THE FOURTH IS STRONG IN THIS ONE: A COMPARATIVE ANALYSIS OF THE FOURTH CIRCUIT'S APPROACH TO JUDICIAL SCRUTINY IN SECOND AMENDMENT CASES

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INTRODUCTION

One of the most hotly-contested constitutional issues in recent history is the debate concerning the right to keep and bear arms as provided in the Second Amendment of the Constitution. While there are

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numerous facets of this debate, one such facet concerns the appropriate level of judicial scrutiny that should be applied to laws that implicate the Second Amendment right to keep and bear arms. There are essentially three sides to this debate. Although this debate is currently fluid, for the purposes of effectively analyzing this issue, the differing views can be grouped in three separate categories. These three categories include: the Fourth Circuit view, which espouses that strict scrutiny should apply to laws concerning gun regulation;[1] the Seventh Circuit view, which applies its own standard;[2] and the D.C., Ninth, and Third Circuit view, which advocates that intermediate scrutiny should apply.[3] However,

> [n]ow that the Supreme Court has told us that there is an individual right to bear arms unrelated to service in a militia, there are numerous open questions regarding the precise scope of the right, *the appropriate standard of review for rights-infringing government action*, and what, if any, auxiliary doctrines and rights might be implied by the core Second Amendment right. Indeed, it is not too much of a stretch to say that what we know with confidence is only that, under current Supreme Court doctrine, the government may not categorically ban handgun possession in private homes or require that all firearms in a private home be kept in an inoperable state.[4]

First, Part I of this Note will provide the background information concerning the bill at issue, Maryland's Firearm Safety Act (FSA), as well as where the individual fundamental right to bear arms came about as described in *District of Columbia v. Heller*.[5] Part II will discuss *Kolbe v. Hogan* and the differing approaches to the level of scrutiny that should be applied by various circuits in addressing Second Amendment issues.[6] Part II will be a comparative analysis of the Fourth Circuit's application of strict scrutiny in *Kolbe v. Hogan*,[7] with similar cases from other Circuits (Seventh, D.C., Ninth, and Third) that applied other standards.[8]

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[1] Kolbe v. Hogan, 813 F.3d 160, 184 (4th Cir. 2016).

[2] Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015).

[3] *See* Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1257 (D.C. Cir. 2011); *see also* Fyock v. City of Sunnyvale, 779 F.3d 991, 999 (9th Cir. 2015); Peruta v. Cty. of San Diego, 824 F.3d 919, 942 (9th Cir. 2016); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 260 (2d Cir. 2015).

[4] David Wolitz, *Second Amendment Realism*, 81 TENN. L. REV. 539, 542–43 (2014).

[5] District of Columbia v. Heller (*Heller I*), 554 U.S. 570 (2008).

[6] *Kolbe*, 813 F.3d at 160; *see Friedman*, 784 F.3d at 410; *see also Heller II*, 670 F.3d at 1257; *Fyock*, 779 F.3d at 999; *Peruta*, 824 F.3d at 942; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 260.

[7] *Kolbe*, 813 F.3d at 184.

[8] *See generally Friedman*, 784 F.3d at 410 (7th Circuit using their own standard instead of strict scrutiny or intermediate scrutiny); *Heller II*, 670 F.3d at 1257 (D.C. Circuit requiring

After each approach is discussed at length in Part II, Part III will include some general observations about the differing approaches and some brief comments concerning the future of assessing the validity of statutes implicating Second Amendment rights.

PART I: THE FUNDAMENTAL RIGHT TO BEAR ARMS UNDER *HELLER* AND MARYLAND'S FSA

In order to address the issue of what level of judicial scrutiny should be applied in these Second Amendment cases, it is necessary to first discuss where the constitutionally-protected right to bear arms perfunctorily came from. The landmark case that granted the individual right to bear arms was *District of Columbia v. Heller*, in which respondent, Dick Heller, a police officer, requested, but was denied by the District of Columbia, a registration certificate for a handgun he desired to keep at his home.[9] In response, Heller filed a lawsuit in the Federal District Court of Columbia "to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement insofar as it prohibits the use of 'functional firearms within the home.'"[10] After the district court dismissed Heller's claim, the Court of Appeals for the District of Columbia reversed the District Court's ruling and "held that the Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right" (citation omitted).[11] After the Court of Appeals' ruling, the United States Supreme Court granted certiorari. Justice Antonin Scalia, writing for the majority, concluded the "[d]istrict's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."[12] While this case granted individuals the

intermediate scrutiny); *Fyock*, 779 F.3d at 999 (9th Circuit requiring intermediate scrutiny); *Peruta*, 824 F.3d at 942 (9th Circuit requiring intermediate scrutiny); *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 260 (2d Circuit requiring intermediate scrutiny).

[9] *Heller I*, 554 U.S. at 575.

[10] *Id.* at 575–76 (citation omitted).

[11] *Id.* at 576.

[12] *Id.* at 635.

constitutionally-protected right to bear arms, it left many questions concerning this right unanswered.

One of these unanswered questions concerns what level of judicial scrutiny should be applied to laws that abridge the Second Amendment right to bear arms. In *Heller*, "[t]he majority expressly declined to instruct lower courts on whether strict or intermediate scrutiny was appropriate for evaluating Second Amendment restrictions."[13] Ordinarily, it may seem beneficial to examine the specific language of the amendment in order to potentially glean some insight into this open question. The Second Amendment states, "[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."[14] However, "[t]he text of the Second Amendment itself will be of little help in the cases to come. Those twenty-seven words—only fourteen if we excise the so-called Prefatory Clause—simply will not, through plain meaning analysis, settle any of the open questions in Second Amendment law."[15] Since neither plain-meaning analysis nor *Heller I* itself lend much aid in determining the level of scrutiny that should be applied, it is appropriate to next examine the divergent circuits and their approaches to applying their respective levels of judicial scrutiny.

Five years after *Heller I* was decided, gun-control legislation remained an active issue in Maryland.[16] "In April 2013, Maryland passed the Firearm Safety Act ("FSA") . . . ban[ning] law-abiding citizens, with the exception of retired law enforcement officers, from possessing the vast majority of semi-automatic rifles commonly kept by several million American citizens for defending their families and homes and other lawful purposes."[17] Specifically, the statute provides, "[e]xcept as provided in subsection (b) of this section, a person may not: (1) transport an assault weapon into the State; or (2) possess, sell, offer to sell, transfer, purchase, or receive an assault weapon."[18] In addition, the FSA also defines an assault weapon to include, "assault long gun[s],"

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[13] *Second Amendment–Western District of Texas Upholds Gun Regulation Under Intermediate Scrutiny in Post-Heller Decision*, 122 HARV. L. REV. 827 (2008). *See also* United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010).

[14] U.S. CONST. amend. II.

[15] *See* Wolitz, *supra* note 4, at 544.

[16] MD. CODE ANN., CRIM. LAW § 4–303 (2013).

[17] Kolbe v. Hogan, 813 F.3d 160, 168 (4th Cir. 2016).

[18] § 4–303(a).

"assault pistol[s]," and "copycat weapon[s]."[19] Another important prohibition concerning larger-capacity magazines (LCMs) that was challenged states, "A person may not manufacture, sell, offer for sale, purchase, receive, or transfer a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm."[20]

PART II: *KOLBE V. HOGAN* AND THE VARYING APPROACHES OF JUDICIAL SCRUTINY FOR SECOND AMENDMENT CASES

Plaintiffs challenging the constitutionality of Maryland's FSA in *Kolbe v. Hogan* are comprised of individuals, corporations, and various advocacy groups.[21] The four primary plaintiffs are Stephen Kolbe, Andrew Turner, Wink's Sporting Goods, Inc., and Atlantic Guns, Inc.[22] Kolbe is small business owner in Towson, Maryland, who owns "one full-size semiautomatic handgun[,]" which includes a standard LCM that can hold more than ten rounds of ammunition.[23] Kolbe's "personal experiences, including an incident in which an employee's ex-boyfriend threatened to come kill her at work . . . and Kolbe's family's close proximity to 'a high-traffic public highway,' (citation omitted) have caused Kolbe to conclude that he needs to keep firearms for the purpose of 'self-defense in [his] home'" (citation omitted).[24] Turner is also a Maryland resident and owns three semi-automatic rifles, which all have standard LCMs that carry more than ten rounds.[25] Turner, a veteran of the United States Navy, "suffered an injury that makes it difficult for him to operate firearms and thus necessitates 'access to full-capacity magazines . . . to ensure,' among other things, his ability to defend himself in his home" (citation omitted).[26] In addition to primarily using his semiautomatic weapons for self-defense, Turner "also uses his currently owned semiautomatic rifles for target shooting and hunting."[27] Lastly, Wink's Sporting Goods, Inc. and Atlantic Guns, Inc. are two

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[19] §§ 4–301(b)–(e).

[20] § 4–305(b) (2013).

[21] 813 F.3d 160, 160 (4th Cir. Feb 4, 2016), *reh'g en banc granted*, 636 F. App'x 880 (Mar. 4, 2016)*, argument calendared*, May 11, 2016.

[22] *Id.* at 160, 170.

[23] *Id.* at 170.

[24] *Id.* (alteration in original).

[25] *Id.*

[26] *Id.*

[27] *Id.*

corporations "that operate in the firearms, hunting, and sport shooting industries . . . ."[28]

In order for the plaintiffs to remedy what they perceived as an unconstitutional state law, "Plaintiffs filed a Motion for a Temporary Restraining Order and sought declaratory and injunctive relief, arguing that the ban on possession of assault rifles and the 10–round limitation on detachable magazines abridges their rights under the Second Amendment. . . ."[29] This motion was denied by the district court, and after receiving cross motions for summary judgment on the merits, "The district court determined that intermediate scrutiny applied to the Second Amendment claims. In granting summary judgment to the State, the district court concluded, under intermediate scrutiny, that Maryland's ban on 'assault' rifles and LCMs met the applicable standards and was thus valid under the Second Amendment."[30] In its holding, the Fourth Circuit Court of Appeals in *Kolbe v. Hogan* held:

> [b]ecause the district court did not evaluate the challenged provisions of the FSA under the proper standard of strict scrutiny, and the State did not develop the evidence or arguments required to support the FSA under the proper standard, we vacate the district court's order as to Plaintiffs' Second Amendment challenge and remand for the court to apply strict scrutiny in the first instance. This is not a finding that Maryland's law is unconstitutional. It is simply a ruling that the test of its constitutionality is different from that used by the district court.[31]

Part II A: Strict Scrutiny: The Fourth Circuit Approach

Before rendering its decision concerning the constitutionality of Maryland's FSA, the Fourth Circuit first had to make a decision concerning which level of judicial scrutiny to apply to the state law. In its determination, the Fourth Circuit in *Kolbe v. Hogan* identified only the standards of intermediate scrutiny and strict scrutiny to apply to the FSA.[32] Strict scrutiny is the highest level of judicial scrutiny that can be applied in reviewing the constitutionality of a law under judicial

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[28] *Id.*

[29] *Id.* at 171.

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

[31] *Id.* at 184.

[32] *Id.* at 179.

review.[33] "The strict-scrutiny standard requires the government to prove its restriction is 'narrowly tailored to achieve a compelling governmental interest.'"[34] In addition, "[t]o be narrowly tailored, the law must employ the least restrictive means to achieve the compelling government interest."[35] Concerning the FSA, for "[a] gun control regulation under strict scrutiny, the government would have to demonstrate a compelling need for the law and then show that any restrictions were narrowly tailored—that is, no more invasive than necessary to achieve the government's objectives."[36]

The Fourth Circuit in *Kolbe v. Hogan* set forth several rationales in reaching its ultimate conclusion that the FSA should be examined under strict scrutiny rather than intermediate scrutiny. Generally, the Fourth Circuit Court made reference to *United States v. Chester*, in which the Court adopted "a First-Amendment-like approach to determining the appropriate level of scrutiny to apply to any given Second Amendment challenge."[37] From this approach, in considering which level of scrutiny to apply, the Fourth Circuit assessed "the nature of the conduct being regulated and the degree to which the challenged law burdens the right."[38] For example, "[a] less severe regulation—a regulation that does not encroach on the core of the Second Amendment—requires a less demanding means-ends showing."[39]

Specifically, the first rationale the Fourth Circuit set forth in determining that strict scrutiny is the correct standard of review to apply was that "[t]he FSA's ban on semi-automatic rifles and larger-capacity magazines burdens the availability and use of a class of arms for self-defense in the home, where the protection afforded by the Second

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[33] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES, 554 (4th ed. 2011).

[34] *Kolbe*, 813 F.3d at 179 (citing Abrams v. Johnson, 521 U.S. 74, 82, 117 (1997)); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) (explaining strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest" (internal quotation marks omitted)).

[35] *Kolbe*, 813 F.3d at 179 (citing United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000)).

[36] Robert A. Levy, *Second Amendment Redux: Scrutiny, Incorporation, and the Heller Paradox*, 33 HARV. J. L. & PUB. POL'Y 203, 204 (2010).

[37] *Kolbe*, 813 F.3d at 179.

[38] *Id.* (citing United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010)).

[39] *Id.* (quoting Nat'l Rifle Ass'n Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 195 (5th Cir. 2012)).

Amendment is at its greatest."[40] "In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty."[41] The crux of this argument is that the FSA substantially impairs a fundamental right, which leads to the Court's second rationale for selecting strict scrutiny.

The second rationale the Fourth Circuit Court set forth is that "the challenged provisions of the FSA substantially burden this [Second Amendment] fundamental right" and that the burden the FSA puts on this fundamental right "is not merely incidental."[42] The Fourth Circuit Court also set forth that the FSA imposed "a complete ban on the possession by law-abiding citizens of AR-15 style rifles—the most popular class of centerfire semi-automatic rifles in the United States."[43] As a result of this complete ban, the Court "struggle[d] to see how Maryland's law would not substantially burden the core Second Amendment right to defend oneself and one's family in the home with a firearm that is commonly possessed by law-abiding citizens for such lawful purposes."[44] The Fourth Circuit also stressed the importance of the fundamental self-defense right as it predominantly pertains to individuals protecting themselves in the home. Recognizing that other jurisdictions have come to different conclusions on the matter, the Fourth Circuit ultimately decided, "Strict scrutiny, then, is the appropriate level of scrutiny to apply to the ban of semiautomatic rifles and magazines holding more than 10 rounds."[45]

Part II B: Friedman v. City of Highland Park, Illinois*, and the Seventh Circuit Approach*

In assessing the Seventh Circuit's approach to the amount of judicial scrutiny that should be applied to Second Amendment cases, it is important to look in-depth at the particular case that adopted this approach. This case is *Friedman v. City of Highland Park, Illinois*.[46]

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[40] *Id.* at 179.

[41] McDonald v. City of Chicago, 561 U.S. 742, 778 (2010).

[42] *Kolbe*, 813 F.3d at 180.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 182.

[46] *See* Friedman v. City of Highland Park, 784 F.3d 406 (7th Cir. 2015).

"The City of Highland Park has an ordinance (§ 136.005 of the City Code) that prohibits possession of assault weapons or large-capacity magazines (those that can accept more than ten rounds)."[47] More specifically, the ordinance defined "an assault weapon as any semi-automatic gun that can accept a large-capacity magazine and has one of five other features: a pistol grip without a stock . . . ; a folding, telescoping, or thumbhole stock; a grip for the non-trigger hand; a barrel shroud; or a muzzle brake or compensator."[48] Even some more common and popular weapons such as the AR-15 and the AK-47 are specifically named and included as banned weapons in the ordinance.[49]

The plaintiffs were Arie Friedman, a citizen of Highland Park, and other members of the Illinois State Rifle Association, some of whom also live in Highland Park.[50] At the time the ordinance was adopted, Friedman was the owner of a banned weapon and also of several LCMs that were also banned under the ordinance, none of which Friedman desired to surrender to the government.[51] The plaintiffs sought to enjoin the city's ordinance, claiming that it violated their Second Amendment right to individually bear arms as granted in *Heller*.[52] In its decision, the Court of Appeals for the Seventh Circuit held that the Highland Park ordinance was constitutionally valid and did not violate the Second Amendment rights of Friedman and the other members of the Illinois State Rifle Association.[53]

Before rendering the reasoning behind its decision, the Seventh Circuit Court of Appeals made some general observations about Second Amendment rights under *Heller* that shed light on the rest of its analysis of the level of scrutiny it chose to apply to the Highland Park ordinance. The Seventh Circuit discussed that "*Heller* does not purport to define the full scope of the Second Amendment. The [Supreme] Court has not told us what other entitlements the Second Amendment creates or what kinds of gun regulations legislatures may enact."[54] The Seventh Circuit reasoned that based upon this lack of instruction from the Supreme

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[47] *Id.* at 407.

[48] *Id.*; *see also* HIGHLAND PARK, ILL., ORDINANCES § 136.0001(1) (2016).

[49] *Friedman*, 784 F.3d at 407.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 412.

[54] *Id.* at 410 (alteration in original).

Court, "[A]t least some categorical limits on the kinds of weapons that can be possessed are proper, and that they need not mirror restrictions that were on the books in 1791."[55]

The Seventh Circuit then proceeded to discuss other approaches to the level of scrutiny that should be applied to Second Amendment cases before resolving not to apply any of them. The fact that the Seventh Circuit notes "the [Supreme Court] Justices have declined to specify how much substantive review the Second Amendment requires,"[56] makes this question concerning the level of judicial scrutiny much more open to interpretation by the various circuits. Initially, the Seventh Circuit discarded rational basis review by stating, "All legislation requires a rational basis; if the Second Amendment imposed only a rational basis requirement, it wouldn't do anything."[57] The Seventh Circuit is making the statement that rational basis review is not helpful in determining whether a law regulating guns is constitutionally valid.[58] The Seventh Circuit also discusses intermediate scrutiny, which was selected by the D.C. Circuit in *Heller v. District of Columbia*,[59] as well as by the Ninth Circuit in *Fyock v. Sunnyvale*.[60] The Seventh Circuit also brushes aside intermediate scrutiny as an appropriate framework to analyze the Highland Park ordinance.[61] Interestingly enough, the Seventh Circuit does not even mention the standard of strict scrutiny in the majority opinion and does not even seem to consider it as an option in their assessment of the Highland Park ordinance.

After addressing rational basis review and intermediate scrutiny (without considering strict scrutiny), the Seventh Circuit essentially adopted its own method of analysis in assessing Second Amendment rights, rather than applying one of the traditional methods of scrutiny. The Seventh Circuit states:

> But instead of trying to decide what "level" of scrutiny applies, and how it works, inquiries that do not resolve any concrete dispute, we think it better to

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[55] *Id.* (citing United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010)).

[56] *Id.* (alteration in original).

[57] *Id.*

[58] *Id.* (stating that a firearms' passage of rational basis test does not imply that its governing laws are constitutionally valid).

[59] District of Columbia v. Heller (*Heller II*), 554 U.S. 570, 575 (2008), *reh'g granted*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

[60] 779 F.3d 991, 999 (9th Cir. 2015).

[61] *Friedman*, 784 F.3d at 410.

> ask 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," (citation omitted), and whether law-abiding citizens retain adequate means of self-defense.[62]

In addition, the Seventh Circuit concludes its analysis of the Highland Park ordinance and its decision not to select any of the traditional forms of judicial scrutiny by making two major points. First, the Seventh Circuit claims, "[t]he central role of representative democracy is no less part of the Constitution than is the Second Amendment: when there is no definitive constitutional rule, matters are left to the legislative process."[63] By allowing the state of Illinois to craft this piece of legislation, the Seventh Circuit maintains that one of the essential functions of a representative democracy is being fulfilled that is just as vital to its existence as the protections that the Constitution provides, and in the absence of explicit constitutional instruction, the state legislation should be allowed to survive.[64] Second, "[t]he Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity."[65] The Seventh Circuit claimed that predicated on its understanding of *Heller* and *McDonald*, the limits that those cases place on the restraint of Second Amendment rights, and in the absence of explicit instruction by the Supreme Court, that it had discretion to select how to analyze the Second Amendment claims against the Highland Park ordinance.

Part II C: Other Circuit Approaches—Intermediate Scrutiny: The D.C. Circuit, Seventh Circuit, and Third Circuit

The D.C. Circuit: *Heller v. D.C.*

Following the Supreme Court's declaration of an individual right to keep and bear arms by striking down Washington, D.C.'s ordinance that banned possession of firearms in an individual's home in *Heller*, "[T]he D.C. Council passed emergency legislation in an effort to conform the District's laws to the Supreme Court's holding while it considered

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[62] *Id.* (citing *Heller I*, 554 U.S. at 622–25; United States v. Miller, 307 U.S. 174, 178–79 (1939)).

[63] *Id.* at 412.

[64] *Id.*

[65] *Id.*

permanent legislation."[66] In an attempt to stop this legislation from being passed, Dick Heller and other D.C. citizens challenged the D.C. laws on the grounds that the laws "(1) are not within the District's congressionally delegated legislative authority or, if they are, then they (2) violate the Second Amendment."[67] Initially, the district court rejected the plaintiffs' argument and granted summary judgment to the District.[68] After the plaintiffs appealed, the D.C. Circuit Court of Appeals affirmed the holding of the district court and found the provisions specifically banning assault weapons and LCMs to be constitutional.[69] Specifically, the D.C. law banned "assault weapons" and "magazines holding more than ten rounds of ammunition."[70]

In their arguments against the passage of the statute, the plaintiffs contended that "[S]trict scrutiny is the appropriate standard of review because, in holding the Fourteenth Amendment made the Second Amendment applicable to the States, the Court in *McDonald* described the right 'to keep and bear arms [as] among those fundamental rights necessary to our system of ordered liberty.'"[71] In response, the District argued that "strict scrutiny would be inappropriate because, among other reasons, the right to keep and carry arms has always been heavily regulated."[72] In addition, the District argued that instead of strict scrutiny, a "reasonable-regulation test" should be applied.[73] The D.C. Circuit Court rejected both the plaintiffs' and defendants' arguments in favor of selecting intermediate scrutiny to apply to the provision concerning the ban of assault rifles and LCMs.[74] "This more lenient level of scrutiny could be called 'intermediate' scrutiny, but regardless of the label, this level requires the government to demonstrate a 'reasonable fit' between the challenged regulation and an 'important' government objective" (citation omitted).[75] In addition, "[t]his 'intermediate'

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[66] *Heller II*, 670 F.3d 1244, 1248 (D.C. Cir. 2011).

[67] *Id.* at 1247.

[68] *Id.*

[69] *Id.* at 1247–48.

[70] *Id.* at 1249.

[71] *Id.* at 1256 (quoting McDonald v. City of Chicago, 561 U.S. 742, 778 (2009)).

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] Nat'l Rifle Ass'n Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 195 (5th Cir. 2012) (citing *Heller I*, 554 U.S. 570, 628 n.27 (2008)).

scrutiny test must be more rigorous than rational basis review, which *Heller* held 'could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right' such as 'the right to keep and bear arms.'"[76]

The D.C. Circuit distinguished the present case (*Heller II*) with the previous *Heller* because "[t]he laws at issue here do not prohibit the possession of 'the quintessential self-defense weapon,' to wit, the handgun."[77] Not only does the D.C. Circuit Court solely distinguish *Heller II* from *Heller* in this regard, but also argues "[T]he ban on certain semi-automatic rifles [does not] prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting, whether a handgun or a non-automatic long gun."[78] Also, the D.C. Circuit Court found that intermediate scrutiny, and not strict scrutiny, applied to the District's law because the prohibition on assault rifles and LCMs did not "impose a substantial burden" on the core fundamental right to keep and bear arms.[79] Ultimately, the D.C. Circuit Court found the prohibition on assault weapons and LCMs survived intermediate scrutiny since "the District ha[d] carried its burden of showing a substantial relationship between the prohibition of both semi-automatic rifles and magazines holding more than ten rounds and the objectives of protecting police officers and controlling crime."[80]

Part II D: The Ninth Circuit: Fyock v. Sunnyvale *and* Peruta v. County of San Diego

In addition to the D.C. Circuit Court, the Ninth Circuit Court of Appeals was also tasked with determining the appropriate level of scrutiny to apply to a city ordinance known as Measure C, which stated in relevant part, "[N]o person may possess a large-capacity magazine in the city of Sunnyvale whether assembled or disassembled. For purposes of this section, 'large-capacity magazine' means any detachable ammunition feeding device with the capacity to accept more than ten

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[76] *Id.*

[77] *Heller II*, 670 F.3d 1244, 1261–62 (D.C. Cir. 2011).

[78] *Id.* at 1262.

[79] *Id.*

[80] *Id.* at 1264.

(10) rounds . . . ."[81] In coming to its eventual conclusion of adopting intermediate scrutiny as its standard of review, the Ninth Circuit Court of Appeals reviewed the district court's analysis of determining which level of scrutiny to apply. Specifically, the Ninth Circuit Court of Appeals held that the district court applied the correct analysis in determining the level of scrutiny by asking "(1) how closely the law comes to the core of the Second Amendment right; and (2) how severely, if at all, the law burdens that right."[82] In addressing the first question, the Ninth Circuit made reference to the only other court at the time that had handled a statute prohibiting LCMs: the D.C. Circuit Court, in *Heller II*.[83] Like the D.C. Circuit Court, the Ninth Circuit concluded, "[t]he regulation's [Measure C's] burden on the core Second Amendment right was not substantial and warranted intermediate scrutiny review."[84]

In order for Measure C to survive intermediate scrutiny, "Sunnyvale was required to show only that Measure C promotes a 'substantial government interest that would be achieved less effectively absent the regulation.'"[85] Sunnyvale posited that its paramount "objective for enacting Measure C is to promote public safety by reducing the harm of intentional and accidental gun use. Measure C is also intended to reduce violent crime and reduce the danger of gun violence, particularly in the context of mass shootings and crimes against law enforcement."[86] In addition to providing evidence to demonstrate a substantial governmental interest, "Sunnyvale was entitled to rely on any evidence 'reasonably believed to be relevant' to substantiate its important interests."[87] Sunnyvale bolstered its argument in demonstrating a substantial governmental interest by showing that "[t]he use of large-capacity magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries."[88] All of the evidence Sunnyvale presented led the district court to conclude (which the Ninth Circuit Court of Appeals affirmed), "[T]he

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[81] Fyock v. Sunnyvale, 779 F.3d 991, 994 (9th Cir. 2015) (quoting SUNNYVALE, CAL. MUN. CODE § 9.44.050(a)).

[82] *Id.* at 998.

[83] *Id.* at 999.

[84] *Id.*

[85] *Id.* at 1000 (citing Colacurcio v. City of Kent, 163 F.3d 545, 553 (9th Cir. 1998)).

[86] *Id.*

[87] *Id.* (citing City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 52 (1986)).

[88] *Id.*

Sunnyvale ordinance is substantially related to the compelling government interest in public safety"[89] and therefore survives intermediate scrutiny.

Most recently, the Ninth Circuit has further demonstrated its commitment to applying intermediate scrutiny to Second Amendment cases through its decision in *Peruta v. County of San Diego*.[90] In *Peruta*, the Ninth Circuit reviewed two cases[91] that addressed the California law stating, "A member of the general public may not carry a concealed weapon in public unless he or she has been issued a license."[92] In order to obtain this permit, the San Diego and Yolo County Sheriff's Departments established that the applicant for the permit must demonstrate that he or she has "good cause" to carry the concealed weapon.[93] More specifically, the sheriff's departments each defined "good cause" as "requiring a particularized reason why an applicant needs a concealed firearm for self-defense."[94] At the district court level, the plaintiffs in each case challenged the validity of the statutory good-cause requirement under California law, alleging that the Second Amendment protected their respective rights to bear arms for self-defense and that the good-cause requirement infringed upon that fundamental right.[95] Eventually, the Ninth Circuit rejected this argument and held, "California's regulation of the carrying of concealed weapons in public survives intermediate scrutiny because it promotes a substantial government interest that would be achieved less effectively absent the regulation."[96] As demonstrated by *Fyock v. Sunnyvale* and *Peruta*, the Ninth Circuit has continued to hold firmly to its stance of applying intermediate scrutiny to Second Amendment cases.

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[89] *Id.*

[90] 824 F.3d 919, 942 (9th Cir. 2016).

[91] *See* Peruta v. Cty. of San Diego, 758 F. Supp. 2d 1106 (S.D. Cal. 2010), *aff'd*, 824 F.3d 919 (9th Cir. 2016); *see also* Richards v. Cty. of Yolo, 821 F. Supp. 2d 1169 (E.D. Cal. 2011), *aff'd*, 824 F.3d 919 (9th Cir. 2016).

[92] *Peruta*, 824 F.3d at 924.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 942 (internal quotations omitted).

Part II E: The Second Circuit: New York State Rifle & Pistol Association, Inc. v. Cuomo

"Plaintiffs—a combination of advocacy groups, businesses, and individual gun owners—filed suit against the governors of New York and Connecticut and other state officials . . . [seeking] declaratory and injunctive relief for alleged infringement of their constitutional rights."[97] New York enacted the Secure Ammunition and Firearms Enforcement Act (SAFE Act), which expanded the definition of prohibited assault weapons "if it contains any one of the enumerated list of military-style features" listed in the SAFE Act.[98] The SAFE Act also contained a prohibition of LCMs which "can hold more than ten rounds of ammunition or that can be readily restored or converted to accept more than ten rounds."[99] Lastly, the SAFE Act "contain[ed] an additional, unique prohibition on possession of a magazine *loaded* with more than seven rounds of ammunition,"[100] which is different than any provision that the D.C. or Ninth Circuits contained in their prohibitory statutes. Connecticut enacted its own provision called "An Act Concerning Gun Violence Prevention and Children's Safety," which adopted essentially the same expanded definition of "assault weapon," in addition to banning LCMs that had the capability of holding more than ten rounds of ammunition.[101] The Connecticut statute did differ from New York's SAFE Act in that it included an additional ban of "183 particular assault weapons listed by make and model, as well as 'copies or duplicates' of most of those firearms."[102] The Connecticut statute also did not include the seven round "load limit" provision that the SAFE Act included.[103]

Similarly to the D.C. and Ninth Circuits, the Second Circuit Court of Appeals applied a two-factor analysis in assessing which level of judicial scrutiny to apply to the statutes.[104] In its assessment, the Second Circuit concluded that the statutes "implicate[d] the core of the Second

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[97] N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 251 (2d Cir. 2015).

[98] *Id.* at 249. *See generally* N.Y. PENAL LAW § 265.00(22) (effective July 5, 2013) (defining military style features and assault weapons).

[99] *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 249.

[100] *Id.*

[101] *Id*. at 250–51. *See also* CONN. GEN. STAT. § 53-202a (2013), *invalidated by N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 242.

[102] *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 250.

[103] *Id.* at 251.

[104] *Id.* at 258.

Amendment's protections by extending into the home."[105] However, the Second Circuit concluded, "[a]t the same time, the regulated weapons are not nearly as popularly owned and used for self-defense as the handgun, that 'quintessential self-defense weapon.'"[106] In its second prong of the analysis, the Second Circuit distinguished New York and Connecticut's statutes from *Heller*, because "New York and Connecticut have not banned an entire class of arms."[107] In contrast, the Second Circuit provided the statutes "ban only a limited subset of semiautomatic firearms, which contain one or more enumerated military-style features."[108] In reaching this conclusion of the two-prong test, the Second Circuit "agree[d] with the D.C. Circuit that 'the prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves.'"[109] The Second Circuit Court of Appeals determined intermediate—not strict—scrutiny should apply to the New York and Connecticut statutes.

In its application of intermediate scrutiny, the Second Circuit accords "substantial deference" to the judgment of the legislature.[110] The Second Circuit described its role in the review process "to assure ourselves that, in formulating their respective laws, New York and Connecticut have 'drawn reasonable inferences based on substantial evidence.'"[111] The Second Circuit concluded that the government's interests of preventing access to assault weapons which pose "unusual risks" and "[w]hen used . . . tend to result in more numerous wounds, more serious wounds, and more victims,"[112] were substantial. The Second Circuit also concluded that while the prohibition on assault weapons and LCMs passed intermediate scrutiny for largely the same reasons, New York's load limit provision of the SAFE Act did not survive intermediate scrutiny.[113] Specifically, the load limit provision did not survive intermediate scrutiny because "New York has failed to

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[105] *Id.*
[106] *Id.*
[107] *Id.* at 260.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 261.
[111] *Id.* at 261–62.
[112] *Id.* at 262.
[113] *Id.* at 264.

present evidence that the mere existence of this load limit will convince any would-be malefactors to load magazines capable of holding ten rounds with only the permissible seven."[114] Since substantial evidence was not presented, the specific load limit provision failed intermediate scrutiny.

PART III: GENERAL OBSERVATIONS AND THE FUTURE OF JUDICIAL REVIEW OF SECOND AMENDMENT CASES

In examining the various forms of judicial scrutiny that have been applied in circuit courts throughout the United States, it is evident that the country is divided on this issue. The decision that each of these circuits made concerning which level of scrutiny it applied largely turned on how each defined the specific Second Amendment right that is burdened by the statute at issue. For example, in *Heller*:

> By positioning the right to keep and bear arms squarely within the camp of specific, enumerated rights, and linking the Second Amendment to "the freedom of speech, the guarantee against double jeopardy, [and] the right to counsel," (footnote omitted) Justice Scalia sent an unmistakable signal that the Court will rigorously review gun control regulations.[115]

Even though Justice Scalia characterized the Second Amendment right to keep and bear arms separate from militia service as a fundamental one, he did not go further as to stipulate that a specific level of judicial scrutiny should be applied to cases implicating this fundamental right.[116] As a result, the appropriate level of scrutiny to apply remains an open question that has been debated among the various circuits.

This debate over the definition of the right at issue is also evident in *Friedman v. Highland Park, Illinois*, where the majority deemed that the statute at issue should not be addressed by any of the traditional levels of scrutiny.[117] Instead, the Seventh Circuit relied on the lack of instruction provided by the Supreme Court in *Heller*, to take the opportunity to apply its own test of judicial scrutiny.[118] However, the dissent written by Justice Manion provides a different analysis by stating, "Insofar as

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[114] *Id.*

[115] *See* Levy, *supra* note 36, at 206.

[116] *See* Wolitz, *supra* note 4.

[117] Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015).

[118] *Id.* at 410–11.

Highland Park's ordinance implicates Friedman's right to keep assault rifles and large-capacity magazines in his home for the purposes of self-defense, it implicates a fundamental right and is subject to strict scrutiny."[119] This distinction of how a court views the Second Amendment rights granted in *Heller* also affects how courts view the effect of various prohibitory statutes on those rights. As a result of this view, courts then select which level of scrutiny seems applicable, predicated on the court's definition of the Second Amendment right as well as to what extent the statute at issue abridges that right.

A further example to this division in defining the Second Amendment rights implicated in these various statutes prohibiting assault rifles and LCMs which leave the Supreme Court's future direction nebulous at best, is through Justice Thomas's dissent to the Supreme Court's denial of certiorari of *Friedman v. Highland Park, Illinois*.[120] Justice Thomas disagreed with the majority's narrowing of *Heller*.[121] More explicitly, Justice Thomas differed with the majority's belief that there is a fundamental right to possess a handgun in self-defense in the home, but other than that, *Heller* "leave[s] matters open" to "the political process and scholarly debate" concerning the Second Amendment.[122] The refusal of the Supreme Court to grant certiorari to hear *Friedman v. Highland Park, Illinois* greatly troubled Justice Thomas.[123] Moreover, he was troubled by the Seventh Circuit's interpretation of the Second Amendment fundamental right as defined in *Heller*. Justice Thomas also believes that if the Supreme Court were to hear the case, it would "prevent the Seventh Circuit from relegating the Second Amendment to a second-class right."[124] It does appear that if the Supreme Court would have granted certiorari to *Friedman v. Highland Park, Illinois*, then it could have potentially addressed the level of scrutiny issue in a definitive fashion and could prevent the discrepancy among the circuits for similar cases for years to come.

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[119] *Id.* at 418 (Manion, J., dissenting).

[120] Friedman v. City of Highland Park, Ill., *cert. denied*, 577 U.S. __, __, 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting).

[121] *Id.* at __, 136 S. Ct. 447–48.

[122] *Id.* at __, 136 S. Ct. 448.

[123] *See id*. at __, 136 S. Ct. 449–50.

[124] *Id*. at __, 136 S. Ct. 450.

CONCLUSION

Since the Second Amendment fundamental right for individuals to keep and bear arms was announced in *Heller*, there has been some debate as to what extent this right should be protected against government abridgement. Such debate was recently decided in Maryland, by the Fourth Circuit Court of Appeals, which decided that Maryland's FSA abridged the core of the fundamental Second Amendment right and was therefore subject to strict scrutiny review.[125] Under strict scrutiny, the Fourth Circuit found that the FSA implicated the core fundamental right that the Second Amendment seeks to protect and that the FSA substantially burdened this right in its ban of semiautomatic rifles and magazines that hold more than ten rounds.[126]

Other circuits have also had to make similar decisions in regards to statutes that implicate Second Amendment rights. The Seventh Circuit decided to reject the conventional levels of scrutiny in favor of adopting its own structure.[127] Instead of determining what level of scrutiny to apply, the Seventh Circuit believed it was important to ask whether the regulation bans weapons that were common at the time and whether the regulation still allows citizens to retain adequate means of self-defense.[128] The Seventh Circuit held that the city ordinance did not violate any Second Amendment rights and was constitutionally valid.[129]

The D.C., Ninth, and Second Circuits all addressed this question as well and selected intermediate scrutiny as the appropriate form of judicial review for the statutes at issue in each circuit.[130] These three circuits applied a similar analysis in their selection of intermediate scrutiny, which included addressing whether the statute implicated the core of the Second Amendment right and how severely that right was

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[125] Kolbe v. Hogan, 813 F.3d 160, 184 (4th Cir. 2016).

[126] *Id*. at 179.

[127] Friedman v. City of Highland Park, 784 F.3d 406, 410 (7th Cir. 2015) (citing District of Columbia v. Heller, 554 U.S. 570, 622–25 (2008); United States v. Miller, 307 U.S. 174, 178–79 (1939)).

[128] *Id.*

[129] *See id.* at 412.

[130] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 575 (2008), *reh'g granted*, 670 F.3d 1244, 1256–57 (D.C. Cir. 2011); Fyock v. Sunnyvale, 779 F.3d 991, 999 (9th Cir. 2015); N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242, 260 (2d Cir. 2015).

burdened by the statute.[131] In all three of these circuits, the prohibitory statutes were found to survive intermediate scrutiny and were deemed to be constitutional.[132]

The results in these respective five circuits help demonstrate the importance of the level of judicial scrutiny selected because that determination plays a pivotal role in whether or not a statute survives judicial scrutiny. With the current splits among these circuits, it remains to be seen what the continuing trend will be in regards to the level of judicial scrutiny applied to statutes implicating Second Amendment rights. Furthermore, with the Supreme Court's lack of explicit instruction in *Heller*, combined with its recent denial of certiorari in *Friedman v. Highland Park, Illinois*, it may be some time before a definitive answer is discovered.

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[131] *See, e.g.*, *Heller II*, 670 F.3d at 1257, 1262; *Fyock*, 779 F.3d at 998–99; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 258–59.

[132] *See, e.g.*, *Heller II*, 670 F.3d at 1264; *Fyock*, 779 F.3d at 1001; *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 264.