history of Congressional gun control legislation for the District of Columbia over the years evidenced “the clearest intent to dramatically tighten the ban on carrying dangerous weapons”; *United States v. Walker*, 380 A.2d 1388, 1390 (D.C. 1977); “Implicit in the statutory proscription of carrying a pistol without a license . . . is a congressional recognition of the inherent risk of harm to the public of such dangerous instrumentality being carried about the community and away from the residence or business of the possessor”.

In *McIntosh v. Washington*, 395 A.2d 744, 755 (D.C. 1978), the Court upheld, as satisfying the “rational basis” standard, another of the statutes attacked by the plaintiffs here, stating:

The Council’s Judiciary Committee found, *inter alia*, a need to improve the District’s capacity to monitor the traffic of firearms in this city; that the availability of firearms was a major contributing factor to crime; that for each intruder stopped by a firearm there are four gun-related accidents within the home; that firearms are more frequently used in situations of violence among friends and relatives; and that most murders result from spontaneous violence by law-abiding citizens where the killer and victim are acquainted.

The Court emphasized that: “[D]angerous or deleterious devices or products are the proper subject of regulatory measures adopted in the exercise of a state’s police power.” 395 A.2d at 756. *See also Fesjian v. Jefferson*, 399 A.2d 861, 864 (D.C.1979).

In S. Rep. No. 575, 75th Cong. 1st Sess. At 10 (1932), Congress assembled statistics showing the prevalence of pistols in the District and the large number of crimes committed with firearms. The “menacing statistics” amassed by Congress in 1932, *Billinger, supra*, 425 A.2d at 1305, have by no means disappeared or diminished. On the contrary, they have risen over the years. Attached hereto as Exhibit A are the latest offense report statistics compiled by the Metropolitan Police Department for 2000, 2001, and 2002, and submitted to the F.B.I. under the Uniform Crime Reporting (“UCR”) program. They show thousands of robberies and assaults committed with firearms in the District in each of these three years. Although these UCR reports do not break out the number of homicides committed with firearms in the District, this Court can take judicial notice of a fact known to all—a large proportion of the hundreds of homicides in the District for many years have been committed with firearms. *See McIntosh, supra*, 395 A.2d at 755. The Bureau of Alcohol, Tobacco and Firearms (“ATF”) of the U.S. Treasury reported in November 2000: “In 1999, 188 people were killed by guns in the District of Columbia; 957 others suffered non-fatal firearm assaults. Locally as well as nationwide, firearm violence is the leading cause of death for African American and Hispanic males under the age of 25.” (Exhibit B hereto). These crime statistics do not, of course, contain the numbers of incidents of domestic violence involving firearms unless they resulted in offense reports to the MPD, or suicides with firearms, or the accidental deaths, including those of young children, which have resulted from the possession of firearms in the home.

The efficacy of the District's gun laws enacted in 1976 in reducing the incidence of homicides and suicides by firearms was demonstrated in an article appearing in the *New England Journal of Medicine*, a respected scholarly journal in 1991.¹² It cannot be seriously contended that the Second Amendment, even if applicable, guarantees private persons a right of ownership or possession of firearms on the basis of an asserted need to resort to self-help. More effective policing, not resort to self-help by private persons, is what is needed to deal with crime in the District. Self-help can pass over into vigilantism, the last thing this city needs. More guns in private hands are not a solution.

A wise man once stated in another context: "It is a condition which confronts us-- not a theory." (President Grover Cleveland, *Third Annual Message to Congress*, December 6, 1887). That describes the problem of firearms in the District of Columbia. Congress and the Council of the District, in their efforts to regulate firearms, have been dealing with matters of life and death. Conditions and practical considerations, not arcane legal theories and historical excursions, should determine the outcome of cases like the present and the constitutionality of statutes like those at issue here.

Conclusion

For the foregoing reasons, plaintiffs' complaint should be dismissed for failure to state a claim upon which this Court can grant relief.

Respectfully submitted,

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¹² Lofton, *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, attached as Exhibit C.

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