Maryland Law Review

Volume 76 | Issue 2 Article 7

Kolbe v. Hogan: Hewing to Heller and Taking Aim at a Standard of Strict Scrutiny for Comprehensive Firearms Legislation

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Note

KOLBE V. HOGAN: HEWING TO *HELLER* AND TAKING AIM AT A STANDARD OF STRICT SCRUTINY FOR COMPREHENSIVE FIREARMS LEGISLATION

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In *Kolbe v. Hogan*,[1] the United States Court of Appeals for the Fourth Circuit considered whether Maryland's Firearm Safety Act[2] infringes upon the right to keep and bear arms under the Second Amendment.[3] The Fourth Circuit held that the Firearm Safety Act's assault weapon and large-capacity magazine bans implicate the protections guaranteed by the Second Amendment, and therefore these bans should be analyzed under a standard of strict scrutiny.[4] The court reached the correct conclusion in this case, in part because it properly construed the "dangerous and unusual" language from *District of Columbia v. Heller*[5] that had been either misunderstood or misapplied by other courts.[6] *Heller* limited the right to keep and bear arms to weapons "in common use at the time," as supported by the historical

∗ J.D. Candidate, 2018, University of Maryland Francis King Carey School of Law. The author wishes to thank his outstanding editors at the *Maryland Law Review*, particularly Mikey Collins for his guidance and firm deadlines, Lindsay DeFrancesco for her insight and commiseration, Hannah Cole-Chu for her abounding enthusiasm and overall editing prowess, and Jerri Shahverdi for keeping the whole ship afloat. He also wishes to thank Professors Richard Boldt and Jana Singer for their thoughtful and invaluable feedback during the writing process. Finally, the author would like to thank his roommates, friends, family members, and classmates for their words and acts of encouragement along the way. He dedicates this Note to those who love and support him the most: his sisters, Jill and Molly, although that love and support often goes against their better instincts; his parents, David and Patricia, who are always in his corner and instilled in him a deep appreciation of learning; and his girlfriend, Maggie Sundel, who has a rather keen legal mind for a medical student and delivers some awe-inspiring pep talks.

1. 813 F.3d 160 (4th Cir. 2016), *reh'g en banc granted*, 636 F. App'x 880 (4th Cir. 2016) (mem).

2. Firearm Safety Act, MD. CODE ANN., CRIM. LAW §§ 4-301 to 4-306 (West Supp. 2015); MD. CODE ANN., PUB. SAFETY § 5-101 (West Supp. 2015); *see Kolbe*, 813 F.3d at 168–70 (providing background information on the Firearm Safety Act).

3. U.S. CONST. amend. II.

4. *Kolbe*, 813 F.3d at 168. *See infra* notes 123–129 and accompanying text (providing an explanation of constitutional levels of scrutiny).

5. 554 U.S. 570 (2008).

6. *See infra* Part IV.A.

tradition of banning dangerous and unusual weapons.[7] As explained in *Kolbe*, *Heller* did not intend the "dangerous and unusual" language to act as an independent limitation on the right to keep and bear arms, despite recent decisions from other circuits.[8] Furthermore, the court reached the correct judgment because it reasoned that sweeping assault weapon and large-capacity magazine bans, like the Firearm Safety Act, demand strict scrutiny.[9] Such bans indiscriminately interfere with the core lawful purpose of the Second Amendment, namely protecting the possession of firearms for self-defense within the home.[10] Other United States courts of appeals have applied intermediate scrutiny to similar laws, which means *Kolbe* created a circuit split.[11] The cogent and compelling reasoning of the Fourth Circuit in favor of applying strict scrutiny to broad firearm bans might produce similar decisions in other circuits and, ultimately, spur the Supreme Court of the United States to resolve the circuit split.[12] On remand, if the United States District Court for the District of Maryland applies strict scrutiny and finds the Firearm Safety Act unconstitutional, state legislatures within the Fourth Circuit will need to carefully craft future firearms legislation to afford greater protection to the right to keep and bear arms.[13]

I. THE CASE

On May 16, 2013, the Governor of Maryland, Martin O'Malley, signed into law the Firearm Safety Act.[14] The Maryland General Assembly passed the Firearm Safety Act in response to a series of mass shootings in

7. 554 U.S. at 627 (quoting United States v. Miller, 307 U.S. 174, 179 (1939)); *see also* Caetano v. Massachusetts, 136 S. Ct. 1027, 1027–28 (2016) (per curiam) (explaining that *Heller*'s "common use at the time" limitation does not merely refer to arms in existence at time of the founding, but more properly refers to all bearable arms, including newer weapons such as electric stun guns).

8. *See infra* Part IV.A.2.

9. Kolbe v. Hogan, 813 F.3d 160, 179–80 (4th Cir. 2016), *reh'g en banc granted*, 636 F. App'x 880 (4th Cir. 2016) (mem); *see infra* Part IV.B.

10. Kolbe v. Hogan, 813 F.3d at 179–80.

11. *See infra* notes 301–305 and accompanying text.

12. *See infra* Part IV.B.

13. *See infra* Part IV.B. The Fourth Circuit originally remanded the case to the district court to apply strict scrutiny to the Firearm Safety Act. Kolbe v. Hogan, 813 F.3d at 192. Subsequently, the State requested a rehearing en banc. Kolbe v. Hogan, 636 F. App'x 880 (4th Cir. 2016) (mem). The Fourth Circuit granted the State's petition for a rehearing en banc and heard oral arguments on May 11, 2016. *Id.* The court is expected to issue an opinion in 2017. *See, e.g.*, John Haughey, *Top 10 Most Important Gun Rights Cases of 2016*, OUTDOORLIFE (Dec. 28, 2016), http://www.outdoorlife.com/top-most-important-10-gun-related-court-cases-2016.

14. *See generally* Firearm Safety Act, MD. CODE ANN., CRIM. LAW §§ 4-301–4-306 (West Supp. 2015) (providing the main text of the Firearm Safety Act); PUB. SAFETY § 5-101 (defining an "assault long gun" and a "licensed firearms dealer" for the purposes of the Firearm Safety Act); Kolbe v. O'Malley, 42 F. Supp. 3d 768, 774 (D. Md. 2014), *aff'd in part, vacated in part sub nom.* Kolbe v. Hogan, 813 F.3d 160 (4th Cir. 2016), *reh'g en banc granted*, 636 F. App'x 880 (4th Cir. 2016) (mem).

other states, most notably the shooting at Sandy Hook Elementary School in Newtown, Connecticut.[15] Key provisions within the act prohibited citizens from possessing, selling, purchasing, or transferring enumerated assault weapons and their copies, as well as large-capacity magazines.[16] Possession or any other violation of the ban after October 1, 2013, constituted a misdemeanor punishable by up to three years in prison.[17] The large-capacity magazine ban applied to magazines with a capacity of more than ten rounds of ammunition and was virtually identical to the assault weapon ban.[18]

The Firearm Safety Act criminalized the conduct and desired conduct of numerous Maryland citizens and organizations.[19] Named plaintiff Stephen Kolbe owned a semi-automatic handgun banned by the Act and would have purchased another semi-automatic firearm and several large-capacity magazines if not for the Firearm Safety Act.[20] Plaintiff Andrew Turner also owned a semi-automatic firearm banned by the Act and wanted to purchase a semi-automatic rifle and more large-capacity magazines.[21] Plaintiffs Wink's Sporting Goods, Inc. and Atlantic Guns, Inc. relied on the sale of firearms and magazines to support their respective businesses.[22] A number of trade, hunting, and gun-owners' rights organizations also joined in filing the complaint because they felt their rights and their members' rights were restricted by the Firearm Safety Act.[23]

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15. Kolbe v. O'Malley, 42 F. Supp. 3d at 774. In the Sandy Hook shooting, the gunman used an assault rifle to claim the lives of twenty children and six adults. *Id.*; *see also Connecticut Shootings Fast Facts*, CNN (Apr. 19, 2016, 4:11 PM), http://www.cnn.com/2013/06/07/us/connecticut-shootings-fast-facts/ (stating that the Sandy Hook shooter used a semi-automatic Bushmaster rifle).

16. Kolbe v. O'Malley, 42 F. Supp. 3d at 775–76 (citing CRIM. LAW §§ 4-303(a), 4-305(b)). The assault weapon ban applied to over forty-five types of assault long guns, including many semi-automatic rifles. *Id.* at 775–76, 775 n.7 (citing CRIM. LAW § 4-301(b); PUB. SAFETY § 5-101(r)(2)). The term "semi-automatic" refers to firearms that require the shooter to pull the trigger for each round of ammunition she wishes to expel, as opposed to automatic firearms, which continuously expel ammunition as long as the trigger is depressed. Kolbe v. Hogan, 813 F.3d at 168 n.1. Narrow exceptions to the assault weapon ban granted limited ownership rights to groups such as law enforcement officers. Kolbe v. O'Malley, 42 F. Supp. 3d at 776 (citing CRIM. LAW § 4-302(7)).

17. Kolbe v. O'Malley, 42 F. Supp. 3d at 776 (citing CRIM. LAW § 4-306(a)).

18. *Id.* (citing CRIM. LAW § 4-305(b)). Unlike the provisions prohibiting assault weapons, however, the law did not prohibit the "mere possession" of large-capacity magazines or the transportation of large-capacity magazines into Maryland from outside the state. *See id.* at 776 & n.9 (citing CRIM. LAW § 4-305).

19. *See, e.g.*, Kolbe v. O'Malley, 42 F. Supp. 3d at 774 n.3 (determining that individual, gun-owning citizens faced a "credible threat" of prosecution under the Firearm Safety Act).

20. *Id.*

21. *Id.* at 774 & n.3.

22. *Id.* at 774 & n.1.

23. *Id.* The complete list of plaintiffs in this case is: Mr. Kolbe; Mr. Turner; Wink's Sporting Goods, Inc.; Atlantic Guns, Inc.; Associated Gun Clubs of Baltimore, Inc.; Maryland Shall Issue, Inc.; Maryland State Rifle and Pistol Association, Inc.; National Shooting Sports Foundation, Inc.;

On September 26, 2013, the plaintiffs filed a complaint against the State in the United States District Court for the District of Maryland, challenging the Firearm Safety Act's constitutionality.[24] The next day, the plaintiffs also filed a motion for a temporary restraining order.[25] Specifically, the plaintiffs asserted that the Firearm Safety Act violated their rights under the Second Amendment, violated the Equal Protection Clause of the Fourteenth Amendment,[26] and was void for vagueness.[27] The district court denied the plaintiffs' motion for a temporary restraining order, and the parties agreed that the court should proceed to consider the matter on the merits as opposed to the request for preliminary injunction alone.[28] Subsequently, the plaintiffs and the State filed cross motions for summary judgment.[29] On August 22, 2014, the district court held that the Firearm Safety Act was constitutional and granted summary judgment in favor of the State.[30]

In the first part of its decision, the district court addressed the plaintiffs' claim that the Second Amendment protected their right to keep and bear the assault weapons and large-capacity magazines banned by the Firearm Safety Act.[31] The district court was "inclined to find" that assault weapons and large-capacity magazines fall outside the scope of Second Amendment protection because they were not considered weapons "commonly possessed for lawful purposes," including self-defense.[32] Despite this inclination, the court abstained from resolving this issue and assumed that the Firearm Safety Act burdened the plaintiffs' Second Amendment right.[33] The court proceeded to the next step of its Second Amendment analysis and determined that intermediate scrutiny should

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and Maryland Licensed Firearms Dealers Association, Inc. *Id.* at 774. The State includes the Governor, the Attorney General, the Secretary of the Department of State Police and Superintendent of the Maryland State Police, and the Maryland State Police. The plaintiffs sued all the defendants in their official capacities. *Id.* at 774 n.2.

24. *Id.* at 776.

25. *Id.*

26. U.S. CONST. amend. XIV.

27. Kolbe v. O'Malley, 42 F. Supp. 3d at 776–77.

28. *Id.* at 776.

29. *Id.* at 774–75.

30. *Id.* at 803.

31. *Id.* at 782.

32. *Id.* at 788. The court noted that assault weapons represent no more than three percent of the current civilian gun stock, and ownership of those weapons is highly concentrated in less than one percent of the U.S. population. *Id.* The court also highlighted the fact that assault weapons are used at a disproportionate rate in mass shootings and murders of law enforcement officers as compared to their ownership levels in the general public. *Id.*

33. *Id.* at 789. Other courts have assumed Second Amendment infringement in order to reach the second step of the analysis. *Id.* (citing Woollard v. Gallagher, 712 F.3d 865, 875–76 (4th Cir. 2013); Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1260–61 (D.C. Cir. 2011)).

apply to the Firearm Safety Act.[34] The court noted that the act only affected assault weapon ownership and did not affect ownership of a handgun or any other type of weapon for the purpose of self-defense.[35] Thus, the court reasoned that the act did not unduly burden the core right under the Second Amendment: self-defense within the home.[36] Lastly, the district court held that the Firearm Safety Act survived intermediate scrutiny because it furthers Maryland's dual interests of protecting public safety and reducing crime.[37]

The plaintiffs also argued that the Firearm Safety Act violated the Equal Protection Clause of the Fourteenth Amendment by containing exceptions allowing former law enforcement officers to possess the weapons and magazines banned to others.[38] The court denied the plaintiffs' Equal Protection claim, holding that Maryland was not treating similarly-situated persons differently by allowing retired law enforcement officers to own assault weapons and large-capacity magazines while denying that same right to the general public.[39]

Finally, the plaintiffs alleged that two specific uses of the word "copy" rendered the Firearm Safety Act void for vagueness because a reasonable person could not discern what constitutes a "copy" of the banned assault weapons.[40] The district court rejected the plaintiffs' vagueness challenge, holding that the word "copy" was not unconstitutionally vague.[41] The

34. *Id.* at 790.

35. *Id.*

36. *Id.*

37. *Id.* at 792–97.

38. *Id.* at 797.

39. *Id.* at 799. The court emphasized retired law enforcement officers' extensive training and experiences ensuring public safety as evidence that they are not similar to the general public in all relevant respects. *Id.* at 798–99.

40. *Id.* at 799. The Firearm Safety Act contains the word "copy" three times. MD. CODE ANN., CRIM. LAW § 4-301(d)(3) (West Supp. 2015); PUB. SAFETY § 5-101(r)(2); CRIM. LAW § 4-301(c).

41. Kolbe v. O'Malley, 42 F. Supp. 3d at 803. The court noted that the term "copies" had been a part of Maryland firearms law for over twenty years, yet no arrest or conviction resulting from a misunderstanding of the term occurred during that time period. *Id.* at 802. The court also explained that the Maryland Attorney General and the Maryland State Police have issued opinions on what constitutes a copy and offering to answer any further questions that citizens might have. *Id.* at 801–02 (citing Regulated Firearms—Assault Weapons—Whether a Weapon is a "Copy" of a Designated Assault Weapon and Therefore Subject to the Regulated Firearms Law, 95 Md. Op. Att'y Gen. 101 (2010) (explaining that a copy of a designated assault weapon has similar components and function to that weapon, not a mere cosmetic similarity); MARYLAND STATE POLICE, FIREARMS BULLETIN #10-2, INFORMATION ON ASSAULT WEAPONS PURCHASES (2010), http://mdsp.maryland.gov/Document%20Downloads/FIREARMS%20BULLETIN%2010-2.pdf (providing information about what the Maryland State Police consider a copy of an enumerated assault weapon)).

plaintiffs appealed to the United States Court of Appeals for the Fourth Circuit.[42]

II. LEGAL BACKGROUND

For over two centuries, the Constitution of the United States, through the Second Amendment, has preserved the right to keep and bear arms.[43] Beginning in the middle of the twentieth century and continuing into the twenty-first century, courts almost universally recognized that the Second Amendment protects the collective right of the militia to keep and bear arms and does not protect an individual right.[44] Yet, within the past decade, the United States Supreme Court's conception of the right to keep and bear arms changed drastically when the Court held that the Second Amendment confers an individual right to keep and bear arms and applies to the individual states.[45] Section II.A recites a brief history of the Second Amendment and its historical understanding dating back to the founding of the United States of America. Section II.B discusses how the holdings in *Heller* and *McDonald v. City of Chicago*[46] altered Second Amendment jurisprudence by recognizing an individual right to keep and bear arms and how courts examine contemporary firearms legislation in light of those holdings. Finally, Section II.C examines the central issue that courts have grappled with since *Heller* and *McDonald*—the correct standard of scrutiny—and the growing trend among courts towards applying intermediate scrutiny.

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42. Kolbe v. Hogan, 813 F.3d 160, 171 (4th Cir. 2016), *reh'g en banc granted*, 636 F. App'x 880 (4th Cir. 2016) (mem).

43. U.S. CONST. amend. II.

44. *See, e.g.*, Silveira v. Lockyer, 312 F.3d 1052, 1060–61 (9th Cir. 2002) (referring to the collective rights view as the "dominant view of the Second Amendment . . . widely accepted by the federal courts . . . ."); United States v. Napier, 233 F.3d 394, 403 (6th Cir. 2000) ("It is well-established that the Second Amendment does not create an individual right."); Love v. Pepersack, 47 F.3d 120, 124 (4th Cir. 1995) ("Since [1939], lower federal courts have uniformly held that the Second Amendment preserves a collective, rather than individual, right."); Eckert v. City of Philadelphia, 477 F.2d 610, 610 (3d Cir. 1973) ("[T]he right to keep and bear arms is not a right given by the United States Constitution."); Burton v. Sills, 248 A.2d 521, 526 (N.J. 1968) ("As the language of the amendment itself indicates it was not framed with individual rights in mind. Thus it refers to the collective right 'of the people' to keep and bear arms in connection with 'a well-regulated militia.'"). There are many other cases reiterating this principle. *But see* United States v. Emerson, 270 F.3d 203, 221–27 (5th Cir. 2001) (recognizing an individual right to keep and bear arms, although "mindful that almost all of our sister circuits have rejected any individual rights view of the Second Amendment").

45. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."); *see also infra* Part II.B (explaining the significance of the *Heller* and *McDonald* decisions).

46. 561 U.S. 742 (2010).

A. The Great Debate: The Struggle Between Viewing the Second Amendment as an Individual Right or a Collective Right in the Years Prior to Heller

The Second Amendment declares, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[47] The first half of the Second Amendment, "[a] well regulated Militia, being necessary to the security of a free state," is the prefatory clause, which provides the law's purpose.[48] The second half of the Amendment, from "the right of the people" onward, is the operative clause, which gives a command.[49] In the decades prior to *Heller*, individual right theorists and collective right theorists clashed over the relationship between these two clauses.[50] Individual right theorists believe the Second Amendment guarantees a personal right to keep and bear arms; thus, the prefatory clause does not affect the operative clause.[51] Collective right theorists believe the Second Amendment provides a right to keep and bear arms "in connection with service in the state militia"; thus, the prefatory clause modifies the operative clause and defines Second Amendment rights.[52]

The debate between individual and collective right theorists predates the Second Amendment's ratification.[53] Discussions at the Constitutional Convention,[54] among early colonial and state legislators,[55] and in eighteenth century legal commentary[56] demonstrate that many citizens, including some Founders, understood the Second Amendment as protecting only the

47. U.S. CONST. amend. II.

48. *Heller*, 554 U.S. at 577, 595.

49. *Id.* at 577 (referring to the relationship between the prefatory and operative clause and stating that there must exist "a link between the stated purpose and the command").

50. *See, e.g.*, United States v. Chester, 628 F.3d 673, 674–75, 675 n.2 (4th Cir. 2010) (discussing the debate between individual and collective right theorists).

51. *Id.* at 675 n.2 (citing Kenneth A. Klukowski, *Armed by Right: The Emerging Jurisprudence of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 167, 180–81 (2008)).

52. *Id.* at 674–75. Because the Justices conducted thorough historical research, much of this discussion of early understandings of the Second Amendment is informed by the opinions in *Heller* and *McDonald*. This reflects both the importance of those opinions and the lack of Second Amendment decisions for approximately seventy years prior to *Heller*. *See, e.g.*, *Heller*, 554 U.S. at 679 (Stevens, J., dissenting) (explaining that the majority "disregard[s] a unanimous opinion of this Court, upon which substantial reliance has been placed by legislators and citizens for nearly 70 years.").

53. *Compare* McDonald v. City of Chicago, 561 U.S. 742, 768 (2010) (determining that the right to keep and bear arms for the personal goal of self-defense was "fundamental" to those who drafted and ratified the Bill of Rights), *with* United States v. Miller, 307 U.S. 174, 178 (1939) (asserting that the purpose of the Second Amendment was to support the militia established by the Constitution).

54. *Miller*, 307 U.S. at 179.

55. *Id.* at 179–81 (providing examples of legislation from Massachusetts, New York, Virginia instituting gun laws for military purposes).

56. *Id.* at 179.

collective right to bear arms for service in the militia.[57] A number of state ratification conventions, for example, proposed different versions of the Second Amendment that emphasized the importance of protecting military interests, not individual interests.[58] Nevertheless, other sources of legal commentary[59] and deliberations prior to the ratification of the Bill of Rights[60] assumed that the right to keep and bear arms was individual and fundamental.[61] State constitutions, enacted before or immediately following ratification, commonly included a right of citizens to bear arms in defense of themselves and the state, protecting both an individual and collective right.[62]

In the period between the ratification of the Second Amendment and the Civil War, courts and prominent legal scholars continued to espouse a variety of views on whether the amendment protected an individual or collective right to bear arms.[63] In *Houston v. Moore*,[64] Justice Story discussed the power of states to organize and arm the militia, but suggested that the Second Amendment "may not . . . have any important bearing on this point."[65] In *Johnson v. Tompkins*,[66] Justice Baldwin posited that a citizen "had a right to carry arms in defence of his property or person."[67] Justice Story and Justice Baldwin's assertions are two post-ratification examples of an individual rights understanding of the Second Amendment.[68] Several state courts[69] and legal commentators[70] also adopted

57. *Id.*

58. Heller v. District of Columbia, 554 U.S. 570, 655 (2008) (Stevens, J., dissenting). *But see id.* at 603 (majority opinion) ("That concern found expression, however, *not* in the various Second Amendment precursors proposed in the state conventions, but in separate structural provisions that would have given the States concurrent and seemingly non-pre-emptible authority to organize, discipline, and arm the militia when the Federal Government failed to do so.").

59. McDonald v. City of Chicago, 561 U.S. 742, 768 (2010) (quoting *Heller*, 554 U.S. at 594).

60. *Id.* (citing *Heller*, 554 U.S. at 598).

61. *Id.* at 769.

62. *Heller*, 554 U.S. at 600–02.

63. *See infra* notes 64–71 and accompanying text (providing cases and commentary supporting the individual rights view). *But see infra* notes 72–73 (providing cases and commentary demonstrating the collective rights view).

64. 18 U.S. (5 Wheat.) 1 (1820).

65. *Heller*, 554 U.S. at 610 (quoting *Houston*, 18 U.S. (5 Wheat.) at 52–53 (Story, J., dissenting)). The quoted passage from Justice Story actually refers to the Fifth Amendment, but it can be safely assumed that reference was a typographical error because Justice Story quotes the entire substance of the Second Amendment in the same sentence. *See id.* ("The fifth amendment to the constitution, declaring that 'a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed,' may not, perhaps, be thought to have any important bearing on this point.").

66. 13 F. Cas. 840 (C.C.E.D. Pa. 1833) (No. 7416).

67. *Id.* at 852.

68. *Heller*, 554 U.S. at 610–11.

69. *E.g.*, Nunn v. State, 1 Ga. 243, 251 (1846); State v. Chandler, 5 La. Ann. 489, 490 (1850); Simpson v. State, 13 Tenn. (5 Yer.) 356, 360 (1833).

the individual rights view, often by declaring that the right to keep and bear arms was calculated to allow for self-defense, the traditional point of emphasis for individual right supporters.[71] Conversely, collective right theorists point to other state court decisions from the post-ratification period that emphasize the right to bear arms in connection with military service.[72] Collective right theorists acknowledge Justice Story's opinion in *Moore*, but claim that his commentary on the Constitution more accurately portrays his view that a well-regulated militia is "the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers."[73]

The debate between individual rights theorists and collective rights theorists arose again after the Civil War.[74] Notably, the 39th Congress' decision to disband Southern militias, but not to disarm their members, was seen as an individual rights endorsement.[75] Furthermore, the courts during this time period recognized that the Second Amendment limited the power of the federal government, not the power of the states.[76]

In 1939, the Supreme Court appeared to adopt a collective right view. In *United States v. Miller*,[77] the Court upheld the application of the National Firearms Act[78] to short-barrel shotguns shipped in interstate commerce.[79] Namely, the Court determined that the Second Amendment was created with "obvious purpose" to assure the continuation and effectiveness of the militia.[80] The Second Amendment did not secure the right to possess short-barrel shotguns because the shotguns were not part of "ordinary military equipment" and could not "contribute to the common defense."[81] After *Miller*, and until *Heller* almost seventy years later, the Supreme Court did not recognize any non-militia-related interests under the Second

70. *Heller*, 554 U.S. at 605–10 (discussing nineteenth century scholars Rawle, Story and Blackstone, who endorsed the individual right view of the Second Amendment).

71. *See id.* at 599 (adopting the individual right view and expressing that self-defense is the "central component" of the Second Amendment right to keep and bear arms).

72. *E.g.*, Aymette v. State, 21 Tenn. (2 Hum.) 154, 158 (1840).

73. *Heller*, 554 U.S. at 667–68 (Stevens, J., dissenting) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897, at 620–21 (4th ed. 1873) (footnote omitted)).

74. *Id.* at 614 (majority opinion).

75. McDonald v. City of Chicago, 561 U.S. 742, 772–73 (2010).

76. *Heller*, 554 U.S. at 674–75 (Stevens, J., dissenting); *see generally McDonald*, 561 U.S. at 754 (2010) (explaining that the Bill of Rights originally only applied against the federal government).

77. 307 U.S. 174 (1939).

78. I.R.C. §§ 5801–5872 (West 2016) (original version at Pub. L. No. 73-474, 48 Stat. 1236 (1934)).

79. *Miller*, 307 U.S. at 177, 183.

80. *Id.* at 178.

81. *Id.*

Amendment.[82] Lower courts, following what was perceived as a well-settled rule, consistently held that the Second Amendment protected a collective right, rather than an individual right to keep and bear arms.[83]

B. Come Heller *High Water: The Supreme Court Settles the Debate and Provides the Analytical Framework for Lower Courts*

Two landmark cases, decided two years and two days apart, dramatically changed the interpretation and application of the Second Amendment.[84] In *District of Columbia v. Heller*, the Supreme Court announced that the Second Amendment conferred an individual right to keep and bear arms.[85] The Court also established a new test for evaluating Second Amendment challenges, whereby courts must consider first whether the challenged law burdens an individual's right to possess and use firearms for traditionally lawful purposes and, if the law does burden an individual's right, the court must subsequently analyze that law under an appropriate standard of heightened scrutiny.[86] In *McDonald v. City of Chicago*, the Supreme Court incorporated the Second Amendment through the Fourteenth Amendment, requiring that states recognize an individual's right to keep and bear arms.[87]

The respondent in *Heller*, Dick Heller, carried a handgun while on duty as a District of Columbia special police officer.[88] Mr. Heller applied for a registration certificate in order to keep a handgun at his home, but the District of Columbia denied his application.[89] The respondent and five other D.C. residents filed suit in the U.S. District Court for the District of Columbia seeking to enjoin the city from enforcing three of its laws restricting private handgun ownership and use.[90] The challenged District of Columbia laws banned handgun registration, required firearms in the home

82. McDonald v. City of Chicago, 561 U.S. 742, 900 (2010) (Stevens, J., dissenting); *see also supra* note 44.

83. *See supra* note 44.

84. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 253–54 (2d Cir. 2015) (referring to *Heller* as "the seminal decision" and *McDonald* as "a landmark case"); United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011) (describing *Heller* and *McDonald* as "landmark decisions").

85. 554 U.S. 570, 595 (2008).

86. *Id.* at 626–29; *see also N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 254 ("This two-step rubric flows from the dictates of *Heller* and *McDonald* . . . .").

87. 561 U.S. at 750 (majority opinion). A majority of the Court held that the Second Amendment was incorporated through the Fourteenth Amendment, but the majority splintered on exactly which section permitted incorporation, producing a plurality opinion on this specific issue. *See id.* at 748–49 (revealing the split with respect to various sections of the opinion); *id.* at 805–06 (Thomas, J., concurring) (urging the Court to incorporate the Second Amendment through the Fourteenth Amendment's Privileges or Immunities Clause).

88. *Heller*, 554 U.S. at 575.

89. *Id.*

90. *Id.* at 575–76; *see infra* note 91 (providing the three laws in question).

to remain inoperable, and imposed a licensing requirement for carrying a handgun.[91] The district court dismissed the complaint, and the respondent appealed.[92] The Court of Appeals for the District of Columbia Circuit reversed the district court's ruling on Second Amendment grounds and directed the district court to enter summary judgment for the respondent.[93] The District of Columbia appealed, and the Supreme Court granted certiorari.[94]

First, the Supreme Court analyzed the language and history of the Second Amendment.[95] Justice Scalia, writing for the majority, examined the meaning of the prefatory and operative clauses at the time of the Second Amendment's enactment.[96] The Court also discussed the way early colonial legislation, state constitutions, case law, and commentaries viewed the right to keep and bear arms.[97] Ultimately, the Court championed the individual right view and stated that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[98] Despite recognizing an individual right, the Court carefully circumscribed it. Justice Scalia provided an informative, not exhaustive, list of statutes that impede the right to keep and bear arms but remain presumptively lawful.[99] Additionally, the Court identified two constraints, first recognized in *Miller*, on the types of weapons protected under the Second Amendment.[100] Weapons must be "typically possessed by law-abiding citizens for lawful purposes" and "in common use at the time."[101] The Court explained that the "in common use at the time" limitation, which first appeared in *Miller*, was fairly supported by the custom of denying "dangerous and unusual weapons" protection under the Second Amendment.[102]

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91. *See generally* D.C. CODE §§ 7-2.501(12), 7-2502.01(a) (2001); D.C. CODE §§ 7-2502.02(a)(4), 7-2507.02 (2001), *invalidated by Heller*, 554 U.S. 570.

92. *Heller*, 554 U.S. at 576.

93. *Id.*

94. *Id.*

95. *Id.* at 576–600 (defining and examining the prefatory and operative clauses of the Second Amendment).

96. *Id.*

97. *Id.* at 600–26; *see also supra* notes 53–76.

98. *Id.* at 635; *see also id.* at 628 (noting that "the inherent right of self-defense has been central to the Second Amendment right").

99. *Id.* at 626–27, 627 n.26. He stated:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools or government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626–27 (footnote omitted).

100. *Id.* at 624–25.

101. *Id.* (first citing United States v. Miller, 307 U.S. 174 (1939); then quoting *id.* at 179)).

102. *Id.* at 627.

Finally, the Supreme Court examined the three District of Columbia laws.[103] The Court held that two of the laws failed under both standards of scrutiny applicable to fundamental rights, but notably declined to recommend a specific level of scrutiny for the Second Amendment analysis, despite Justice Breyer's admonition in his dissent.[104] The Court, however, disqualified rational basis review and sharply criticized Breyer's proposal, the interest-balancing approach.[105] The Court did not address the constitutionality of the District's third law, the licensing requirement, and assumed that the requirement would not interfere with the respondent's requested relief.[106]

Two years after deciding *Heller*, the Supreme Court expanded *Heller*'s reach in the landmark decision of *McDonald v. Chicago*. In *McDonald*, Otis McDonald and three other Chicago residents wanted to keep handguns in their homes for the purpose of self-defense.[107] Mr. McDonald, a community activist, received threats because of his efforts to introduce alternative policing strategies in his community.[108] Likewise, the other petitioners were subjected to threats and violence.[109] One Chicago ordinance required residents to obtain a registration certificate in order to possess a firearm, but another ordinance prohibited the registration of most handguns.[110] Oak Park, a town in the Chicago suburbs, had a similar ordinance that entirely prohibited all firearms.[111]

The *McDonald* Court held that the Second Amendment is applicable against the states and, therefore, remanded the case to the Seventh Circuit to

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103. *Id.* at 628–31.

104. *Id.* at 628–31, 634; *id.* at 687 (Breyer, J., dissenting) (asserting that the standard "matters" for future Second Amendment cases); *see also infra* notes 123–129 and accompanying text discussing standards of scrutiny.

105. *Id.* at 628 n.27 (majority opinion) (explaining that rational basis scrutiny "could not be used" to evaluate legislation that attempts to burden a specific, enumerated right); *id.* at 634–35 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach."). Justice Breyer acknowledged that the writers of the Second Amendment sought to protect the right of citizens to possess and use arms in self-defense. *Id.* at 682 (Breyer, J., dissenting). However, Justice Breyer also identified several interests a legislature might have in limiting citizen access to firearms: saving lives, preventing injury, and reducing crime. *Id.* Recognition of these competing interests colored Justice Breyer's interest-balancing approach, which was intended to find the middle ground between rational basis review, which presumes a gun regulation's constitutionality, and strict scrutiny, which presumes a gun regulation's unconstitutionality. *Id.* at 689. This approach is designed to mirror inquiries the Court conducted in other contexts, such as election law cases, and defer to the legislature in instances where lawmakers are likely to have greater expertise and fact-finding ability. *Id.* at 690.

106. *Id.* at 630–31.

107. McDonald v. City of Chicago, 561 U.S. 742, 750 (2010).

108. *Id.* at 751.

109. *Id.*

110. *Id.* at 750 (quoting CHI., ILL., MUNICIPAL CODE §§ 8-20-040(a), 8-20-050(c) (2009); OAK PARK, ILL., VILLAGE CODE § 27-1-1 (2009)).

111. *Id.* (quoting OAK PARK, ILL. VILLAGE CODE § 27-2-1 (2007)).

determine if the relevant city ordinances impeding and prohibiting handgun possession violated the Second Amendment.[112] The Court reiterated that the right to keep and bear arms for self-defense is the "central component" of the Second Amendment and found that right to be "necessary to our system of ordered liberty."[113] Thus, the Court's incorporation doctrine counseled that the right to keep and bear arms was fully applicable to the states through the Fourteenth Amendment.[114] After incorporating the Second Amendment, the Court reversed the Seventh Circuit's judgment and remanded to allow the court of appeals to consider whether the pertinent laws unconstitutionally restricted the right to keep and bear arms.[115]

The Court declared in *Heller* and *McDonald* that the Second Amendment protects a private, individual right to possess and use firearms for traditionally lawful purposes, especially self-defense within the home.[116] The test *Heller* sets forth is, first, a court must consider whether the challenged law burdens an individual's Second Amendment rights by prohibiting conduct that falls within the scope of the Second Amendment through two inquiries.[117] This inquiry often requires a court to consider the list of presumptively lawful statutes provided in *Heller*.[118] If the regulation prohibits a specific type of weapon, a court must consider whether law-abiding citizens typically possess that weapon for lawful purposes and whether the weapon is "in common use at the time."[119] Second, if a court

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112. *Id.* at 791. Justice Alito, writing for the majority on this issue, explored the history of the Bill of Rights with respect to incorporation through the Fourteenth Amendment. *Id.* at 753–59. The Court traced the path from *Barron v. Baltimore*, 32 U.S. 243 (1833), a landmark case that rejected the Bill of Rights' applicability to the states, to the modern doctrine of selective incorporation, which has incorporated almost all of the provisions in the Bill of Rights to the states. *McDonald*, 561 U.S. at 754; *id.* at 763 (explaining that selective incorporation uses the Due Process Clause to incorporate "particular rights contained within the first eight Amendments"). Since *Heller* implicated federal law and no Supreme Court opinion to date had addressed incorporation of the Second Amendment, some lower courts had concluded that the Second Amendment did not apply to the states. *McDonald*, 561 U.S. at 752 (citing NRA, Inc. v. Oak Park, 617 F. Supp. 2d 752, 754 (N.D. Ill. 2008) (noting that the district court refused to apply the Second Amendment against the states because *Heller* "did not opine" on the subject of incorporation)).

113. *McDonald*, 561 U.S. at 767 (quoting District of Columbia v. Heller, 554 U.S. 570, 599 (2008)); *id.* at 778.

114. *Id.* at 750. Justice Thomas wrote separately to argue that the Second Amendment should be incorporated through the Privileges or Immunities Clause of the Fourteenth Amendment rather than the Due Process Clause. *Id.* at 800 (Thomas, J., concurring).

115. *Id.* at 791.

116. *E.g.*, United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011) (explaining that the decisions in *Heller* and *McDonald* established a "clearly-defined fundamental right" to have firearms in the home for the purpose of self-defense).

117. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n. v. Cuomo, 804 F.3d 242, 252–53 (2d Cir. 2015) ("Guided by the teachings of the Supreme Court, our own jurisprudence, and the examples provided by our sister circuits, we adopt a two-step analytical framework . . . .").

118. *See supra* note 99 and accompanying text.

119. *N.Y. State Rifle & Pistol Ass'n.*, 804 F.3d at 255.

determines that the law in question indeed burdens an individual's Second Amendment rights through either of these tests, it must apply heightened scrutiny to the law in question.[120]

Arguably, the tandem of *Heller* and *McDonald* transformed the right to keep and bear arms more profoundly than any other event since the enactment of the Second Amendment. *Heller* declared that the Second Amendment protected an individual right to keep and bear arms, and *McDonald* secured that right for the citizens of the various states.[121] Furthermore, *Heller* and *McDonald* dramatically altered the approach that lower courts use for legislation challenged under the Second Amendment.[122]

C. Under Scrutiny: The Standards of Scrutiny After Heller *and* McDonald *and the Growing Preference for Intermediate Scrutiny*

When considering cases concerning alleged violations of constitutional rights, the Supreme Court employs different standards of judicial review known as levels or standards of scrutiny.[123] Strict scrutiny, the most exacting of the Court's standards, is applied to laws that limit the exercise of a fundamental right.[124] In order to overcome strict scrutiny, a statute must promote a compelling governmental interest, and the government must narrowly tailor the statute in question in order to achieve that interest.[125] Rational basis review, the most deferential of the Court's standards, is used for legislation that does not significantly interfere with a fundamental right.[126] Under rational basis scrutiny, a statute rationally in furtherance of a legitimate governmental purpose is constitutional.[127] Finally, the Court utilizes a third level of scrutiny, intermediate scrutiny, for

120. *Id.* at 254.

121. *See supra* notes 98, 112 and accompanying text.

122. *See supra* notes 116–120 and accompanying text.

123. Heller v. District of Columbia, 554 U.S. 570, 628–29 (2008) (referring to the "standards of scrutiny" the Court applies). The levels of scrutiny are also, of course, applied in the context of an alleged violation of the Equal Protection Clause or Due Process Clause of the Fourteenth Amendment, but this Note discusses their application to an alleged violation of one of the rights expressed in the Bill of Rights.

124. Regan v. Taxation With Representation of Wash., 461 U.S. 540, 547 (1983); United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments . . . ." (citing Stromberg v. California, 283 U.S. 359, 369–70 (1931); Lovell v. Griffin, 303 U.S. 444, 452 (1938)).

125. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200, 227 (1995) (applying strict scrutiny to a statute using racial classifications).

126. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

127. *Id.*

laws that either implicate important, non-fundamental interests or do not impose a severe burden on a fundamental right.[128] A statute will survive intermediate scrutiny if it is substantially related to the achievement of an important governmental objective.[129]

In *Heller*, the Supreme Court eliminated rational basis review as a viable standard of scrutiny for alleged violations of the Second Amendment, but the Court did not provide, and has not provided since, any further guidance in regard to the proper standard.[130] Therefore, courts have applied a range of standards of scrutiny to laws challenged under the Second Amendment.[131] The following Sections explain these different kinds of scrutiny as they have been applied in the Fourth Circuit Court of Appeals and other Circuits, respectively.

1. The Fourth Circuit's First Amendment Framework Leads to the Application of Intermediate Scrutiny

The Fourth Circuit Court of Appeals provided a blueprint for lower courts to use when analyzing post-*Heller* Second Amendment challenges in *United States v. Chester*.[132] In *Chester*, the challenged law prevented domestic violence misdemeanants from obtaining firearms.[133] Applying the first step from the *Heller* analysis, the court concluded that the defendant's Second Amendment rights remained intact following his domestic violence conviction.[134] The court noted that laws disarming felons were presumptively valid under *Heller*, but determined that there was "a lack of historical evidence" concerning disarming misdemeanants.[135] The court then turned to the level of scrutiny applicable to a law that burdens conduct protected under the Second Amendment.[136] During this part of its analysis, the Fourth Circuit explained that the First Amendment could serve as a

128. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 562–63 (1980) (establishing that, although the First Amendment protects commercial speech, there is a "'commonsense' distinction" between commercial speech and private speech, which is at the core of the First Amendment right to free speech (quoting Ohralik v. Oh. State Bar Ass'n, 436 U.S. 447, 455–56 (1978)).

129. *Id.* at 566.

130. *See, e.g.*, Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir.), *cert. denied*, 136 S. Ct. 447 (2015) ("So far, however, the Justices have declined to specify how much substantive review the Second Amendment requires."); United States v. Skoien, 614 F.3d 638, 642 (7th Cir. 2010) (en banc) (referring to the decision of which level of scrutiny to apply as a "quagmire").

131. *See infra* Parts II.C.1–2.

132. 628 F.3d 673, 678 (4th Cir. 2010) ("[We] . . . reissue our decision to provide district courts in this Circuit guidance on the framework for deciding Second Amendment challenges.").

133. *Id.*; *see generally* 18 U.S.C.A. § 922(g)(9) (West 2016).

134. *Chester*, 628 F.3d at 681–82.

135. *Id.* at 681.

136. *Id.* at 682.

"guide" since *Heller* had neglected to provide a specific standard of scrutiny.[137] In cases that assert a violation of the right to free speech as protected under the First Amendment, the court looks at two factors to determine the applicable standard of scrutiny: the nature of the conduct being regulated and the degree to which the challenged law burdens the right.[138] Private speech subject to content-specific regulations would be examined under strict scrutiny, but commercial speech or speech subject to content-neutral regulations would be afforded greater deference by the court.[139] In *Chester*, the Fourth Circuit held that intermediate scrutiny was appropriate because the defendant was not a "law-abiding, responsible" citizen seeking to exercise his rights under the Second Amendment, so the burden of the law was light.[140]

One year later, in *United States v. Masciandaro*,[141] the Fourth Circuit addressed a Second Amendment challenge to a federal statute that prohibited possessing a handgun in a national park.[142] The defendant in *Masciandaro* was asleep in his car within the national park area when he was arrested for having a gun in his vehicle.[143] Because the defendant frequently slept in his car while traveling for business, he argued that *Heller* gave him a right to possess a handgun for the purpose of self-defense.[144] The Fourth Circuit applied its First Amendment framework once again, holding that intermediate scrutiny was appropriate with respect to laws that burden the right to keep and bear arms outside of the home.[145] The court, relying on *Heller*, concluded that "firearm rights have always been more limited" outside of the home and upheld the statute as constitutional.[146]

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137. *Id.*

138. *Id.*

139. *Id.* Content-neutral regulations serve purposes unrelated to the content of the speech. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). When the government acts pursuant to a purpose independent of the content of the regulated speech, it lessens the probability that the government enacted the regulation out of disapproval with the message of the speech, the principal inquiry in determining content neutrality. *Id.* On the other hand, the message of the speech itself is the only justification for content-specific regulations. *See id.* (implying that content-specific regulations lack independent justification because "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral . . . ."). Based on this distinction, courts have applied different levels of scrutiny to the two types of regulations. *Chester*, 628 F.3d at 682; *see also* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (holding that a town's sign code was a content-based regulation that was subject to strict scrutiny).

140. *Chester*, 628 F.3d at 682–83. The court vacated and remanded to afford the government a chance to establish a relationship between the federal statute and an important governmental goal. *Id.* at 683. On remand, the district court applied intermediate scrutiny and upheld the defendant's conviction. United States v. Chester, 847 F. Supp. 2d 902, 911–12 (S.D.W.V. 2012).

141. 638 F.3d 458 (4th Cir. 2011).

142. *Id.* at 465.

143. *Id.* at 460.

144. *Id.* at 465.

145. *Id.* at 470–71.

146. *Id.* at 470, 474.

In *Woollard v. Gallagher*,[147] a handgun owner and a Second Amendment advocacy group challenged a Maryland law requiring its citizens to present a good and substantial reason for obtaining a handgun permit.[148] In *Woollard*, the Fourth Circuit did not refer to its First Amendment-like approach during the Second Amendment analysis.[149] Citing *Masciandaro*, the court directly applied intermediate scrutiny to the challenged law because it implicated the right to keep and bear arms outside of the home and upheld the statute.[150]

Case law within the Fourth Circuit suggests that a First Amendment approach is a useful analogy for analyzing Second Amendment claims.[151] Furthermore, the Fourth Circuit's precedent indicates a tendency to apply intermediate scrutiny to firearms legislation.[152]

2. Other Circuits' Approaches and the Affinity for Intermediate Scrutiny

Many state and federal courts outside of the Fourth Circuit have also addressed firearms legislation in the wake of *Heller* and *McDonald*. Several circuit courts of appeals have adopted a First Amendment-like approach, resembling the approach used by the Fourth Circuit, or crafted their own approaches.[153] The most common level of scrutiny currently applied by courts is intermediate scrutiny.[154]

Immediately following *Heller* and *McDonald*, courts applied different levels of scrutiny to firearms legislation. In *United States v. Engstrum*,[155] for example, the District Court for the District of Utah held that a federal statute preventing domestic violence misdemeanants from owning a firearm, the same law challenged in *Chester*, should be analyzed under strict scrutiny.[156] After applying strict scrutiny, the court concluded that the federal law was narrowly tailored to its legislative objective and, therefore,

147. 712 F.3d 865 (4th Cir. 2013).

148. *Id.* at 870.

149. *Id.* (referring only to the decision in *Masciandaro* and not mentioning the First Amendment framework)

150. *Id.* at 868, 876.

151. *See supra* notes 137–139, 149–150 and accompanying text; *see also, e.g.*, *Masciandaro*, 638 F.3d at 470 ("[A]s has been the experience under the First Amendment, we might expect that courts will employ different types of scrutiny in assessing burdens on Second Amendment rights . . . .").

152. *See Woollard*, 712 F.3d at 876 (applying intermediate scrutiny); *Masciandaro*, 638 F.3d at 471 (applying intermediate scrutiny); United States v. Chester, 628 F.3d 673, 682–83 (4th Cir. 2010) (applying intermediate scrutiny).

153. *See infra* notes 168–168, 175–178 and accompanying text.

154. *See infra* notes 169–174 and accompanying text.

155. 609 F. Supp. 2d 1227 (D. Utah 2009).

156. *Id.* at 1231–32; *see supra* note 133.

was presumptively lawful.[157] In *GeorgiaCarry.Org, Inc. v. Georgia*,[158] the District Court for the Middle District of Georgia applied intermediate scrutiny to a Georgia law restricting the possession of weapons in a place of worship and upheld the challenged law.[159] The court cited a portion of Justice Breyer's *Heller* dissent arguing that the inclusion of a list of presumptively lawful regulations is inconsistent with strict scrutiny.[160] The court ultimately applied intermediate scrutiny because Georgia's law concerned firearm possession outside the home.[161] Still, other courts eschewed the traditional levels of scrutiny for standards such as an "undue burden" test.[162]

Several circuit courts of appeals have adopted a First Amendment-like approach, akin to the approach used by the Fourth Circuit. In *United States v. Marzzarella*,[163] the Third Circuit held that a federal law prohibiting ownership of a gun with an obliterated serial number did not violate the Second Amendment right to keep and bear arms.[164] The court, after describing the procedure it used for assessing the standard of scrutiny to apply to First Amendment claims, announced, "[w]e see no reason why the Second Amendment would be any different."[165] The Court applied intermediate scrutiny because citizens could continue to own any lawful firearm if that firearm bore its original serial number.[166] The Seventh Circuit, in *Ezell v. City of Chicago*,[167] also borrowed from its First Amendment case law to determine the standard of judicial scrutiny applicable to Chicago's ordinance restricting citizens' use of firing ranges.[168]

Today, most courts confronting firearms legislation apply intermediate scrutiny.[169] In *New York State Rifle & Pistol Ass'n v. Cuomo*,[170] the Second

157. *Engstrum*, 609 F. Supp. 2d at 1235.

158. 764 F. Supp. 2d 1306 (M.D. Ga. 2011).

159. *Id.* at 1317–19.

160. *Id.* at 1317 (citing *Heller*, 554 U.S. at 688 (Breyer, J., dissenting)).

161. *Id.* at 1317.

162. *See, e.g.*, People v. Flores, 169 Cal. App. 4th 568, 577 n.5 (Cal. Ct. App. 2008) (upholding a law preventing the carrying of loaded firearms in public places under a "midlevel standard of scrutiny analogous to the 'undue burden' standard").

163. 614 F.3d 85 (3d Cir. 2010).

164. *Id.* at 87.

165. *Id.* at 96–97.

166. *Id.* at 98–99.

167. 651 F.3d 684 (7th Cir. 2011).

168. *Id.* at 702–03, 706–07.

169. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 260–61 (2d Cir. 2015). In *New York State Rifle & Pistol Ass'n*, the court stated:

> [W]e conclude that intermediate, rather than strict, scrutiny is appropriate. This conclusion coheres not only with that reached by the D.C. Circuit when considering substantially similar gun-control laws, but also with the analyses undertaken by other

Circuit Court of Appeals confronted gun-control legislation passed by the New York and Connecticut legislatures following the Newtown tragedy that closely resembled Maryland's Firearm Safety Act of 2013.[171] The court held that the laws' assault weapon and large-capacity magazine bans did not violate the Second Amendment and noted during its level of scrutiny inquiry that "many" other courts conducting analyses of laws implicating the Second Amendment have applied intermediate scrutiny.[172] The court cites to *Marzzarella*, *Chester*, and other recently issued opinions from the Fifth, Ninth, and Tenth Circuits where intermediate scrutiny was applied to laws burdening the right to keep and bear arms.[173] In addition, the District of Columbia Circuit court has applied intermediate scrutiny to similar legislation.[174]

Despite intermediate scrutiny's prevalence, in *Friedman v. City of Highland Park*,[175] the Seventh Circuit abandoned the more traditional tiers of scrutiny analysis and applied a unique standard to a city ordinance banning assault weapons and large-capacity magazines.[176] The court considered "whether a regulation bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated militia' and whether law-abiding citizens retain adequate means of self-defense."[177] The Seventh Circuit upheld the ordinance, and the Supreme Court denied certiorari.[178]

> courts, many of which have applied intermediate scrutiny to laws implicating the Second Amendment.

Id.; *see also* Fyock v. Sunnyvale, 779 F.3d 991, 999 (9th Cir. 2015) ("Consistent with the reasoning of our sister circuit, we also agree that intermediate scrutiny is appropriate [for a law burdening the right to keep and bear arms]."); United States v. Chovan, 735 F.3d 1127, 1136 (9th Cir. 2013) ("[L]ike the First, Fourth, and Seventh Circuits, we apply intermediate scrutiny to [a firearm statute] and hold that it is constitutional . . . ."); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 990 F. Supp. 2d 349, 366 (W.D.N.Y. 2013), *aff'd in part, rev'd in part on other grounds*, 804 F.3d 242 (2d Cir. 2015) ("[C]ourts throughout the country have nearly universally applied some form of intermediate scrutiny in the Second Amendment context."); United States v. Lahey, 967 F. Supp. 2d 731, 754 (S.D.N.Y. 2013) ("The emerging consensus appears to be that intermediate scrutiny is generally the appropriate level of scrutiny for laws which substantially burden Second Amendment rights.").

170. 804 F.3d 242 (2d Cir. 2015).

171. *Id.* at 247.

172. *Id.* at 260–61.

173. *Id.* at 261 n.101.

174. *Heller II*, 670 F.3d 1244, 1257 (D.C. Cir. 2011).

175. 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015).

176. *Id.* at 410; *see also* Kolbe v. Hogan, 813 F.3d 160, 182 (4th Cir. 2016), *reh'g en banc granted*, 636 F. App'x 880 (4th Cir. 2016) (mem) ("[T]hat court conjured its own test . . . .").

177. *Friedman*, 784 F.3d at 410 (citation omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 622 (2008)).

178. Friedman v. City of Highland Park, 136 S. Ct. 447 (2015), *denying cert. to* 784 F.3d 406 (7th Cir. 2015).

The judicial landscape outside of the Fourth Circuit supports the application of intermediate scrutiny to firearms legislation, even when such legislation burdens the right to possess certain weapons within the home for self-defense.[179] In addition, no post-*Heller* circuit court of appeals decision has applied strict scrutiny to a comprehensive firearm ban, although other circuits that apply a First Amendment framework have considered the possibility.[180]

III. THE COURT'S REASONING

In *Kolbe v. Hogan*, the Fourth Circuit Court of Appeals vacated the district court's decision to uphold the Firearm Safety Act, holding that a complete prohibition of semi-automatic rifles and large-capacity magazines encroaches on the Second Amendment right to keep and bear arms and that a standard of strict constitutional scrutiny should apply to such a prohibition.[181] First, the court reasoned that the Firearm Safety Act burdens conduct within the scope of the Second Amendment because the assault weapon and large-capacity magazine bans include firearms that are typically used for lawful purposes and in common use.[182] Second, it held that the district court should have applied strict scrutiny because the Firearm Safety Act significantly burdens the core right protected under the Second Amendment: use of firearms for self-defense in the home.[183] Consequently, the Fourth Circuit remanded the case and instructed the district court to evaluate the disputed sections of the Firearm Safety Act under the standard of strict scrutiny.[184] Additionally, the court affirmed the district court's decision to grant summary judgment to the State on the plaintiffs' Equal Protection and vagueness claims.[185]

The Fourth Circuit began with a familiar first step in the wake of *Heller*: assessing whether or not the Firearm Safety Act burdens conduct protected by the Second Amendment.[186] Because the Firearm Safety Act specifically regulates weapons, Chief Judge Traxler, writing for the majority, considered the appropriate test for determining if possession of a weapon constitutes constitutionally protected conduct.[187] Relying on

179. *See supra* notes 169–174 and accompanying text.

180. *Kolbe v. Hogan*, 813 F.3d at 196 (King, J., dissenting); *see also, e.g.*, United States v. Marzzarella, 614 F.3d 85, 96–97 (weighing whether to apply intermediate or strict scrutiny).

181. *Kolbe*, 813 F.3d at 168 (majority opinion).

182. *Id.* at 178.

183. *Id.* at 181–82.

184. *Id.* at 192.

185. *Id.*

186. *Id.* at 172 (citing United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010)).

187. *Id.* at 173 ("[W]hen the regulated conduct relates to a particular class of weapons, we must address an additional issue before we can say with assurance that the Second Amendment applies . . . .").

Heller, the court stated that the Second Amendment only protects the right to keep and bear weapons "typically possessed by law-abiding citizens for lawful purposes."[188] The court referred to evidence in the record showing that more than eight million AR- or AK-style semi-automatic rifles were manufactured in or imported into the United States between 1990–2012.[189] In 2012 alone, the number of these weapons manufactured in or sold into the United States was twice the number of Ford F-150 trucks sold in the same year.[190] The court also cited evidence that more than 75 million large-capacity magazines are in circulation in the United States.[191] Based on this evidence and other facts in the record, the court found that semi-automatic rifles and large-capacity magazines were both commonly possessed by law-abiding citizens of the United States.[192] The court noted that semi-automatic rifles and large-capacity magazines were *possessed* for lawful purposes and criticized the State's argument that semi-automatic rifles and large-capacity magazines had to be *actually used* for lawful purposes to warrant Second Amendment protection.[193] Finally, the court asserted that semi-automatic rifles and large-capacity magazines were not excluded from Second Amendment protection under the "dangerous and unusual" exception.[194] The court applied the reasoning from *Heller* and explicitly rejected the State's argument that "unusually dangerous" was synonymous with "dangerous and unusual."[195] In sum, the court found that semi-automatic rifles and large-capacity magazines fall within the confines of Second Amendment protection.[196]

The Fourth Circuit next considered which level of scrutiny to apply, the second step in the *Heller* framework.[197] The court used the First Amendment approach from *United States v. Chester*.[198] Under this approach, a court must consider "the nature of the conduct being regulated" and "the degree to which the challenged law burdens the right."[199] The Fourth Circuit explained that the Firearm Safety Act prevents citizens from possessing banned weapons for all purposes, including the purpose of self-

188. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 625 (2008)).

189. *Id.* at 174.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 176.

194. *See id.* at 177–78, 178 n.8; *see infra* Part IV.A (exploring the majority's understanding of the "dangerous and unusual" language).

195. *Kolbe*, 813 F.3d at 177–78; *see infra* Part IV.A (providing a more in-depth discussion of this point).

196. *Kolbe*, 813 F.3d at 178.

197. *Id.* at 179.

198. 628 F.3d 673, 682 (4th Cir. 2010).

199. *Kolbe*, 813 F.3d at 179 (quoting *Chester*, 628 F.3d at 682).

defense in the home.[200] The court noted that this right is fundamental, so the conduct being regulated extends to the "core" of the Second Amendment.[201] The court rejected the argument that the availability of other classes of firearms for self-defense within the home permits prohibiting certain classes of weapons.[202] The court also pointed out that the Firearm Safety Act is a complete ban, so it significantly burdens this fundamental right.[203] Based on the nature of the conduct prohibited and the burden imposed, the Fourth Circuit reasoned that the law must be examined under strict scrutiny.[204] In so concluding, the court rejected other standards, such as the Seventh Circuit's *Friedman* test and intermediate scrutiny, applied by courts to similar assault weapon and large-capacity magazine bans.[205] The Fourth Circuit vacated the district court's summary judgment order on the plaintiffs' Second Amendment claims and remanded for the district court to apply strict scrutiny.[206]

Next, the court addressed the plaintiffs' claim that the Firearm Safety Act's exception, which allowed former law enforcement officers to possess assault weapons and large-capacity magazines, violates the Equal Protection Clause of the Fourteenth Amendment.[207] Although the plaintiffs argued that they were similarly situated to retired law enforcement officers in all relevant respects, the Fourth Circuit highlighted several fundamental differences between the two groups.[208] Because an Equal Protection claim

200. *Id.* at 179–80.

201. *Id.* (quoting District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (explaining that the interest-balancing approach is particularly inappropriate because the core of the constitutional right under the Second Amendment is at stake)).

202. *Id.* at 180–81 ("[T]he fact that handguns, bolt-action and other manually-loaded long guns, and, as noted earlier, a few semi-automatic rifles are still available for self-defense does not mitigate this burden . . . ."); *cf. id.* at 181 ("[O]ne is not to have the exercise of liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975))).

203. *See Kolbe*, 813 F.3d at 180 ("The burden imposed in this case is not merely incidental. . . . [The Firearm Safety Act] reaches *every* instance where an AR-15 platform semi-automatic rifle or LCM might be preferable to handguns or bolt-action rifles . . . .").

204. *Id.* at 181–82.

205. *See id.* at 182 ("We recognize that other courts have reached different outcomes when assessing similar bans, but we ultimately find those decisions unconvincing.").

206. *Id.* at 192.

207. *Id.* at 184–85. Judge Agee wrote this section of the majority opinion, with Judge King concurring in the judgment and Chief Judge Traxler dissenting. *See id.* at 184, 199.

208. *Id.* at 185–88. These fundamental differences included the training and experience with firearms that former police officers have, the public trust granted to police officers, and the threats from criminals that former police officers face. *Id.* The court also determined that these differences between retired law enforcement officers and private citizens were sufficiently related to the objectives of the Firearm Safety Act. *Id.* at 188–89 (explaining that the retired law enforcement officer exception is "directly related to [the Maryland legislature's] broad objectives" and the court "should not embrace" the argument made by Chief Judge Traxler's dissent that the differences between retired law enforcement officers and private citizens are not related to these objectives).

requires two groups that are similarly situated yet treated differently, the court affirmed the district court's ruling.[209]

Finally, the Fourth Circuit analyzed the plaintiffs' claim that the Firearm Safety Act is void for vagueness because the law uses the undefined term "copies."[210] The court affirmed the district court and held that the Firearm Safety Act is not void for vagueness because the act has a plainly legitimate sweep that identifies a core of prohibited conduct such that the ordinary citizen could understand it.[211]

Judge King concurred in the judgment on the plaintiffs' equal protection and vagueness claims, but strongly dissented from the majority's conclusion that the district court should have reviewed the Firearm Safety Act under strict scrutiny.[212] He argued that the Second Amendment should not protect semi-automatic rifles and large-capacity magazines because these firearms are "lethal weapons of war," nearly indistinguishable from some firearms singled out in *Heller* as "dangerous and unusual."[213] Judge King disagreed with the majority's conception of the "dangerous and unusual" standard, specifically its reliance on the ambiguous word "common"[214] and its perfunctory treatment of the word "dangerous."[215] Although inclined to find that the Firearm Safety Act does not infringe on Second Amendment rights, Judge King resisted doing so and proceeded to a means-end scrutiny analysis.[216] Judge King argued that the majority erred by mandating that strict scrutiny apply to the Firearm Safety Act, because intermediate scrutiny was counseled by the Fourth Circuit's own precedent,[217] the decisions of sister circuits,[218] and the degree to which the

209. *Id.* at 189–90.

210. *Id.* at 190; *see generally* MD. CODE ANN., PUB. SAFETY § 5-101(r)(2) (West Supp. 2015) (classifying "a firearm that is any one of the following specific assault weapons or their copies" as regulated firearms). Once again, Chief Judge Traxler wrote for the majority. *Kolbe*, 813 F.3d at 190.

211. *Kolbe*, 813 F.3d at 192. In its analysis, the court explained that due process requires criminal statutes to adequately inform citizens of ordinary intelligence about what type of conduct is illegal, and if a criminal statute cannot be understood by the ordinary citizen, it should be held void for vagueness. *Id.* at 190 (citing United States v. Sun, 278 F.3d 302, 309 (4th Cir. 2002)). The court tempered this observation and stated that vagueness challenges are deferential and unlikely to succeed if a statute has "a plainly legitimate sweep." *Id.* at 190–91 (quoting United States v. Comstock, 627 F.3d 513, 518 (4th Cir. 2010)).

212. *Id.* at 192 (King, J., dissenting).

213. *Id.* at 193 (comparing an AR-15 semi-automatic rifle to a previously banned M-16 rifle).

214. *Id.* at 194 ("what line separates 'common' from 'uncommon' ownership" (quoting Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015))).

215. *Id.* at 195 ("Another significant problem with the panel majority's conception of the dangerous-and-unusual standard is that it renders the word 'dangerous' superfluous, on the premise that all firearms are dangerous.").

216. *Id.* at 196.

217. *Id.* at 197 (first citing Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013); and then citing United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011)).

law burdened the right to keep and bear arms.[219] Therefore, Judge King concluded that, were he the district judge, he would apply intermediate scrutiny and uphold the Firearm Safety Act as constitutional.[220]

IV. ANALYSIS

In *Kolbe v. Hogan*, the Fourth Circuit held that the Second Amendment protects semi-automatic rifles and large-capacity magazines and that Maryland's Firearm Safety Act should be subject to strict scrutiny.[221] The court made the correct judgment in this case, both because it accurately construed *Heller*'s "dangerous and unusual" language, and because it properly determined that Maryland's comprehensive assault weapon and large-capacity magazine ban should be subject to strict scrutiny.[222] The Fourth Circuit refuted several misconceptions concerning the "dangerous and unusual" language in *Heller*, including the way the language functions and its importance within the context of a judicial analysis.[223] Furthermore, the court sensibly concluded that the district court should examine Maryland's assault weapon and large-capacity magazine bans under the strictest level of scrutiny.[224] The Fourth Circuit advanced an important argument in favor of applying strict scrutiny that other courts must consider when faced with Second Amendment challenges to similar legislation and may represent a shift in the tide of Second Amendment case law.[225] The Fourth Circuit's decision may also persuade the Supreme Court to address the circuit split regarding the appropriate level of scrutiny for assault weapon bans.[226] In addition, it requires state legislatures within the circuit to pass more narrowly tailored firearms legislation.[227]

A. The Fourth Circuit's Judgment Reaffirmed the Proper Interpretation of "Dangerous and Unusual"

In *Kolbe*, the Fourth Circuit correctly concluded that semi-automatic rifles and large-capacity magazines are typically possessed by law-abiding citizens for lawful purposes and, therefore, are protected under the Second

218. *Id.* at 196 ("[N]ot a single court of appeals has ever—until now—deemed strict scrutiny to be applicable to a firearms regulation along the lines of the [Firearm Safety Act].").

219. *See id.* at 197 (holding that the Firearm Safety Act does not sufficiently inhibit the right to keep and bear arms to warrant strict scrutiny).

220. *See id.* at 198.

221. *Id.* at 178, 182 (majority opinion).

222. *See infra* Part IV.A, Part IV.B.

223. *See infra* Part IV.A.

224. *Kolbe*, 813 F.3d at 168.

225. *See infra* Part IV.B.

226. *See infra* Part IV.B.

227. *See infra* Part IV.B.

Amendment.[228] In doing so, the court clarified several misconceptions held by the State, the dissent, and recent decisions from other courts concerning *Heller*'s "dangerous and unusual" language.[229] *Kolbe* emphasized that "dangerous and unusual" is not synonymous with "unusually dangerous," the "dangerous and unusual" language is not an independent limitation on the right to keep and bear arms, and the "in common use at the time" language has not been supplanted by the "dangerous and unusual" language.[230]

1. "Unusually Dangerous" is Not Synonymous with "Dangerous and Unusual"

In *Kolbe*, the court faithfully adhered to the Supreme Court's "dangerous and unusual" language and rejected an alteration advanced by the State and the dissent. In *Heller*, the "dangerous and unusual" language first appears when the Court discusses the appropriate limits on the Second Amendment right to keep and bear arms.[231] The *Heller* Court adopts a limitation from *United States v. Miller* confining Second Amendment protection to weapons "in common use at the time."[232] The Court explained that this limitation is supported by the established practice of proscribing the carrying of dangerous and unusual weapons.[233] In *Kolbe*, the State argued that "unusually dangerous" weapons fall outside the scope of Second Amendment protection.[234] Judge King, in his dissent, supported the State's use of the "unusually dangerous" benchmark by claiming that the standard found support in *Heller*.[235] The Fourth Circuit rightly refuted these arguments. First, the court could not locate a single statute or case mentioning the "unusually dangerous" standard, so it was unsupported by legal precedent.[236] Additionally, the State inappropriately rearranged "dangerous *and* unusual," two words that *Heller* Court purposefully arranged conjunctively.[237] Furthermore, substituting "unusually dangerous" in place of "dangerous and unusual" would yield significant consequences

228. *See Kolbe*, 813 F.3d at 168 (announcing that semi-automatic rifles and large-capacity magazines were within Second Amendment protection).

229. *See, e.g.*, *id.* at 178 (concluding that the State's unusually dangerous standard "is of no avail"); *see also infra* Part IV.A.1–3 (explaining why other views of the "dangerous and unusual" language are erroneous). *But see Kolbe*, 813 F.3d at 195 (King, J., dissenting) ("[T]he unusually dangerous benchmark is no more difficult to apply than, for example, the majority's dubious test . . . .").

230. *See infra* Parts IV.A–B

231. 554 U.S. 570, 627 (2008).

232. *Id.* (quoting United States v. Miller, 307 U.S. 174 (1939)).

233. *Id.*

234. *Kolbe*, 813 F.3d at 177 (majority opinion).

235. *Id.* at 195 (King, J., dissenting).

236. *Id.* at 177 (majority opinion).

237. *Id.* at 178 (emphasis added).

that the Supreme Court did not intend.[238] Whereas *Heller*'s arrangement suggests that even a dangerous weapon may enjoy constitutional protection if that weapon is in common use at the time, the State's arrangement forecloses this possibility entirely.[239] It is also unclear which weapons are so dangerous that they do not receive Second Amendment protection.[240] *Kolbe*'s rejection of the "unusually dangerous" standard prevented the manipulation of the "dangerous and unusual" language from *Heller*.

2. "Dangerous and Unusual" Does Not Function as an Independent Limitation on the Right to Keep and Bear Arms

The *Kolbe* court also correctly noted that the "dangerous and unusual" language from *Heller* does not independently constrain the right to keep and bear arms.[241] In *Kolbe*, both the State and the dissent viewed "dangerous and unusual" as an independent limitation on the right to keep and bear arms.[242] The State claimed that firearms that are "unusually dangerous" fall altogether outside of the scope of the Second Amendment.[243] Judge King wrote in his dissent, "I am far from convinced that the Second Amendment reaches the AR-15 and other assault weapons prohibited under Maryland law, given their military-style features, *particular dangerousness*, and questionable utility for self-defense."[244] Judge King later asserted that "the Heller Court surely had relative dangerousness in mind when it repudiated Second Amendment protection for short-barreled shotguns and 'weapons that are most useful in military service—M–16 rifles and the like.'"[245] Thus, Judge King would presumptively rely on the AR-15's dangerousness as a factor in withdrawing Second Amendment protection from such a weapon.[246] Other courts have understood *Heller*'s dangerous and unusual

238. *See id.* at 177 (noting that *Heller*'s standard would sometimes protect dangerous weapons that were "widely employed for lawful purposes").

239. *Id.* at 177–78 ("But if the proper judicial standard is to go by total murders committed, then handguns should be considered far more dangerous . . . . Yet *Heller* has established that handguns are constitutionally protected . . . ."); *see also, e.g.*, Friedman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir.), *cert. denied*, 136 S. Ct. 447 (2015) (referring to statistics that reveal handguns kill as many people in Chicago annually as mass shootings have killed nationwide in the past decade).

240. *Kolbe*, 813 F.3d at 177–78.

241. *See id.* at 177 ("The State's novel 'unusually dangerous' standard reads too much into *Heller*.").

242. The State attempted to exclude the challenged weapons on the grounds that they were dangerous and unusual. *Id.* Judge King repeatedly refers to the "dangerous-and-unusual" standard in his analysis. *Id.* at 194–96 (King, J., dissenting).

243. *Id.* at 177 (majority opinion).

244. *Id.* at 193 (King, J., dissenting) (emphasis added).

245. *Id.* at 195 (quoting District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

246. *See id.* at 196 (stating that he is "strongly inclined" to declare that the Firearm Safety Act does not implicate the Second Amendment). In his opinion, Judge King actually refrained from reaching this conclusion in order to apply an appropriate level of scrutiny. *Id.*

language in a similar light. In *Commonwealth v. Caetano*,[247] the Supreme Judicial Court of Massachusetts held that a Massachusetts law prohibiting the possession of stun guns did not violate the Second Amendment.[248] The court used a dangerous and unusual test to analyze whether stun guns were dangerous per se, which it defined as "designed and constructed to produce death or great bodily harm . . . for the purpose of bodily assault or defense,"[249] and whether stun guns were unusual, which it defined as "a weapon of warfare to be used by the militia."[250]

As the majority stated in *Kolbe*, and as the Supreme Court confirmed in vacating *Commonwealth v. Caetano*, the Court did not intend its phrase "dangerous and unusual" to function as an independent limitation on an individual Second Amendment right.[251] *Heller*'s baseline protection under the Second Amendment was an individual right, unconnected to military service, to keep and bear arms in case of confrontation.[252] The Supreme Court articulated two limitations on what type of weapons command Second Amendment protection: those which are "typically possessed by law-abiding citizens for lawful purposes"[253] and weapons "in common use at the time."[254] The *Heller* Court went on to note that the "common use" limitation "*is fairly supported*" by the practice of prohibiting "dangerous and unusual weapons."[255] To infer the meaning the State does from this language, the Supreme Court must have used the active tense.[256] For example, if the *Heller* Court had announced, "the common use limitation *fairly supports* the tradition of banning dangerous and unusual weapons" the phrasing would indicate that the "common use" analysis was a way of answering a "dangerous and unusual" inquiry.[257] This is not the case.[258] As

247. 26 N.E.3d 688 (Mass. 2015), *vacated per curiam*, 136 S. Ct. 1027 (2016).

248. *Id.* at 695.

249. *Id.* at 692 (quoting Commonwealth v. Appleby, 402 N.E.2d 1051 (Mass. 1980)).

250. *Id.* at 693.

251. *See* Caetano v. Massachusetts, 136 S. Ct. 1027 (2016) (per curiam).

252. District of Columbia v. Heller, 554 U.S. 570, 595 (2008); *see also* Kolbe v. Hogan, 813 F.3d 160, 172 (4th Cir. 2016), *reh'g en banc granted*, 636 F. App'x 880 (4th Cir. 2016) (mem).

253. *Kolbe*, 813 F.3d at 173 (quoting *Heller*, 554 U.S. at 625). *Heller* offers the example of a short-barreled shotgun as a weapon that fails this particular test. *Heller*, 554 U.S. at 625 (citing United States v. Miller, 307 U.S. 174 (1939)).

254. *Id.* at 172 (quoting *Heller*, 554 U.S. at 627).

255. 554 U.S. 570, 627 (2008) (emphasis added).

256. *Cf. Kolbe*, 813 F.3d at 178 (referring to Justice Breyer's dissenting opinion in *Heller*, which focused on dangerousness alone, and indicating that Justice Breyer potentially construed the "dangerous and unusual" and "common use" relationship in a different manner than the majority in *Heller* intended).

257. *See, e.g.*, *id.* ("Most likely, common use is the sole limiting principle." (quoting Dan Terzian, *The Right to Bear (Robotic) Arms*, 117 PENN ST. L. REV. 755, 767–68 (2013))).

258. Other examples may prove instructive. Consider "the verdict is fairly supported by the evidence" and "the writer's conclusion is fairly supported by her arguments." Both of these

Kolbe emphasized, "it was only a dissent in *Heller*" that used this line of reasoning.[259] Typical possession by law-abiding citizens for lawful purposes and common use at the time are the only constitutional hurdles a particular weapon must clear in order to gain eligibility for Second Amendment protection. Therefore, assertions like Judge King's, that dangerousness led the *Heller* Court to ban M-16 rifles, are misleading. The *Heller* Court banned M-16 rifles because the rifles were not in common use at the time, and by extension "unusual," not because those weapons reached a certain level of dangerousness.[260] In *Caetano v. Massachusetts*, the Supreme Court reinforced this view and criticized the Massachusetts court's understanding of the "dangerous and unusual" language.[261] In his concurrence, Justice Alito wrote, "If *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous."[262]

In summary, the court in *Kolbe* recognized that *Heller* used "dangerous and unusual" to describe the types of weapons that might not receive Second Amendment protection, but *Heller* did not intend "dangerous and unusual" to independently constrain the right to keep and bear arms.

3. "In Common Use at the Time" Is Still Relevant to the Consideration of a Second Amendment Claim

Lastly, Kolbe recognized that the "dangerous and unusual" language has not supplanted the "in common use at the time" limitation from *Heller*. The dissent and *Friedman* criticize the "in common use at the time" limitation and its continued relevance. In *Friedman*, the Seventh Circuit upheld a ban on assault weapons and large-capacity magazines while dismissing interpretations of *Heller* that rely on the common use limitation.[263] The court wrote:

> [R]elying on how common a weapon is at the time of litigation would be circular to boot. Machine guns aren't commonly owned for lawful purposes today because they are illegal; semi-automatic weapons with large-capacity magazines are owned more commonly because, until recently (in some jurisdictions),

sentences involve similar relationships and should illustrate the importance of the tense the *Heller* Court used.

259. *Id.* at 178.

260. *Id.* at 177.

261. 136 S. Ct. 1027, 1027 (2016) (per curiam).

262. *Id.* at 1028 (Alito, J., concurring). *But see id.* at 1131 (suggesting that "dangerous and unusual" is a conjunctive test).

263. Friedman v. Highland Park, 784 F.3d 406, 409 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015).

> they have been legal. Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned. A law's existence can't be the source of its own constitutional validity.[264]

The dissent in *Kolbe* quoted this passage as support for the idea that the majority misunderstood the word "unusual" as it functions within *Heller*'s "dangerous and unusual" standard.[265] While the majority defined unusual in terms of whether a weapon is in common use or typically possessed by the citizenry, the dissent contends that unusual cannot mean not commonly possessed, because this would result in imaginary line-drawing, whereby a weapon's popularity determines its constitutionality.[266]

Although this language may seem circular or absurd to some, the majority in *Kolbe* did not misunderstand the "in common use at the time" limitation or how the Supreme Court intended the word "unusual" to function. In an order denying certiorari to the *Friedman* case, Justice Thomas—joined by Justice Scalia who wrote the *Heller* opinion—explained that the Seventh Circuit misread *Heller* and "flout[ed] two of [the Court's] Second Amendment precedents."[267] In other words, the *Friedman* court erred because "[u]nder [the Court's] precedents, [common use for lawful purposes] is all that is needed for citizens to have a right under the Second Amendment to keep such weapons."[268] The *Kolbe* court reiterated the idea that common use or typical possession by the citizenry is the hallmark of Second Amendment protection, not the "dangerous and unusual" quality of the weapons alone.[269] And, in *Caetano*, the Court reaffirmed the importance of the common use at the time limitation and the "dangerous and unusual" language.[270] In a concurring opinion, Justice Alito writes, "the pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes *today*."[271] Justice Alito also explored the Massachusetts state court's misapplication of the "dangerous and unusual" language and explained that the court "defied *Heller*'s reasoning."[272]

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264. *Id.*

265. Kolbe v. Hogan, 813 F.3d 160, 194–95 (4th Cir. 2016), *reh'g en banc granted*, 636 F. App'x 880 (4th Cir. 2016) (mem).

266. *Id.* at 177; *id.* at 194–95 (King, J., dissenting).

267. Friedman v. City of Highland Park, 136 S. Ct. 447, 449 (Thomas, J., dissenting), *denying cert. to* 784 F.3d 406 (7th Cir. 2015).

268. *Id.*

269. *Kolbe*, 813 F.3d at 177–78.

270. *See supra* note 251 and accompanying text.

271. Caetano v. Massachusetts, 136 S. Ct. 1027, 1032 (2016) (per curiam) (Alito, J., concurring).

272. *Id.* at 1030.

Despite these alternative views, *Kolbe* hewed closest to the language set forth in *Heller*.[273] Future courts considering Second Amendment challenges to firearms legislation should rely on *Kolbe*, not *Friedman* or others, because *Kolbe* construed "dangerous and unusual" as the Supreme Court intended.

B. The Fourth Circuit Correctly Mandated Strict Scrutiny, Encouraging the Supreme Court to Resolve the Circuit Split and Legislatures to Narrowly Tailor Future Firearms Legislation

In *Kolbe*, the Fourth Circuit correctly held that the Firearm Safety Act's assault weapon and large-capacity magazine bans should be analyzed under strict scrutiny.[274] The court grounded its determination in the "First-Amendment-like" framework that the Fourth Circuit often employs for challenges under the Second Amendment.[275] Since the Firearm Safety Act indiscriminately banned a class of firearms used for conduct at the core of the Second Amendment, the court equated the law with one that "foreclose[s] an entire medium of expression" in a First Amendment context.[276] Legislation that severely burdens a fundamental right must be analyzed under strict scrutiny.[277] Although the State argued that the plaintiffs could possess other types of weapons to defend themselves, *Kolbe* reinforced that courts cannot permit bans of entire classes of weapons merely because other classes of weapons are available.[278] The Fourth Circuit's holding appreciated that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table."[279] The Second Amendment right to keep and bear arms, just like the First Amendment right to free speech, commands the judiciary's protection. If courts subject content-based speech regulations to strict scrutiny because those regulations intrude upon the core First Amendment right, then blanket firearm bans that intrude upon the core Second Amendment right, the law-abiding citizen's right to possess a firearm for self-defense, should also be subject to strict scrutiny.[280]

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273. *See Kolbe*, 813 F.3d at 194–95 (showing deference to key passages from *Heller* such as "typically possessed by law-abiding citizens for lawful purposes" and the conjunctive phrase "dangerous and unusual" and applying those passages in the same way the Court did in *Heller*).

274. *Id.* at 182.

275. *Id.* at 179 (citing United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010)).

276. *Id.* at 183 (quoting City of Ladue v. Gilleo, 512 U.S. 43, 55 (1994)); *see, e.g.*, Jamison v. Texas, 318 U.S. 413, 414, 416 (1943) (holding that the First Amendment protects the door-to-door distribution of literature from prohibition "at all times, at all places, and under all circumstances").

277. *Kolbe*, 813 F.3d at 181.

278. *Id.* at 180–81.

279. District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

280. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) (requiring strict scrutiny for a town's sign code that targeted speech based on its content).

Kolbe was the first court of appeals to apply strict scrutiny to a comprehensive assault weapon and large-capacity magazine ban.[281] The court acknowledged that other courts have applied intermediate scrutiny to similar bans.[282] In *Friedman*, the Seventh Circuit applied its own standard, which the *Kolbe* court strongly criticized.[283] A few courts have applied strict scrutiny to other firearm regulations or in non-Second Amendment cases,[284] but intermediate scrutiny is the overwhelming standard of choice.[285] Many courts echo the sentiment "strict in theory, but fatal in fact," which implies that applying strict scrutiny will inevitably overturn the law in question.[286] But, as Justice O'Connor explained in *Adarand Constructors v. Pena*,[287] strict scrutiny is not, in fact, fatal.[288] Rather, it is designed to ensure that the legislature acts "within constitutional constraints" by narrowly tailoring its means toward a compelling governmental end.[289]

As the first court of appeals decision to conclude that strict scrutiny should be applied to a provision of comprehensive firearms legislation, *Kolbe* may influence Second Amendment jurisprudence outside of the Fourth Circuit and gun regulations within the Fourth Circuit. First, courts that have not yet addressed cases involving broad firearms legislation will have to consider *Kolbe*'s strong endorsement of strict scrutiny when analyzing similar bans. *Heller* left the appropriate level of heightened scrutiny for firearms legislation open to interpretation by the lower courts.[290] Circuit courts of appeals have been reluctant to apply strict

281. *Kolbe*, 813 F.3d at 196 (King, J., dissenting).

282. *Id.* at 182; *see, e.g.*, *Heller II*, 670 F.3d 1244, 1261–62 (D.C. Cir. 2011) (finding that intermediate scrutiny rather than strict scrutiny is the appropriate heightened standard of review for a comprehensive firearm statute).

283. *Kolbe*, 813 F.3d at 182 (majority opinion).

284. *See, e.g.*, United States v. Montalvo, No. 08-CR-004S, 2009 WL 595998, at *3 (W.D.N.Y. Mar. 12, 2009); United States v. Erwin, No. 1:07-CR-556 (LEK), 2008 WL 4534058, at *5–6 (N.D.N.Y. Oct. 6, 2008).

285. Stephen Kiehl, *In Search of a Standard: Gun Regulations After* Heller *and* McDonald, 70 MD. L. REV. 1131, 1145 (2011).

286. *See e.g.*, *Kolbe*, 813 F.3d at 198 (King, J., dissenting) (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)).

287. 515 U.S. 200 (1995).

288. *Id.* at 237.

289. *Id.*

290. 554 U.S. 570, 628 (2008) (referring generally to the fact that the law would satisfy "any" of the standards of heightened scrutiny); *cf.* Richard C. Boldt, *Decisional Minimalism and the Judicial Evaluation of Gun Regulations*, 71 MD. L. REV. 1177, 1178–82 (2012) (asserting that Justice Scalia adopted a Burkean minimalist approach in the *Heller* opinion and left the appropriate standard of scrutiny question open for judges to interpret based on "longstanding settled practices and traditions").

scrutiny and have generally opted to apply intermediate scrutiny.[291] Intermediate scrutiny permits courts to show greater deference to the legislature than strict scrutiny in the process of upholding most firearms legislation.[292] Similarly, many courts have displayed a tendency to confine *Heller* to its specific facts, which limits its application to handgun bans.[293] Yet many of the same courts that apply intermediate scrutiny to firearm regulations or cabin *Heller*'s holding to handgun bans subject laws that infringe upon other enumerated constitutional rights to strict scrutiny.[294] *Kolbe* is not mandatory authority outside of the Fourth Circuit, but it is persuasive authority. In at least one case, lawyers filing Second Amendment claims in the Tenth Circuit have already cited *Kolbe* in order to persuade the court to apply strict scrutiny.[295] Furthermore, *Kolbe* challenges *Friedman*, a case that some viewed as the future direction of Second Amendment jurisprudence.[296] *Friedman* asked whether a firearm regulation "bans weapons that were common at the time of ratification or those that have 'some reasonable relationship to the preservation or efficiency of a well regulated [sic] militia' . . . and whether law-abiding citizens retain adequate means of self-defense."[297] *Kolbe* discussed some of

291. *See* Kiehl, *supra* note 285, at 1145 ("The majority of courts to announce a standard of review have employed intermediate scrutiny, which is emerging as a clear favorite in the lower courts for Second Amendment challenges."); *supra* notes 174–174 and accompanying text.

292. *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 260–61, 269 (2d Cir. 2015) (applying intermediate scrutiny and upholding an assault weapon ban); Woollard v. Gallagher, 712 F.3d 865, 868, 876 (4th Cir. 2013) (same); *Heller II*, 670 F.3d 1244, 1247, 1257 (D.C. Cir. 2011) (same); *see also* Kiehl, *supra* note 285, at 1142 ("[T]he only consistency in the lower court cases is in the results. Regardless of the test used, challenged gun laws almost always survive." (quoting TINA MEHR & ADAM WINKLER, AM. CONSTITUTION SOC'Y, THE STANDARDLESS SECOND AMENDMENT 1 (2010), https://www.acslaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf)).

293. *See, e.g.*, Friedman v. City of Highland Park, 136 S. Ct. 447, 448 (2015) (Thomas, J., dissenting), *denying cert. to* 784 F.3d 406 (7th Cir. 2015) ("Instead of adhering to our reasoning in *Heller*, the Seventh Circuit limited *Heller* to its facts . . . ."); *see also* Richard Re, *Narrowing Supreme Court Precedent From Below*, 104 GEO. L.J. 921, 962 (2016) (stating that some courts' reasonable reluctance to apply the ruling in *Heller* led Justice Thomas to write dissents from denials of certiorari criticizing this "apparent narrowing from below").

294. *See, e.g.*, State Emp. Bargaining Agent Coalition v. Rowland, 718 F.3d 126, 133 (2d Cir. 2013) (holding that a state policy of only laying off union members interfered with the employees' freedom to associate and was subject to strict scrutiny).

295. *See, e.g.*, Brief for Petitioners at 10–11, Bonidy v. United States Postal Serv., 790 F.3d 1121 (10th Cir.) (No. 15-746), 2016 WL 722179 (arguing that the court should consider *Kolbe* and apply strict scrutiny), *cert. denied*, 136 S. Ct. 1486 (2016) (mem).

296. *See* Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 WASH. U. L. REV. 1187, 1201–04 (2015) (citing *Friedman* in support of the idea that the more "flexible" approach taken by lower courts has doomed *Heller*'s reading of Second Amendment originalism and opened the door to an interest-balancing approach).

297. Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir.), *cert. denied*, 136 S. Ct. 447 (2015) (quoting District of Columbia v. Heller, 554 U.S. 570, 622–25 (2008); and then citing United States v. Miller, 307 U.S. 174, 178–79 (1939)).

the flaws in this standard of scrutiny that Justice Scalia and Justice Thomas identified in their dissent from the Supreme Court's denial of certiorari for *Friedman*.[298] Specifically, *Kolbe* dismissed the Seventh Circuit's approach because it ignores the levels of scrutiny analysis in a way that "cannot be reconciled with *Heller*."[299] Although the Supreme Court denied certiorari in the *Friedman* case, the Court endorsed *Kolbe*'s view in the more recent *Caetano* case by criticizing the Massachusetts Supreme Judicial Court's decision to ban stun guns, labelling it incompatible with *Heller*'s extension of Second Amendment protection to arms that were not in existence at the time of the founding.[300] Thus, other courts must seriously consider *Kolbe* and its arguments when determining the appropriate level of scrutiny to apply to sweeping firearms legislation.

The Fourth Circuit's decision in *Kolbe* will produce firearms legislation that offers greater protection to the right to keep and bear arms. *Kolbe* has influenced Second Amendment jurisprudence by creating a circuit split[301] regarding the appropriate level of scrutiny for a Second Amendment analysis, which may compel the Supreme Court to grant certiorari to a case involving a firearm ban.[302] All circuit courts of appeals up until *Kolbe* addressing challenges to comprehensive firearms legislation applied intermediate scrutiny.[303] In late 2015, before *Kolbe* was decided, the Supreme Court declined to expound on the scrutiny question it left open in *Heller* by denying certiorari in the *Friedman* case.[304] Following *Kolbe*, legal commentators and news articles have predicted that the Supreme Court will grant certiorari to a case involving comprehensive firearms legislation in order to rectify the circuit split.[305]

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298. Kolbe v. Hogan, 813 F.3d 160, 182–83 (4th Cir. 2016), *reh'g en banc granted*, 636 F. App'x 880 (4th Cir. 2016) (mem) (majority opinion).

299. *Kolbe*, 813 F.3d at 182.

300. 136 S. Ct. 1027, 1028 (2016) (per curiam) (quoting *Heller*, 554 U.S. at 582 ("[The Massachusetts stun gun ban is] inconsistent with *Heller*'s clear statement that the Second Amendment 'extends . . . to . . . arms . . . that were not in existence at the time of the founding.'")).

301. *Compare* N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 260–61 (2d Cir. 2015) (applying intermediate scrutiny to an assault weapon ban), *and Friedman*, 784 F.3d at 410 (applying a standard requiring protected weapons to have a reasonable relationship to the preservation or efficiency of a well-regulated militia to an assault weapon ban), *with Kolbe*, 813 F.3d at 182 (applying strict scrutiny to an assault weapon ban).

302. *See, e.g.*, Eric Hansford, *Measuring The Effects of Specialization with Circuit Split Reviews*, 63 STAN. L. REV. 1145, 1152–53 (explaining that the Supreme Court typically takes cases from the courts of appeals to settle a disagreement among the circuits).

303. *Kolbe*, 813 F.3d at 196 (King, J., dissenting).

304. Friedman v. City of Highland Park, 136 S. Ct. 447, 447 (2015), *denying cert. to* 784 F.3d 406 (7th Cir. 2015)

305. *See, e.g.*, Dahlia Lithwick, *Are Assault Weapons Protected by the Second Amendment?*, SLATE (Feb. 5, 2016, 3:14 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/the_supreme_court_may_

Now may be a particularly opportune time for the Supreme Court to decide what level of scrutiny should be applied in Second Amendment challenges. Gun control legislation played a prominent role in the national political conversation during the 2016 U.S. presidential election.[306] Cities and states will likely continue to pass, or at least propose, assault weapon bans in light of recent, high profile shootings, often committed with automatic or semi-automatic weapons.[307] Assuming that the Supreme Court does not pull back from *Heller*, where the Court insisted that the Second Amendment legislation must satisfy heightened scrutiny, it might specifically endorse either intermediate or strict scrutiny.[308] If the Court champions strict scrutiny, then the fundamental, constitutional right to keep and bear arms for self-defense will be accorded greater protection by all courts.

Finally, the Fourth Circuit remanded the case to the district court and instructed the court to apply strict scrutiny in order to decide whether or not the Firearm Safety Act is constitutional.[309] On remand, the district court could conclude that the Firearm Safety Act, when examined through a lens of strict scrutiny, violates the Second Amendment right to keep and bear arms. If the district court does hold the act unconstitutional, Maryland and the other states within the Fourth Circuit will have to change their approach

finally_have_to_take_a_new_gun_case.html (considering the idea that we may see a "high court showdown" involving the Supreme Court and comprehensive gun legislation following *Kolbe*).

306. *See, e.g.*, Aaron Blake, *The Final Trump-Clinton Debate Transcript, Annotated*, WASH. POST (Oct. 19, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated/ (transcribing the third, televised debate between Hillary Clinton and Donald Trump during the 2016 presidential campaign, during which the candidates discussed, among other topics, gun regulation and comprehensive background checks).

307. In particular, the tragic shooting in an Orlando nightclub on June 12, 2016, provoked a groundswell of support for assault weapon bans. *See* Christopher Ingraham, *Support for Assault Weapons Ban Surges Following Orlando Shooting*, WASH. POST (June 15, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/06/15/something-might-be-changing-after-orlando-americans-suddenly-want-to-ban-assault-weapons/ (describing the rise in the number of Americans who support a nationwide assault weapon ban following the shooting in the Pulse nightclub); Gary Rohrer, *GOP, Democrats Still Battle over Gun Control in Florida*, ORLANDO SENTINEL (June 17, 2016, 5:55 PM), http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/politics/os-orlando-shooting-gun-control-legislature-20160617-story.html (describing the debate over increased gun control in the Florida legislature following the Orlando shooting). The Orlando shooter used a semi-automatic pistol and semi-automatic rifle to kill forty-nine people and injure fifty-three more, marking the deadliest mass shooting in American history. Hayley Tsukayama, Mark Berman & Jerry Markon, *Gunman Who Killed 49 in Orlando Nightclub Had Pledged Allegiance to ISIS*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/06/12/orlando-nightclub-shooting-about-20-dead-in-domestic-terror-incident-at-gay-club/.

308. Strict scrutiny is one of the types of heightened scrutiny that the Court permitted lower courts to apply following *Heller* and *McDonald*. *See* District of Columbia v. Heller, 554 U.S. 570, 628 (2008) (disqualifying rational-basis scrutiny only).

309. *Id.* at 168. *But see supra* note 13 (explaining that the Fourth Circuit must issue an en banc opinion first that could prevent the case from being remanded).

to firearms legislation.[310] Presumably, future gun regulations will need to be narrower to allow law-abiding citizens to possess firearms, including semi-automatic weapons, within their homes for the purpose of self-defense.[311]

IV. CONCLUSION

In *Kolbe v. Hogan*, the Fourth Circuit held that semi-automatic rifles and large-capacity magazines were protected under the Second Amendment and that a total prohibition of these weapons should be analyzed under strict scrutiny.[312] The court reached the correct conclusion in this case, partly because its accurate interpretation of the "dangerous and unusual" standard set forth in *Heller* should assist future courts facing Second Amendment challenges.[313] Furthermore, the court properly decided *Kolbe* because it determined that comprehensive assault weapon and large-capacity magazine bans like the Firearm Safety Act's must be evaluated under the standard of strict scrutiny.[314] The Fourth Circuit's application of strict scrutiny implores future courts to seriously consider *Kolbe*'s arguments for strict scrutiny in the context of broad firearms legislation and could pressure the Supreme Court to grant certiorari to a similar Second Amendment challenge in the next few years.[315] In addition, if on remand the district court finds the Firearm Safety Act unconstitutional, state legislatures within the Fourth Circuit will need to pass narrower firearm regulations that safeguard the right to keep and bear arms.[316]

310. *See* McDonald v. City of Chicago, 561 U.S. 742, 922–23, 927 (2010) (Breyer J., dissenting) (asserting that state legislatures must consider firearm case law when devising gun regulations).

311. *See* Kolbe v. Hogan, 813 F.3d 160, 183 (4th Cir. 2016), *reh'g en banc granted*, 636 F. App'x. 880 (4th Cir. 2016) (mem) (noting that the Firearm Safety Act goes beyond regulation into total prohibition and implying that Maryland's legislature should have tempered this absolute prohibition).

312. *Id.* at 168.

313. *See supra* Part IV.A.

314. *See supra* Part IV.A.

315. *See supra* Part IV.B.

316. *See supra* Part IV.B.