

# COMMON USE UNDER FIRE: *KOLBE V. HOGAN* AND THE URGENT NEED FOR CLARITY IN THE MASS-SHOOTING ERA

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*It is, perhaps, fitting to say that we are living in the Mass-Shooting Era. While the number of gun-related homicides has stabilized in the United States, fear of mass shootings has become commonplace. We are constantly bombarded with images and stories detailing the horrific trauma these events cause. However, the nation's emotional outpour over mass shootings has not gone unheard; politicians on both sides of the aisle have responded with legislation designed to provide greater protection to their constituents. But these responses have run into a substantial legal roadblock: the ambiguities of Second Amendment jurisprudence. In its seminal case, *District of Columbia v. Heller*, the Supreme Court roughly sketched the boundaries of the Second Amendment: weapons in "common use at the time" that are "typically possessed by law-abiding citizens for lawful purposes" fall within its protections. But the *Heller* Court declined to discuss exactly how these standards apply. As a result, state and federal courts have struggled to develop clear and uniform frameworks for resolving the common-use question. The Fourth Circuit's recent decision in *Kolbe v. Hogan* is the latest, and, perhaps, most controversial example of this trend. Thus, by engaging in a comprehensive analysis of the Fourth Circuit's treatment of common-use test at each stage of the *Kolbe* case, this Note seeks to understand the Fourth Circuit's decision within the larger, continuing struggles of the lower courts to keep faith with *Heller*'s requirements, particularly the common-use test. Ultimately, this Note concludes that, considering its controversial decision and the present situation in the United States, the *Kolbe* case is the strongest evidence of the urgent need for the Supreme Court to reengage with the Second Amendment and with common use.*

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## INTRODUCTION

Aurora.<sup>1</sup> Newtown.<sup>2</sup> Tucson.<sup>3</sup> San Bernardino.<sup>4</sup> Charleston.<sup>5</sup> Orlando.<sup>6</sup> Dallas.<sup>7</sup> Within America, the message of this list is grimly clear: each of these places has experienced the terror and tragedy of a public mass shooting.<sup>8</sup> The Mass-Shooting Era<sup>9</sup> is in full swing, and no region of the United States has been left untouched.<sup>10</sup> While the number of gun-related homicides has stabilized in

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1. Dan Frosch & Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. TIMES (July 20, 2012), <http://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html>.

2. Steve Vogel et al., *Sandy Hook Elementary Shooting Leaves 28 Dead, Law Enforcement Sources Say*, WASH. POST (Dec. 20, 2012), [https://www.washingtonpost.com/politics/sandy-hook-elementary-school-shooting-leaves-students-staff-dead/2012/12/14/24334570-461e-11e2-8e70-e1993528222d\\_story.html?utm\\_term=.90ea15adf84e](https://www.washingtonpost.com/politics/sandy-hook-elementary-school-shooting-leaves-students-staff-dead/2012/12/14/24334570-461e-11e2-8e70-e1993528222d_story.html?utm_term=.90ea15adf84e).

3. Denise Grady & Jennifer Medina, *From Bloody Scene to E.R., Lifesaving Choices in Tucson*, N.Y. TIMES (Jan. 14, 2011), <http://www.nytimes.com/2011/01/15/us/15medical.html>.

4. Krishnadev Calamur et al., *A Day After the San Bernardino Shooting*, THE ATLANTIC (Dec. 3, 2015), <https://www.theatlantic.com/national/archive/2015/12/a-shooter-in-san-bernardino/418497/>.

5. Karen Workman & Andrea Kannapell, *The Charleston Shooting: What Happened*, N.Y. TIMES (June 18, 2015), <https://www.nytimes.com/2015/06/18/us/the-charleston-shooting-what-happened.html>.

6. Ralph Ellis et al., *Orlando Shooting: 49 Killed, Shooter Pledged ISIS Allegiance*, CNN (June 13, 2016, 11:05 AM), <http://www.cnn.com/2016/06/12/us/orlando-nightclub-shooting/>.

7. Faith Karimi et al., *Dallas Sniper Attack: 5 Officers Killed, Suspect Identified*, CNN (July 9, 2016, 1:37 AM), <http://www.cnn.com/2016/07/08/us/philando-castile-alton-sterling-protests/>.

8. See *supra* notes 1–7. The U.S. Congressional Research Service acknowledges that there is not a single accepted definition for a public mass shooting, but settled on “incidents occurring in relatively public places, involving four or more deaths—not including the shooter(s)—and gunmen who select victims somewhat indiscriminately.” Jerome P. Bjelopera et al., *Public Mass Shootings in the United States: Selected Implications for Federal Public Health and Safety Policy*, CONG. RESEARCH SERV. 1, 4 (Mar. 18, 2013), <https://fas.org/sgp/crs/misc/R43004.pdf>. Notably, this definition excluded events where the gunmen were motivated by terrorism. *Id.* at 5.

9. For the purposes of this Note, the *Mass-Shooting Era* is not simply the raw number of public mass shootings in the last decade and a half. In fact, there is debate over whether public mass shootings have increased in the last decade, and the extent of their impact compared with the number of gun-related homicides in America. *Id.* What isn’t debated, however, is the increasing cultural awareness and anxiety surrounding public mass shootings in the Nation. See Oliver Roeder, *The Phrase ‘Mass Shooting’ Belongs to the 21st Century*, FIVETHIRTYEIGHT (Jan. 21, 2016, 7:00 AM), <https://fivethirtyeight.com/features/we-didnt-call-them-mass-shootings-until-the-21st-century/>.

10. See Mark Follman et al., *A Guide to Mass Shootings in America*, MOTHER JONES (Jan. 14, 2017, 2:15 PM), <http://www.motherjones.com/politics/2012/07/mass-shootings-map>.

America,<sup>11</sup> fears of mass shootings have shaken Americans' notions of security and catapulted the deeply divided debate over gun control into the political, social, and cultural spotlight of the Nation.<sup>12</sup> This emotional outpour has led to calls for action that have, fortunately, not gone unheard; politicians on both sides of the aisle have responded with legislation designed to provide greater protection from these events for their constituents.<sup>13</sup>

Some proposed gun-control laws restrict the right to possess, manufacture, sell, and transfer assault weapons<sup>14</sup> and large-capacity magazines ("LCMs").<sup>15</sup>

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11. Jens Manuel Krogstad, *Gun Homicides Steady After Decline in '90s; Suicide Rate Edges Up*, PEW RESEARCH CTR. (Jan. 5, 2016), <http://www.pewresearch.org/fact-tank/2015/10/21/gun-homicides-steady-after-decline-in-90s-suicide-rate-edges-up/>.

12. See, e.g., Jennifer Agiesta & Tom LoBianco, *Poll: Gun Control Support Spikes After Shooting*, CNN (June 20, 2016, 6:49 PM), <http://www.cnn.com/2016/06/20/politics/cnn-gun-poll/> (tracking the increase in support for gun control legislation following the Orlando Pulse Nightclub mass shooting); *Opinions on Gun Policy and the 2016 Campaign*, PEW RESEARCH CTR., (Aug. 26, 2016), <http://www.people-press.org/2016/08/26/opinions-on-gun-policy-and-the-2016-campaign/> (a poll concluding that while broad support exists across political party lines for specific gun control measures, support for other types of legislation remains deeply divided based upon partisan ties).

13. See, e.g., Yanan Wang, *Across the Country, School Districts Are Quietly Arming Teachers for the Next Shooting*, WASH. POST: MORNING MIX (Apr. 14, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/04/14/across-the-country-school-districts-are-quietly-arming-teachers-for-the-next-shooting/?utm\\_term=.6ca114f9b9cd](https://www.washingtonpost.com/news/morning-mix/wp/2016/04/14/across-the-country-school-districts-are-quietly-arming-teachers-for-the-next-shooting/?utm_term=.6ca114f9b9cd) (discussing school districts' decisions to allow teachers to carry firearms as a defense against mass shooters); Alberto Luperon, *California Has Banned Possession of High-Capacity Magazines*, LAW NEWZ (July 1, 2016, 3:49 PM), <http://lawnewz.com/important/california-has-banned-possession-of-high-capacity-magazines/> (outlining California's recent ban on the possession of LCMs).

14. The term *assault weapon* is controversial for gun-rights advocates. See NRA-ILA, "Assault Weapons" and "Large" Magazines (Aug. 8, 2016), <https://www.nra-ila.org/issues/assault-weapons-large-magazines/>. For the sake of parity with both the relevant laws and court decisions discussed in this Note, however, I will continue to use the term. Seven states—California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York—and the District of Columbia have implemented some form of assault weapon ban or restriction, although the content of the law and definition of an assault weapon varies from state-to-state. See *Assault Weapons*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/classes-of-weapons/assault-weapons/#state> (last visited Aug. 15, 2017).

15. LCMs are magazines with the capability to load more than a certain number of rounds of ammunition. See *Large Capacity Magazines*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/> (last visited Aug. 15, 2017); Krogstad, *supra* note 11; NRA-ILA, *supra* note 14.

These proposals are popular<sup>16</sup> but contentious.<sup>17</sup> To gun-control advocates, these bans represent common-sense gun control; a reasonable means of mitigating the damage an individual could inflict without infringing the Second Amendment right to possess a firearm for recreation, hunting, or self-defense.<sup>18</sup> To gun-rights advocates, on the other hand, these bans represent another slide down the slippery slope to the complete erosion of the Second Amendment's guarantees and place impermissible restrictions on individual freedom to purchase and utilize firearms.<sup>19</sup>

State attempts to prohibit assault-weapons and LCMs have thus been met with rapid constitutional challenges in federal courts.<sup>20</sup> In adjudicating the constitutionality of these bans, however, federal courts have run into an analytical dead zone: the ambiguities left unresolved by the Supreme Court in its seminal

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16. Eight states—California, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York—and the District of Columbia have implemented some form of LCM prohibition or restriction, although the content of the law and the definition of an LCM varies from state-to-state. *See Large-Capacity Magazines, supra* note 15.

17. *See id.*; Krogstad, *supra* note 11 (highlighting the deep partisan divide over issues such as LCM laws); NRA-ILA, *supra* note 14.

18. *See, e.g.*, Tim Kaine (@timkaine), TWITTER (Dec. 5, 2015, 12:55 PM), <https://twitter.com/timkaine/status/673244244337913858> (calling for common-sense gun control); *Full Interview: Tim Kaine on Meet the Press*, NBC NEWS (June 25, 2016), <http://www.nbcnews.com/meet-the-press/video/full-interview-tim-kaine-on-meet-the-press-712826435537> (former vice-presidential candidate Tim Kaine exclaiming his belief that high-capacity magazine bans are an effective legislative response to calls for gun control legislation); Seattle Times Editorial Board, Opinion, *It's Time to Ban Assault-style Weapons, High-capacity Magazines*, SEATTLE TIMES (Dec. 17, 2015, 5:14 PM), <http://www.seattletimes.com/opinion/editorials/its-time-to-ban-assault-style-weapons-high-capacity-magazines/>.

19. *See, e.g.*, NRA-ILA, *124 Anti-gun Democrats Introduce Semi-Auto Gun and Magazine Ban in House of Representatives* (Dec. 29, 2015), <https://www.nraila.org/articles/20151229/124-anti-gun-democrats-introduce-gun-and-magazine-ban-in-house-of-representatives> (calling for opposition to a 2015 bill seeking to prohibit the manufacture of magazines with capacities over 10 rounds); Chris W. Cox, Heller's *Vultures*, NRA-ILA (Jan. 28, 2016), <https://www.nraila.org/articles/20160128/hellers-vultures> (warning pro-gun readers of the dangers posed by Hillary Clinton and gun control advocates to the Second Amendment right enumerated in *Heller*).

20. *See, e.g.*, Aaron C. Davis, *Signing of Md. Gun Control Bill to Launch New Legal Battles, Fight for Public Support*, WASH. POST (May 15, 2013), [https://www.washingtonpost.com/local/md-politics/signing-of-md-gun-control-bill-to-launch-new-legal-battles-fight-for-public-support/2013/05/15/2c68f7d8-bd99-11e2-9b09-1638acc3942e\\_story.html](https://www.washingtonpost.com/local/md-politics/signing-of-md-gun-control-bill-to-launch-new-legal-battles-fight-for-public-support/2013/05/15/2c68f7d8-bd99-11e2-9b09-1638acc3942e_story.html) (documenting the legal battle over Maryland's Firearms Safety Act); Thomas Kaplan, *U.S. Judge Upholds Most New York Gun Limits*, N.Y. TIMES (Dec. 31, 2013), <http://www.nytimes.com/2014/01/01/nyregion/federal-judge-upholds-majority-of-new-york-gun-law.html> (reporting on a federal challenge to New York's SAFE Act); Adam Liptak, *Supreme Court Won't Hear Challenge to Assault Weapons Ban in Chicago Suburb*, N.Y. TIMES (Dec. 7, 2015), <http://www.nytimes.com/2015/12/08/us/supreme-court-will-not-hear-challenge-to-assault-weapons-ban-of-highland-park-ill.html> (discussing the federal challenge to the City of Highland's park assault weapon and LCM laws).

Second Amendment case, *District of Columbia v. Heller*.<sup>21</sup> In holding that a District of Columbia regulation effectively prohibiting handguns violated the Second Amendment,<sup>22</sup> the Supreme Court in *Heller* declined to offer lower courts a clear, workable analytical framework to apply to Second Amendment challenges.<sup>23</sup> In particular, the Court's decision not to define *common use* and *lawful purposes*<sup>24</sup> has led to differing approaches among the lower courts in resolving challenges to assault weapon and LCM bans. And nowhere, perhaps, is this disparity more apparent than within the new and controversial approach adopted recently by the en banc Fourth Circuit in *Kolbe v. Hogan*.<sup>25</sup>

This Note, therefore, will use the litigation surrounding *Kolbe v. Hogan*<sup>26</sup> to accomplish three objectives. First, this Note will comprehensively analyze the district court, appellate panel, and en banc court's engagement with *Heller*'s discussion of common use. Second, this Note will utilize this analysis to highlight the impact of the unresolved issues that remain in the post-*Heller* world. And third, this Note will advocate for Supreme Court review of the *Kolbe* case as an effective and timely opportunity to provide the lower courts with guidance on the viability and proper application of the common-use test.

Part I of this Note will provide an overview of the Supreme Court's decision in *Heller*, paying particular attention to its analysis of *common use* and *lawful purposes*. This Part will also provide a brief overview of the lower courts' reactions to *Heller*'s articulation of the common-use test to provide necessary background for the *Kolbe* case.

Part II of this Note will engage in a thorough analysis of each stage of the *Kolbe* case: (1) the district court of Maryland's opinion expressing doubt over whether the at-issue firearms and magazines were in common use for lawful

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21. 554 U.S. 570 (2008); see *infra* Section II.B. and accompanying text.

22. *Heller*, 554 U.S. at 635.

23. *Id.*; see also Allen Rostron, *The Continuing Battle Over the Second Amendment*, 78 ALB. L. REV. 819, 819–20 (2015); Ryan L. Card, Note, *An Opinion Without Standards: The Supreme Court's Refusal to Adopt a Standard of Constitutional Review in District of Columbia v. Heller Will Likely Cause Headaches for Future Judicial Review of Gun-Control Regulations*, 23 BYU J. PUB. L. 259, 279 (2009).

24. Rostron, *supra* note 23; Card, *supra* note 23, at 280–81.

25. Compare *New York State Rifle and Pistol Ass'n v. Cuomo* (“NYSRPA”), 804 F.3d 242, 257 (2d Cir. 2015) (upholding the constitutionality of an assault-weapon and LCM ban under intermediate scrutiny), *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015) (also upholding assault-weapons and LCM bans under strict scrutiny), and *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244, 1261 (D.C. Cir. 2011) (also upholding assault-weapons and LCM bans under strict scrutiny), with *Kolbe v. Hogan*, 849 F.3d 114, 135–37 (4th Cir. 2017) (en banc) (concluding that assault weapons and LCMs are not entitled to Second Amendment protections at all), and *Friedman v. Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (upholding an assault-weapon and LCM ban under an entirely novel analytical framework).

26. For the remainder of this Note, the Author will refer to the collective actions in *Kolbe v. O'Malley*, *Kolbe v. Hogan*, and the en banc decision of *Kolbe v. Hogan* as “the *Kolbe* case.”

purposes; (2) the appellate panel's unequivocal conclusions with respect to common use; and (3) the en banc Fourth Circuit's decision to abandon common use in favor of its own test.

Part III of this Note will mine the *Kolbe* case and the lower courts' reactions to *Heller* to argue that the common-use test is unworkable in its current form and desperately needs to be clarified. The first section of this Part will focus on demonstrating how the *Kolbe* case is emblematic of the lower courts' continuing struggles with *Heller*'s ambiguous discussion of common use and lawful purposes. Finally, the second section of Part III will utilize this Note's analysis and its implications to make a persuasive argument for Supreme Court review of the *Kolbe* case.

### I. *DISTRICT OF COLUMBIA V. HELLER*: INTERPRETATION WITHOUT GUIDANCE

#### A. *The Supreme Court's Interpretation of the Purpose of the Second Amendment*

Dick Heller, a District of Columbia special police officer, applied for a registration certificate with the city authorizing him to keep a handgun within his home, but was denied.<sup>27</sup> Heller filed suit in federal court, seeking to enjoin the District of Columbia from enforcing restrictive aspects of the firearm codes such as the ban against registering handguns and the carrying of lawful firearms within the home without a license.<sup>28</sup> The Supreme Court granted certiorari following disagreement between the District Court and D.C. Circuit Court of Appeals over the constitutionality of the District of Columbia's handgun laws.<sup>29</sup>

Justice Antonin Scalia, writing for the majority, concluded that the Second Amendment conferred an individual right to keep and bear arms, albeit not an unlimited one.<sup>30</sup> In so finding, Justice Scalia determined that the core tenets of this individual right to keep and bear arms included possession of a firearm for self-defense, particularly within the home.<sup>31</sup> Justice Scalia then buoyed this interpretation with an in-depth examination of the treatment of the Second Amendment by post-ratification, pre-Civil War, and post-Civil War commentators, legal scholars, and courts.<sup>32</sup>

Having established that the Second Amendment enshrined an individual right to keep and bear arms, Justice Scalia outlined a set of principles that would

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

28. *Id.* at 575–76.

29. *Id.* at 576.

30. *Id.* at 595 (“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. Of course the right was not unlimited, just as the First Amendment’s right of free speech was not . . .”).

31. *Id.* at 628–29 (“Under any of the standards of scrutiny that we have applied to enumerated constitutional rights banning from the home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family would fail constitutional muster.’”) (internal citations omitted).

32. *Id.* at 605–28.

later prove inscrutable to lower courts attempting to apply *Heller* to Second Amendment challenges.<sup>33</sup>

While the Court cautioned that the individual right to keep and bear arms was not unlimited, it declined to clearly delineate the right's boundaries or provide the lower courts with a practical test from which to determine those boundaries for themselves.<sup>34</sup> Instead, Justice Scalia only outlined a presumptive, non-exhaustive list of types of laws that, due to their historical acceptance by the courts and society, as well as their common-sense nature, fell outside the scope of the Second Amendment's guarantees.<sup>35</sup> Examples included laws banning the possession of firearms by felons and the mentally ill, laws prohibiting the carrying of firearms in sensitive areas such as schools and government buildings, and laws regulating the commercial sale of firearms.<sup>36</sup> The Court also recognized the historical tradition of banning "dangerous and unusual weapons" such as "M-16 rifles and the like," but did not describe what other types of weapons might fall into this category.<sup>37</sup>

The Court in *Heller* also posited that the Second Amendment protected weapons in "common use at the time."<sup>38</sup> Weapons "not typically possessed by law-abiding citizens for lawful purposes" did not fall under the Second Amendment's protections.<sup>39</sup> The Court found support in the historical ban of "dangerous and unusual" weapons.<sup>40</sup> But the Court did not articulate the proper method lower courts should use to determine whether a specific type of firearm was in common use or possessed for lawful purposes. For example, while Justice Scalia's conclusion that handguns are the "quintessential firearm for self-defense within the home" meant that the class of firearms facially satisfied the common-use test, the Court offered no guidance to help a lower court determine if a more nuanced restriction—such as the prohibition of a particular model or type of handgun—affects the analysis of whether the weapon is in common use.<sup>41</sup>

Justice Stephen Breyer, in dissent, criticized the majority's decision to couch the boundaries of the Second Amendment's protections in phrases like "common use" and "typically possessed for lawful purposes."<sup>42</sup> Justice Breyer asserted this framework would force the Court to extend the Second Amendment's

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33. *Id.* at 626–27, 628–36.

34. *Id.* at 626.

35. *Id.* at 626–27.

36. *Id.*

37. *Id.* at 627.

38. *Id.*

39. *Id.* ("We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those in common use at the time." (internal quotation marks omitted)).

40. *Id.* ("We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons." (internal quotation marks omitted)).

41. See Cody Jacobs, *End the Popularity Contest: A Proposal for Second Amendment "Type of Weapon" Analysis*, 83 TENN. L. REV. 231, 243–48 (2015) (discussing the ambiguities surrounding *Heller*'s common-use test, and its application in lower courts).

42. *Heller*, 554 U.S. at 720–21 (Breyer, J., dissenting).

protections—regardless of precedent or other factors counseling otherwise—to any weapon that became popular.<sup>43</sup> By the same token, the Court would also be required to uphold a regulation on a particular firearm so long as Congress or the States acted in time to keep it from entering common use.<sup>44</sup> Thus, Justice Breyer admonished the majority for casting the constitutionality of gun laws throughout the United States into uncertainty. Justice Breyer then concluded that there was “no sound legal basis for launching the courts on so formidable and dangerous a mission.”<sup>45</sup>

Responding to Justice Breyer’s dissent, Justice Scalia and the majority pointed to the fact that their decision was the Court’s first in-depth discussion of the Second Amendment, and that there would be “time enough” to provide further clarity in future cases.<sup>46</sup> Likening their decision to the Supreme Court’s first forays into the interpretation of the First Amendment,<sup>47</sup> Justice Scalia and the majority were confident that future cases would provide more appropriate fora to discuss the merits and justifications of these analytical frameworks.<sup>48</sup>

***B. Extending the Confusion to the States: McDonald v. City of Chicago Maintains the Status Quo Imposed by Heller***

The Supreme Court’s decision in *Heller* generally received a lukewarm response from the legal community, gun-rights and gun-control advocates, and the American public.<sup>49</sup> Many constitutional scholars, including even those in favor of Justice Scalia’s strong reading of the Second Amendment’s guarantees, expressed concern with the opinion’s decision to leave the contours of the individual right for later cases to define.<sup>50</sup> In addition, the ambiguities surrounding the Court’s incomplete analytical framework caused apprehension within the legal

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43. *Id.* at 721 (“[I]f Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to reverse course . . .”).

44. *Id.* (“On the majority’s reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so.”).

45. *Id.* at 722 (Breyer, J., dissenting).

46. *Id.* at 635 (“And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”).

47. *Id.*

48. *Id.*

49. *See, e.g.*, Card, *supra* note 23 (critiquing *Heller*’s refusal to adopt a standard of review for adjudicating Second Amendment challenges); *Supreme Court Shoots Down D.C. Gun Ban*, CBS NEWS (June 26, 2008, 9:17 AM), <http://www.cbsnews.com/news/supreme-court-shoots-down-dc-gun-ban/> (discussing gun-rights advocates’ victory in having the right to bear arms declared a recognized right and gun-control advocates’ victory in the recognition that the right is not absolute); David G. Savage, *Justices’ Decision Triggers Questions*, L.A. TIMES (June 28, 2008), <http://articles.latimes.com/2008/jun/28/nation/na-scotus28> (highlighting legal scholars’ reservations with the Court’s decision in *Heller*).

50. Savage, *supra* note 49.

community,<sup>51</sup> especially when coupled with the promises and predictions of the increased Second Amendment litigation that would follow *Heller*.<sup>52</sup> Faced with imminent Second Amendment challenges from gun-rights advocates<sup>53</sup> and left unable to accurately determine the specific constitutionality of their particular laws, some cities and even states repealed aspects of their firearms regulations.<sup>54</sup>

Two years later, this apprehension only increased when, in *McDonald v. City of Chicago*, the Supreme Court held that the Second Amendment's individual right to keep and bear arms extended to the states.<sup>55</sup> Justice Samuel Alito opined in *McDonald* that the Second Amendment's core right to self-defense within the home was fundamental to "ordered liberty."<sup>56</sup> Justice Alito also addressed amici states' concerns that the Court's decision would prevent any reasonable firearm regulations. Justice Alito explained that incorporating the Second Amendment would only limit, and not eliminate, a state's ability to "devise solutions to social problems that suit local needs and values."<sup>57</sup> However, the Court in *McDonald* again did not provide the lower courts with a proper framework to evaluate Second Amendment challenges to state and federal firearm regulations.<sup>58</sup>

### ***C. The Post-Heller World: Assault-Weapon and LCM Bans, the Common-Use Test, and the Lower Courts' Reactions to Heller***

Lower courts adjudicating Second Amendment challenges in the wake of *Heller* and *McDonald* were thus initially unequipped to deal with the task of pinpointing the scope of the Second Amendment.<sup>59</sup> Regarding Second Amendment challenges to assault-weapon and LCM bans, courts have had mixed success in their attempts to craft workable frameworks around *Heller*'s discussion of common use and lawful purposes.<sup>60</sup>

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51. See, e.g., *id.*; Judy Keen, *High Court Ruling Triggers Gun Ban Repeals*, *NRA Suits*, USA TODAY (Sept. 10, 2008, 11:07 PM), [http://usatoday30.usatoday.com/news/nation/2008-09-10-gunsbans\\_N.htm](http://usatoday30.usatoday.com/news/nation/2008-09-10-gunsbans_N.htm) (describing the reactions of the NRA and state and municipal governments to the Supreme Court's decision in *Heller*).

52. See Keen, *supra* note 51.

53. *Id.*

54. *Id.*

55. 561 U.S. 742, 791 (2010).

56. *Id.* at 767.

57. *Id.* at 785.

58. *Id.* at 785–86. The Court in *McDonald* also reiterated *Heller*'s holding that the fundamental rights enshrined within the Second Amendment could not be subject to an interest-balancing test. *Id.*

59. *Id.* at 687 (Stevens, J., dissenting) ("The majority is wrong when it says that the District's law is unconstitutional '[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights.' How could that be?" (internal citations omitted)); see also Rostron, *supra* note 23 at 819–20 (discussing lower court adaptations to the unresolved issues of *Heller*).

60. Compare *New York State Rifle and Pistol Ass'n v. Cuomo* ("NYSRPA"), 804 F.3d 242, 257 (2d Cir. 2015) (upholding the constitutionality of an assault-weapon and LCM ban under intermediate scrutiny), *Fyock v. Sunnyvale*, 779 F.3d 991, 1000 (9th Cir. 2015)

Excluding the Fourth Circuit's decision in *Kolbe*, four circuits<sup>61</sup> have decided the constitutionality of assault-weapon and LCM bans: (1) the D.C. Circuit, in *Heller v. District of Columbia* ("Heller II");<sup>62</sup> (2) the Ninth Circuit in *Fyock v. Sunnyvale*;<sup>63</sup> (3) the Seventh Circuit in *Friedman v. Highland Park*;<sup>64</sup> and (4) the Second Circuit in *New York State Rifle and Pistol Association v. Cuomo* ("NYSRPA").<sup>65</sup> All four circuits upheld the constitutionality of the respective bans, but differed in how they resolved the respective Second Amendment challenges.<sup>66</sup>

Three out of the four circuits—the D.C., Ninth, and Second Circuits—applied a two-step framework to determine if their respective bans violated the Second Amendment.<sup>67</sup> This framework was first articulated by the Third Circuit in *United States v. Marzzarella*.<sup>68</sup> Under the two-step framework, a reviewing court must first ask whether "the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."<sup>69</sup> If the answer to this inquiry is "no," the law is valid.<sup>70</sup> If, however, the answer under this first step is "yes," a reviewing court must then "evaluate the law under [the appropriate] form of means-end scrutiny."<sup>71</sup> If the law passes whatever form of judicial scrutiny is applied, it is constitutional.<sup>72</sup> If it fails, it is unconstitutional.<sup>73</sup>

Under the D.C., Ninth, and Second Circuits' use of the two-step framework, the first step turned on whether the at-issue firearms and LCMs were in "common use for lawful purposes" at the time of the ban, or, in other words, whether

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(also upholding assault-weapons and LCM bans under strict scrutiny), and *Heller v. District of Columbia* ("*Heller I*"), 670 F.3d 1244, 1261 (D.C. Cir. 2011) (also upholding assault-weapons and LCM bans under strict scrutiny), with *Kolbe v. Hogan*, 849 F.3d 114, 135–36 (4th Cir. 2017) (en banc) (concluding that assault weapons and LCMs are not entitled to Second Amendment protections at all), and *Friedman v. Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (upholding an assault-weapon and LCM ban under an entirely novel analytical framework).

61. The District Court of Colorado evaluated an assault weapon and LCM ban in *Colorado Outfitters Association v. Hickenlooper* under the two-step framework, but the Tenth Circuit vacated its decision for lack of standing. 24 F. Supp. 3d 1050 (D. Colo. 2014), *vacated and remanded*, 823 F.3d 537 (10th Cir. 2016).

62. 670 F.3d at 1244.

63. 779 F.3d at 991–92.

64. 784 F.3d at 406.

65. 804 F.3d at 242.

66. *Id.*; *Friedman*, 784 F.3d at 406; *Fyock*, 779 F.3d at 991; *Heller II*, 670 F.3d at 1244.

67. *NYSRPA*, 804 F.3d at 254; *Fyock*, 779 F.3d at 996; *Heller II*, 670 F.3d at 1252–53.

68. 614 F.3d 85, 89 (3d Cir. 2010).

69. *Id.* at 89.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

the firearms and LCMs satisfied the common-use test articulated in *Heller*.<sup>74</sup> Here, the circuits faced *Heller*'s first jurisprudential roadblock: what evidence was required under *Heller* to prove that a firearm or magazine is in common use for lawful purposes? While the circuits seemed to agree on using an objective, statistical inquiry to evaluate common use,<sup>75</sup> more important were their later conclusions that they need not actually *decide the question at all*.<sup>76</sup> In *Heller II*, *Fyock*, and *NYSRPA*, the circuits—regardless of where the objective, statistical inquiry led them<sup>77</sup>—all ultimately chose to leave the common-use test undecided.<sup>78</sup>

In *Friedman*, the Seventh Circuit broke away from the D.C., Ninth, and Second Circuits by rejecting *Marzzarella*'s two-step framework altogether.<sup>79</sup> *Friedman* concerned Highland Park, Illinois's assault-weapon and LCM ban.<sup>80</sup> Deeming the common-use test “circular”<sup>81</sup> and uncertain,<sup>82</sup> the Seventh Circuit thought it more appropriate to consider the following: (1) whether the at-issue firearms and magazines were in common use at the time of the Constitution's ratification or bear “some reasonable relationship to the preservation or efficiency of a well-regulated militia”<sup>83</sup> and (2) whether “law-abiding citizens retain adequate

74. New York State Rifle and Pistol Ass'n v. Cuomo (“NYSRPA”), 804 F.3d 242, 255; *Fyock v. Sunnyvale*, 779 F.3d 991, 997–98; *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244, 1260–61.

75. *NYSRPA*, 804 F.3d at 255, 257; *Fyock*, 779 F.3d at 998; *Heller II*, 670 F.3d at 1261.

76. *NYSRPA*, 804 F.3d at 257 (“[W]e follow the approach taken by the District Courts and by the D.C. Circuit in *Heller II* and assume for the sake of argument that these commonly used weapons and magazines are also typically possessed by law-abiding citizens for lawful purposes.” (internal quotations omitted)); *Fyock*, 779 F.3d at 998 (“However, we cannot say that the district court abused its discretion by inferring from the evidence of record that, at a minimum, magazines are in common use.”); *Heller II*, 670 F.3d at 1261 (“We need not resolve that question, however, because even assuming [the assault-weapon and LCM bans] do impinge upon the right protected by the Second Amendment, we think intermediate scrutiny is the appropriate standard of review and the prohibitions survive that standard.”).

77. *NYSRPA*, 804 F.3d at 257 (leaning in favor of finding the at-issue firearms and LCMs to satisfy common use, but expressing uncertainty over how to assess the lawful purposes element of the common use test); *Fyock*, 779 F.3d at 998 (expressing doubt over whether the common-use evidence submitted by the plaintiff actually demonstrated common use); *Heller II*, 670 F.3d at 1261 (leaning towards finding the at-issue firearms and LCMs in common use, but expressing doubt over whether they were in common use for lawful purposes).

78. See *supra* note 76 and accompanying text.

79. *Friedman v. Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015).

80. *Id.* at 406.

81. *Id.* at 409 (“And relying on how common a weapon is at the time of litigation would be circular to boot.”).

82. *Id.* (“[B]ut what line separates ‘common’ from ‘uncommon’ ownership is something the Court did not say.”).

83. *Id.* at 410.

means of self-defense.”<sup>84</sup> Under this new framework, the Seventh Circuit upheld the constitutionality of the assault-weapon and LCM ban.<sup>85</sup>

Thus, the jurisprudence surrounding the application of *Heller*'s common-use test to assault weapon and LCM bans was anything but clear. The D.C., Ninth, and Second Circuits' hesitation towards actually deciding the threshold inquiry of the two-step framework, coupled with the Seventh Circuit's divergence, has formed an active, ever-shifting backdrop of uncertainty for each stage of the *Kolbe* case.

## II. THE *KOLBE* CASE: THE FOURTH CIRCUIT GRAPPLES WITH THE AMBIGUITIES OF *HELLER*'S COMMON-USE TEST

### A. *The Firearms Safety Act: Maryland's Contentious Response to Public Mass Shootings*

On May 16, 2013, then-Governor of Maryland and future presidential candidate Martin O'Malley signed into law the Firearms Safety Act (“FSA”) of 2013.<sup>86</sup> A package of both amendments and new laws, the FSA was designed to address, among other things, the following: (1) the connection between gun violence, gun ownership, and mental health; (2) school safety; (3) the possession of “assault-style” weapons; and (4) the sale and purchase of firearm magazines with the capacity to hold ten or more rounds of ammunition.<sup>87</sup> Touted as “among the country’s most sweeping legislative responses to the December mass shooting in Newtown, [Connecticut],”<sup>88</sup> the FSA’s passage received intense, even inflammatory, criticism from opponents to the bill within the state legislature and from local and national gun-rights organizations.<sup>89</sup>

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84. *Id.*

85. *Id.* at 412.

86. Erin Cox, *O'Malley Signs Gun Bill*, BALT. SUN (May 16, 2013), [http://articles.baltimoresun.com/2013-05-16/news/bs-md-gun-bill-signed-20130516\\_1\\_gun-bill-gun-law-gun-ownership](http://articles.baltimoresun.com/2013-05-16/news/bs-md-gun-bill-signed-20130516_1_gun-bill-gun-law-gun-ownership); *Maryland: Governor Signs Sweeping Gun Control Bill into Law*, NRA-ILA (May 17, 2013), <https://www.nraila.org/articles/20130517/maryland-governor-signs-sweeping-gun-control-bill-into-law>; see also Davis, *supra* note 20.

87. 2013 Md. Laws ch. 427, at 1–3, [http://mgaleg.maryland.gov/2013RS/Chapters\\_noln/CH\\_427\\_sb0281e.pdf](http://mgaleg.maryland.gov/2013RS/Chapters_noln/CH_427_sb0281e.pdf). With respect to the prohibition of LCMs, the FSA of 2013 amended the Maryland Criminal Code to prohibit the manufacture, sale, offer, purchase, receipt, or transfer of a detachable magazine that has a capacity of greater than ten rounds of ammunition. MD. CODE ANN., CRIM. LAW § 4-305(b) (West 2013).

88. Cox, *supra* note 86; see also Aaron C. Davis, *Maryland House Passes Strict Gun-control Measure Crafted After Newtown Massacre*, WASH. POST (Apr. 3, 2013), [https://www.washingtonpost.com/local/md-politics/maryland-house-passes-strict-gun-control-measure-crafted-after-newtown-massacre/2013/04/03/303e1754-9c69-11e2-a941-a19bce7af755\\_story.html](https://www.washingtonpost.com/local/md-politics/maryland-house-passes-strict-gun-control-measure-crafted-after-newtown-massacre/2013/04/03/303e1754-9c69-11e2-a941-a19bce7af755_story.html).

89. See, e.g., Erin Cox, *Maryland National Rifle Association Lawsuit: Gun-Control Opponents Say They Will not Seek Referendum on New Laws, Will Back Lawsuit Planned By NRA*, HUFFINGTON POST (Apr. 18, 2013, 8:57 AM), [http://www.huffingtonpost.com/2013/04/18/maryland-national-rifle-association-lawsuit\\_n\\_3107252.html](http://www.huffingtonpost.com/2013/04/18/maryland-national-rifle-association-lawsuit_n_3107252.html) (discussing support and opposition to the FSA); Jon S. Cardin,

As the effective date of the FSA drew near, gun-rights advocates first attempted to stall enforcement of the FSA through a ballot initiative.<sup>90</sup> When the ballot initiative proved unsuccessful, gun-rights advocates turned their efforts to the courts. A group of Maryland gun owners, local and national gun clubs, advocacy organizations, and local firearms retailers sued Governor O'Malley and other state officials in the District Court of Maryland, seeking a declaratory injunction holding the FSA unconstitutional under the Second Amendment.<sup>91</sup>

***B. Struggling with “No”: The District Court of Maryland Applies the Common-Use Test, Then Avoids the Results***

The District Court of Maryland evaluated the constitutionality of the FSA in *Kolbe v. O'Malley* by answering the same threshold question as the other circuits: whether the FSA burdened conduct protected by the Second Amendment.<sup>92</sup> This inquiry, in keeping with the other circuits' framework, hinged on two interrelated considerations: (1) whether the at-issue firearms and magazines were in common use and (2) whether they were in common use for lawful purposes.<sup>93</sup> While the district court ultimately did not resolve the case on these considerations,<sup>94</sup> its careful analysis of common use and lawful purposes is illustrative of the federal courts' struggle to define *common use* and reconcile it with the uncertain contours of the Second Amendment's protections.<sup>95</sup>

In evaluating whether FSA's restriction the firearms and LCMs infringed upon conduct protected by the Second Amendment, the district court of Maryland was forced to sift through a deluge of common-use evidence, an exercise that serves to highlight the uncertainty of the common-use test.<sup>96</sup> The plaintiffs primarily presented the district court with estimates concerning the absolute number of at-issue firearms and LCMs in circulation *nationwide* because they sought a broad conception of common use.<sup>97</sup> Buoyed by these immense figures, the plaintiffs made

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Opinion, *The Lawless Sheriffs of Maryland*, BALTIMORE SUN (June 17, 2013), [http://articles.baltimoresun.com/2013-06-17/news/bs-ed-sheriffs-guns-20130617\\_1\\_sheriffs-laws-maryland-judiciary](http://articles.baltimoresun.com/2013-06-17/news/bs-ed-sheriffs-guns-20130617_1_sheriffs-laws-maryland-judiciary) (discussing a representative in the Maryland House of Delegates criticizing a county sheriff's refusal to fully enforce the FSA).

90. See Erin Cox, *Maryland Petition to Repeal Gun Control Law Fails; NRA Lawsuit Looms*, BALTIMORE SUN (June 2, 2013), [http://articles.baltimoresun.com/2013-06-02/news/bal-20130601\\_1\\_nra-lawsuit-gun-ownership-gun-control-law](http://articles.baltimoresun.com/2013-06-02/news/bal-20130601_1_nra-lawsuit-gun-ownership-gun-control-law).

91. *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 774 (D. Md. 2014), *aff'd in part, rev'd in part sub nom. Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), and *aff'd Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc).

92. See *id.* at 784.

93. *Id.*

94. *Id.* at 789.

95. See *supra* notes 76–77, 79–82 and accompanying text.

96. *O'Malley*, 42 F. Supp. 3d at 784–89.

97. “The plaintiffs also claim that at least 5 million of the banned assault weapons are possessed nationwide, and that the number may be as high as 8.2 million.” *Id.* at 784. The plaintiffs also presented evidence that, in 2012, more of the banned firearms had been manufactured in or imported to the United States than “the most commonly sold vehicle.” *Id.* Finally, as to the banned LCMs, the plaintiff presented evidence that “they represent seventy-

only cursory references to the number of restricted firearms and LCMs in circulation within Maryland.<sup>98</sup>

The State, on the other hand, presented evidence of the number of at-issue firearms and LCMs in circulation as compared with the *total* number of firearms and LCMs available to U.S. citizens.<sup>99</sup> The State also argued that the absolute number of restricted firearms and LCMs in circulation was a poor indicator of common use; instead, the State contended, courts should consider estimates of the number of individuals who actually possessed one of the restricted firearms or LCMs.<sup>100</sup> Finally, the State sought to narrow the district court's conception of the common-use test to ownership of the restricted firearms and LCMs within Maryland alone.<sup>101</sup> By shifting from a nationwide to a state-specific analysis of common use, the State contended that, in total, less than 1% of the population of Maryland owned a FSA-restricted firearm.<sup>102</sup>

But the arguments surrounding common use in the trial court proceedings of the *Kolbe* case extended beyond which measurement the district court should utilize. The common-use test additionally requires that a firearm be in common use *for lawful purposes*.<sup>103</sup> Thus, as interpreted in *Kolbe*, *Heller* required the plaintiffs

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five million, or forty-six percent, of all magazines in U.S. consumer possession between 1990 and 2012." *Id.* at 785.

98. The plaintiffs presented evidence that, over the past three years in Maryland, "there have been approximately 35,000 transfers of assault weapons and frames and receivers of such weapons." *Id.* at 784. The district court was quick to note, however, that the ways in which transfers were recorded could overstate the actual number of firearms involved. *See id.* at 784 n.3.

99. The defendants' expert estimated that at the time of the 1994 federal ban, assault weapons comprised less than one percent of the civilian gun stock. Assuming that recent sales have increased the number of assault weapons in the current civilian market to nine million, such weapons would represent about three percent of the civilian gun stock. *Id.* at 786 (citations omitted).

100. The District Court also highlighted the defendants' assertion that the absolute number of assault weapons far exceeds the number of people who own them. In recent decades, gun ownership in the United States has become increasingly concentrated; fewer households own firearms, but those households owning guns own more of them. Using NSSF's figure that the average assault weapons owner has 3.1 such weapons, this means less than 1% of Americans own an assault weapon. *Id.* (citations omitted).

101. "Assuming again that the average assault weapons owner has 3.1 such weapons, this means approximately 15,000 Marylanders own 46,577 assault weapons. The defendants assert that, in light of Maryland's approximately 4.5 million adult residents, the number of Marylanders owning assault weapons is well below 1%." *Id.*

102. *See id.*

103. *Id.* at 784; *see also* *New York State Rifle & Pistol Ass'n v. Cuomo* ("NYSRPA"), 804 F.3d 242, 255–57 (2d Cir. 2015); *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1260 (D.C. Cir. 2011).

to present—and the State to dispute—evidence that the restricted firearms and LCMs were in common use for some lawful purpose(s).<sup>104</sup> Both the parties and the district court primarily focused on the firearms and LCMs' use and usefulness for the lawful purpose specified by the *Heller* Court as the core right of the Second Amendment: self-defense.<sup>105</sup> As in the arguments over common use, however, the parties attempted to steer the district court to a particular means of defining and evaluating *common use for lawful purposes* by presenting differentiated evidence.<sup>106</sup>

Although the District Court of Maryland was offered an array of different evidentiary avenues to resolve the lawful-purposes component of the common-use test,<sup>107</sup> it chose to focus on the State's evidence with respect to the actual use and usefulness of the at-issue firearms and LCMs for self-defense.<sup>108</sup> The plaintiffs' argument that the banned firearms and LCMs were in common use for lawful purposes failed because they were unable to point to a single relevant incident in Maryland where a banned firearm or more than ten rounds were used in self-defense.<sup>109</sup> Without this evidence, the plaintiffs had no means to counterbalance the State's assertions that the firearms and LCMs banned under the FSA were not in common use for self-defense<sup>110</sup> and, moreover, that the firearms and LCMs were disproportionately used for *unlawful purposes* such as shootings of police officers and mass shootings.<sup>111</sup>

After reviewing the extensive evidence presented by both sides, the district court expressed "serious[] doubts" over whether the banned firearms and LCMs

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104. See *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 784 (D. Md. 2014); see also *NYSRPA*, 804 F.3d at 255–57; *Fyock*, 779 F.3d at 997–98; *Heller II*, 670 F.3d at 1260–61.

105. See *O'Malley*, 42 F. Supp. 3d at 785, 787–88.

106. The plaintiffs presented evidence of self-defense primarily through surveys of owners of the at-issue firearms indicating that *home defense* was the second most important reason for owning them. *Id.* at 789 n.28. The defendants, on the other hand, pointed to the lack of evidence of an at-issue firearm and LCM ever actually being used in self-defense. *Id.* at 786–87 (“With the exception of one incident not relevant here, Maryland law enforcement officials are unaware of any Marylander using an assault weapon, or needing to fire more than ten rounds, to protect himself.”).

107. See *supra* notes 97–101 and accompanying text.

108. See *O'Malley*, 42 F. Supp. 3d at 787–88; see also *id.* at 787 (“The defendants' expert, Lucy Allen, confirms that it is rare for a self-defender to fire more than ten rounds. Upon analyzing the NRA Institute for Legislative Action's reports on self-defense incidents occurring between January 2011 and December 2013, she determined that, on average, 2.1 bullets were fired.”).

109. See *supra* notes 106, 108.

110. *O'Malley*, 42 F. Supp. 3d at 788–89 (“As for their claims that assault weapons are well-suited for self-defense, the plaintiffs proffer no evidence beyond their desire to possess assault weapons for self-defense in the home that they are in fact commonly used, or possessed, for that purpose.”).

111. *Id.* at 787–89. The defendants pointed to the disproportionate use of the at-issue firearms and LCMs as compared to their ownership in mass shootings around the country, and that their use caused more casualties than when other types of weapons were used. *Id.* at 787.

were in common use for lawful purposes.<sup>112</sup> The district court stated that finding common use by the absolute number of banned firearms and LCMs in circulation failed to take into account the overall civilian gun stock in the United States<sup>113</sup> and that the at-issue firearms and magazines were likely concentrated in less than 1% of the U.S. population.<sup>114</sup> As for the lawful-purposes component of the test, the plaintiffs' desire to use the banned firearms and LCMs for self-defense could not, without evidence of actual common use for that purpose, satisfy it.<sup>115</sup>

Despite these conclusions, the district court then utilized a precedential back-door<sup>116</sup> to avoid the logical end to its application of the common-use test: finding that the firearms and LCMs banned by the FSA were not entitled to protection under the Second Amendment. Instead, the district court *assumed* that the FSA's LCM and assault weapon bans placed a burden on the Second Amendment and moved on to the second step of the two-step framework: determining the level of means-end scrutiny it should apply to the FSA.<sup>117</sup>

The district court's analytical path raises the following question: Why go through the exhaustive process of applying the common-use test only to avoid its results? The easy answer is that the district court likely did not want to go where no other federal court had gone before.<sup>118</sup> No other court<sup>119</sup> applying the common-use

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112. *Id.* at 788.

113. *Id.*

114. *Id.*

115. *Id.* at 789. The district court was unconvinced by the surveys the plaintiffs presented as evidence of common use for self-defense. *Id.* at n.28. The survey only "asked how important home defense was for owning the weapon and provided an average rating between one and ten," and thus did not specifically demonstrate that the weapons were in common use for self-defense. *Id.*

116. "Nevertheless, the court need not resolve whether the banned assault weapons and LCMs are useful or commonly used for lawful purposes, and will assume, although not decide, that the Firearm Safety Act places some burden on the Second Amendment right." *Id.* at 789 (citing *Woollard v. Gallagher*, 712 F.3d 865, 875–76 (4th Cir. 2014)).

117. *Id.*; *see also supra* notes 68–71.

118. *See, e.g., New York State Rifle & Pistol Ass'n v. Cuomo* ("NYSRPA"), 804 F.3d 242, 257 (2d Cir. 2015) (assuming for the sake of argument that the at-issue firearms and LCMs were in common use for lawful purposes "in the absence of clearer guidance from the Supreme Court or stronger evidence in the record"); *Fyock v. Sunnyvale*, 779 F.3d 991, 997–98 (9th Cir. 2015) (holding that the trial court did not abuse its discretion by concluding that LCMs were in common use, despite the fact that the plaintiffs only introduced sales statistics and marketing materials to demonstrate common use); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1261 (D.C. Cir. 2011) (refusing to resolve the question of common use, despite almost agreeing with the plaintiff's contention that the at-issue firearms and LCMs were in common use); *Colo. Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014), *vacated and remanded*, 823 F.3d 537 (10th Cir. 2016) (agreeing with the parties' stipulation that the at-issue firearms and LCMs were in common use for self-defense).

119. Most courts of appeals have either found the at-issue firearms and LCMs in common use or assumed that they were to move on to a more dispositive inquiry. *See supra* note 118. The Seventh Circuit, on the other hand, found the common-use test to be circular and refused to engage with the two-step framework adopted by most other circuits. Friedman

test to an assault-weapon and LCM ban, regardless of its findings, had taken the affirmative step of holding the at-issue weapons and magazines to be outside the Second Amendment's protections.<sup>120</sup>

But leaving the question at the district court's apparent hesitation ignores another potential rationale for its decision, a rationale that cuts straight to the heart of the problem with post-*Heller* discussion of common use. Simply put, the district court may have chosen to leave the common-use question unanswered because it had no way to know if its application of the common-use test was correct.<sup>121</sup> In almost deciding that the at-issue firearms and LCMs were not in common use and thus were not protected by the Second Amendment, the district court had focused on evidence of the number of *individual* possession and their *actual use* for self-defense in Maryland.<sup>122</sup> But *Heller*, *McDonald*, and even the other circuit decisions neither endorse nor condemn resolving the common-use question on these grounds.<sup>123</sup>

How, then, could the district court have any confidence in its common-use determination? The logic and reasoning of the decision aside, what would stop appellate courts from simply drawing a different conclusion from the same evidence? As this Note's discussion of the Fourth Circuit's review of *Kolbe v. O'Malley* in the next Section demonstrates, without clear guidance from the Supreme Court, lower courts seeking to apply the common-use test are faced with a choice: enter a jurisprudential no-man's land, where little is settled and the threat of reversal is high; or find a way to avoid answering the common-use question altogether.

### *C. Highlighting Ambiguities: The Fourth Circuit Rejects the District Court's Common-Use Analysis*

The District Court of Maryland ultimately applied intermediate scrutiny and upheld the constitutionality of the FSA.<sup>124</sup> Undeterred, the plaintiffs appealed, and the case continued in the Fourth Circuit.<sup>125</sup> Nearly two years later, on February 4, 2016, a three-judge appellate panel issued a 2–1 opinion reversing the district court's decision.<sup>126</sup> The panel began its Second Amendment analysis by analyzing

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v. Highland Park, 784 F.3d 406, 408–10 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447; *see also supra* notes 79–85 and accompanying text.

120. *See supra* notes 118–19.

121. Without a single example of a court finding a relevant weapon not to be in common use for lawful purposes, the District Court of Maryland would be entering unknown waters if it resolved the cases on the grounds to which it was inclined by its review of the evidence. *See Kolbe v. O'Malley*, 42 F. Supp. 3d at 788; *see also supra* notes 118–19.

122. *See supra* notes 108–15 and accompanying text.

123. *See supra* Sections I.A., I.C.; *see also supra* notes 118–19.

124. *O'Malley*, 42 F. Supp. 3d at 789–97, 803.

125. *Kolbe v. Hogan*, 813 F.3d 160, 168 (4th Cir. 2016), *vacated en banc*, *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017).

126. *Id.* at 192.

the threshold question of the two-step approach: whether the banned firearms and magazines were protected by the Second Amendment.<sup>127</sup>

In evaluating whether the FSA's assault-weapon and LCM ban implicated the Second Amendment, the appellate panel—in agreement with the district court—concluded that satisfaction of this prong hinged upon whether the at-issue assault weapons and LCMs were “commonly possessed by law-abiding citizens for lawful purposes.”<sup>128</sup> Breaking down the common-use test into two components, common possession, and lawful purposes,<sup>129</sup> the Fourth Circuit first determined that the record showed the at-issue assault weapons and LCMs were “unequivocally” in the common possession of the American citizenry.<sup>130</sup> In finding the common-use element of the test satisfied, the appellate panel relied entirely on the absolute number of banned firearms and magazines in circulation nationwide. For example, the court found that over 75 million magazines with a capacity over ten rounds were in circulation in the United States<sup>131</sup> and that, in 2012, more AR-15 and AK-type rifles were sold nationally than Ford F-150 trucks.<sup>132</sup>

As for the “lawful purposes” component of the test, the appellate panel rejected the State's argument that the lack of actual use of LCMs within the State of Maryland for self-defense placed the LCMs outside the scope of the Second Amendment's protection.<sup>133</sup> First, the panel asserted that measuring the common use of a firearm for the lawful purpose of self-defense by the actual use of that firearm in self-defense was inadequate, as it was very unlikely that an individual who owned a firearm for self-defense would ever need to use it for that purpose. Instead—and directly contradicting the district court—the appellate panel found that the plaintiffs' desire to own banned assault weapons and LCMs for self-defense was enough to satisfy the lawful-purposes element of the test.<sup>134</sup>

Second, attributing the State's argument to a misinterpretation of the discussion of common use in *Heller*,<sup>135</sup> the panel found that the proper inquiry for

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127. *Id.* at 172 (“We first address the threshold question of whether the bans imposed by the FSA burden conduct that falls within the scope of the Second Amendment.”).

128. *Id.* at 173.

129. *Id.* at 174–76 (dividing the discussion of “commonly possessed by law-abiding citizens for lawful purposes” into two sections entitled “commonly possessed” and “lawful purposes”).

130. *Id.* at 174. To support this finding, the court explained that, “[v]irtually every federal court to have addressed this question has concluded that ‘magazines having a capacity to accept more than ten rounds are in common use.’” *Id.* at 174 (quoting *Fyock v. Sunnyvale*, F. Supp. 3d 1267, 1275 (N.D. Cal. 2014), *aff'd*, 779 F.3d 991, 998 (9th Cir. 2015)); *see also* *New York Rifle & Pistol Ass'n v. Cuomo* (“NYSRPA”), 804 F.3d 242, 255 (2d Cir. 2015); *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244, 1261 (D.C. Cir. 2011)).

131. *Hogan*, 813 F.3d at 174.

132. *Id.*

133. *Id.* at 176; *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 790–91 (D. Md. 2014), *aff'd in part, rev'd in part sub nom.* *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), and *aff'd*, 849 F.3d 114 (4th Cir. 2017) (en banc).

134. *Hogan*, 813 F.3d. at 175–76.

135. *Id.* at 176.

lawful purposes was whether the LCMs prohibited by the FSA “[were] ‘typically possessed by law-abiding citizens for lawful purposes’ as a matter of history and tradition.”<sup>136</sup> Under this standard, the panel concluded that the State had failed to meet its burden of showing that LCMs have been historically prohibited.<sup>137</sup>

The appellate panel’s conclusions about common use were exactly opposite those of the district court, despite using the same test and relying on the same evidence.<sup>138</sup> The difference between the courts’ respective common-use analyses lies, then, in the methodology used by each court to apply that same test to that same evidence. For the appellate panel, estimates of the individuals actually possessing the at-issue firearms and magazines, whether in Maryland or nationwide, were not dispositive to the common-use inquiry.<sup>139</sup> The absolute number of at-issue firearms and magazines sold and in circulation nationwide, on the other hand, were relevant.<sup>140</sup> In addition, the panel saw little reason to consider—for the purposes of the common-use test—statistics concerning the actual use of the at-issue firearms and magazines for self-defense.<sup>141</sup> Instead, the appellate panel thought it enough that the plaintiffs and other individuals wished to keep the firearms and magazines for self-defense.<sup>142</sup>

The point-by-point disagreement between the district court and the appellate panel in the *Kolbe* case powerfully highlights the ambiguities of the common-use test, even eight years after the test was first articulated in *Heller*. Courts applying the common-use test have little to no guidance regarding both the type of evidence they can and cannot consider, and how much weight they can ascribe to that evidence.<sup>143</sup> Left untethered by these ambiguities, courts have generally either

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136. *Id.* The court asserted that measuring the common use of a firearm for the lawful purpose of self-defense by the *actual use* of that firearm in self-defense would be inadequate, as it was very unlikely that an individual who owned a firearm for self-defense would ever need to use it for that purpose. *Id.*

137. *Id.* at 176–77. The Court pointed to the unprohibited sale of semi-automatic rifles and magazines with capacities greater than ten rounds as early as the late 1800s and the production of Colt’s original AR-15 rifle in 1963 as evidence that LCMs and semi-automatic rifles were not historically banned. *Id.* at 177.

138. *Id.* at 174.

139. *Id.*

140. *Id.* at 174–75.

141. *Id.* at 174.

142. The appellate panel focused on evidence related to individuals’ purpose for acquiring the banned firearms, including:

survey evidence showing that self-defense was a primary reason for the purchase of weapons banned under the FSA, and a 1989 Report from the Bureau of Alcohol, Tobacco, and Firearms indicated that self-defense was a suitable purpose for semi-automatic rifles. The State’s expert Daniel Webster even agreed that it is reasonable to assume that a purpose for keeping one of the prohibited weapons is self-defense in the home.

*Id.* at 175–76.

143. See *Friedman v. Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (“The record shows that perhaps 9% of the nation’s firearms owners have assault weapons, but what line separates ‘common’ from ‘uncommon’ ownership is

(1) focused on the absolute number of the at-issue weapons to buoy their determinations, disregarding whether that number is actually representative of common use, as in the appellate panel's decision;<sup>144</sup> or (2) avoided deciding the common-use question by assuming that the at-issue weapons are protected by the Second Amendment, as in the district court's decision.<sup>145</sup> The next stage of the *Kolbe* case, analyzed in the following Section, presents a third, much more radical, solution to the courts' continued grappling with the ambiguities of the common-use test: replace it.

#### *D. Abandoning Ship: The En Banc Fourth Circuit Replaces the Common-Use Test*

On March 4, 2016, a majority of active judges within the Fourth Circuit voted in favor of rehearing *Kolbe v. Hogan* en banc.<sup>146</sup> At oral argument, many judges expressed concern over hinging the Second Amendment's protections on the definition of a phrase as vague and malleable as *common use*, and proposed hypotheticals challenging the appellees' arguments that the common-use test should decide the case.<sup>147</sup> The Fourth Circuit's apparent discomfort with the common-use test in *Kolbe* was fully revealed when, nearly a year after agreeing to rehear the case, it published a decision that purposefully abandoned the test in favor of a wholly original, expansive, and eminently more controversial means of resolving the FSA's constitutionality. Abandoning the common-use test led the majority to conclude that the banned firearms and LCMs were not protected by the Second Amendment *at all*.<sup>148</sup>

Judge Robert B. King, the same judge who dissented in the original appellate ruling, authored the nine-judge majority opinion in the *Kolbe* en banc decision.<sup>149</sup> As in nearly every other opinion deciding the constitutionality of LCM and assault weapon bans, the opinion began by addressing the initial question of the two-part approach to resolving Second Amendment challenges: whether the at-issue firearms and LCMs were protected by the Second Amendment at all.<sup>150</sup> After outlining the district court's, appellate panel's, and other circuits' decisions and rationales, the majority acknowledged that it easily could follow the other courts'

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something the Court did not say."); *see also* *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) ("These cases indicate there is considerable variety across the circuits as to what the relevant statistic is and what threshold is sufficient for a showing of common use.").

144. *See Hogan*, 813 F.3d at 174–75; *see also supra* notes 118–19.

145. *See supra* notes 118–19.

146. *Kolbe v. Hogan*, 636 Fed. Appx. 880 (4th Cir. 2016).

147. Oral Argument at 6:00–14:30, 23:00–27:00, 35:00, *Kolbe v. Hogan*, No. 14-1945 (4th Cir. 2016), <http://coop.ca4.uscourts.gov/OAarchive/mp3/14-1945-20160511.mp3>.

148. *Kolbe*, 849 F.3d at 135–36.

149. *Id.* at 120.

150. *Id.* at 132–33 ("Like most of our sister courts of appeals, we have concluded that 'a two-part approach to Second Amendment claims seems appropriate under *Heller*.'" (citations omitted)).

lead in avoiding the troublesome nature of resolving this inquiry by assuming, without deciding, that the FSA implicated the Second Amendment.<sup>151</sup>

But maintaining the status quo, the majority opined, would weaken the circuit's decision, especially in light of the dissent's unequivocal conclusion that the Second Amendment should protect the banned firearms and LCMs.<sup>152</sup> The radical nature of this choice cannot be understated.<sup>153</sup> By deciding, as a threshold matter, to confront headlong the question of whether assault weapon and LCM bans implicate the Second Amendment, the majority forced itself to enter a jurisprudential no-man's land.<sup>154</sup> Even more radical, however, were the conclusions it then dug up from that no-man's land.

The majority began its discussion of whether a ban on assault weapons and LCMs implicated conduct protected by the Second Amendment by succinctly outlining the myriad problems the district court, the appellate panel, and the other circuits have struggled with in attempting to apply the common-use test to resolve this inquiry.<sup>155</sup> But why, contended the majority, should courts grapple with the

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151. *Id.* at 134–35. The majority acknowledged that this was the norm: [w]e could resolve the Second Amendment aspects of this appeal by adopting the district court's sound analysis and thereby follow the lead of our distinguished colleagues on the Second and District of Columbia Circuits. That is, we could simply assume that the assault weapons and large-capacity magazines outlawed in Maryland are protected by the Second Amendment and then deem the FSA constitutional under the intermediate scrutiny standard of review.

*Id.* at 135.

152. More specifically, the majority opined the following: [i]t is more appropriate, however, in light of the dissent's view that such constitutional protection exists, that we first acknowledge what the Supreme Court's *Heller* decision makes clear: Because the banned assault weapons and large-capacity magazines are 'like' 'M-16 rifles'—'weapons that are most useful in military service'—they are among those arms that the Second Amendment does not shield.

*Id.*

153. While courts evaluating the constitutionality of assault-weapon and LCM bans had toyed with idea of finding the at-issue firearms and magazines to be outside of the Second Amendment's protections, only the Seventh Circuit court of appeals had actually decided its case on similar grounds. *See Friedman v. City of Highland Park*, 784 F.3d 406, 418 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (finding that a city ordinance banning certain assault weapons and LCMs did not violate the Second Amendment because the banned weapons were not in common use at the time of ratification). With the Supreme Court's implicit rejection of this standard in its recent decision in *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (Mar. 21, 2016) (*per curiam*), the Fourth Circuit's decision to find the at-issue firearms and magazines outside the Second Amendment's protection was even more radical.

154. *See supra* note 153.

155. The majority's analysis began as follows:

On the issue of whether the banned assault weapons and large-capacity magazines are protected by the Second Amendment, the *Heller* decision raises various questions. Those include: How many assault weapons and large-capacity magazines must there be to consider them 'in common use

ambiguities of common use when, “thankfully,”<sup>156</sup> a “dispositive and relatively easy”<sup>157</sup> alternative stood ready-made in *Heller*?<sup>158</sup> In *Heller*, the Court held, “It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned . . . .”<sup>159</sup> From this statement, the majority drew a new test for evaluating the FSA’s constitutionality: whether the at-issue firearms and magazines were “most useful in military service.”<sup>160</sup> Under the military-usefulness test, the firearms and LCMs banned by the FSA, according to the majority, clearly fell outside the protections of the Second Amendment, as their military combat features<sup>161</sup> and ability to increase a user’s lethality<sup>162</sup> would obviously be more useful in military service than for any other legitimate purpose.<sup>163</sup>

In adopting the military-usefulness test, the majority not only abandoned common use, it also expressly rejected reducing the common-use discussion in *Heller* to so-called popularity tests.<sup>164</sup> Framed as an argument against Judge William Traxler’s four-judge dissent,<sup>165</sup> the en banc *Kolbe* court attacked any conception of *common use* that would grant a dangerous weapon Second Amendment protections simply because that weapon was widely circulated throughout the United States.<sup>166</sup> Critical to the majority’s abandonment of the common-use test too was—as the

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at the time’? In resolving that issue, should we focus on how many assault weapons and large-capacity magazines are owned; or on how many owners there are; or on how many of the weapons and magazines are merely in circulation? Do we count the weapons and magazines in Maryland only, or in all of the United States? Is being ‘in common use at the time’ coextensive with being ‘typically possessed by law-abiding citizens for lawful purposes’? Must the assault weapons and large-capacity magazines be possessed for any ‘lawful purpose[]’ or, more particularly and importantly, the ‘protection of one’s home and family’?

*Kolbe*, 849 F.3d at 135–36 (citations omitted).

156. *Id.* at 136.

157. *Id.*

158. *Id.*

159. 554 U.S. 570, 627 (2008).

160. *Kolbe*, 849 F.3d at 136.

161. *Id.* at 137. The majority focused on the physical aspects of the banned firearms, including features “such as flash suppressors, barrel shrouds, folding and telescoping stocks, pistol grips, grenade launchers, night sights, and the ability to accept bayonets and large-capacity magazines.” *Id.* As for the at-issue LCMs, the majority highlighted an LCM’s ability to “enable a shooter to hit ‘multiple human targets very rapidly’; ‘contribute to the unique function of any assault weapon to deliver extraordinary firepower;’ and are a ‘uniquely military feature[]’ of both the banned assault weapons and other firearms to which they may be attached.” *Id.* (citations omitted).

162. *Id.*

163. *Id.*

164. *Id.* at 141–42.

165. *Id.*

166. *Id.*

majority was quick to point out—the fact that the Supreme Court has never explicitly adopted it, despite numerous opportunities to do so in *Heller* and later cases.<sup>167</sup>

The Supreme Court's discussion of "M-16s and the like"<sup>168</sup> in *Heller* provided the majority in the en banc *Kolbe v. Hogan* decision with a clear and dispositive alternative to the common-use test. To the dissent, however, the majority's abandonment of the common-use analysis and adoption of the military-usefulness test was merely an artful attempt to side-step an analytical framework that, while compelled by *Heller*, seemed unfair in application.<sup>169</sup> The ill-defined boundaries and illogical possibilities of the common-use analysis, the dissent argued, were irrelevant; the Supreme Court crafted its decision with full knowledge of the implications of the common-use test. The dissent pointed out that it was not within the lower court's authority to abandon common use whenever the results proved problematic.<sup>170</sup>

The dissent then bolstered its argument by pointing to Justice Alito's recent discussion of the common-use test<sup>171</sup> in his concurrence in *Caetano v. Massachusetts*.<sup>172</sup> Joined by Justice Clarence Thomas, Justice Alito stated that the "pertinent Second Amendment inquiry" was "whether [the firearms at-issue] are commonly possessed by law-abiding citizens for lawful purposes *today*."<sup>173</sup> While this language conspicuously did not appear in the *per curiam* opinion, to the dissenters in *Kolbe*, Justice Alito's concurrence offered further proof that the only relevant test for determining whether the banned firearms and magazines under the FSA were protected by the Second Amendment was through an "objective and largely statistical inquiry"<sup>174</sup> into their popularity.<sup>175</sup> Under this test, the dissent concluded that the absolute number of banned firearms and magazines in circulation clearly required the Fourth Circuit to find the FSA implicated the Second Amendment's protections.<sup>176</sup>

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167. *Id.* at 155 n.3 (Traxler, J., dissenting) ("It is evident that my good friends in the majority simply do not like *Heller*'s determination that firearms commonly possessed for lawful purposes are covered by the Second Amendment.").

168. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008).

169. *Kolbe*, 849 F.3d at 155–56 (Traxler, J., dissenting). "In the majority's view, *Heller*'s 'commonly possessed' test produces unacceptable results in this case, providing Second Amendment coverage for semiautomatic rifles owned by less than 1% of the American public and thwarting 'efforts by the other 99%' to ban them." *Id.* at 155 n.3.

170. *Id.* at 153.

171. *Id.* at 156.

172. 136 S. Ct. 1027 (2016).

173. *Id.* at 1032 (Alito, J., concurring) (emphasis in original).

174. *Kolbe*, 849 F.3d at 153 (citing *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016)).

175. *Id.* at 153–55 (Traxler, J., dissenting).

176. *Id.* at 155 ("Because the evidence before us clearly demonstrates that these popular weapons are commonly possessed for lawful purposes and are therefore not dangerous and unusual, they are covered by the Second Amendment. The majority errs in holding otherwise.").

While the majority's abandonment of *common use* and creation of the military-usefulness test won out over the dissent's rigid enforcement of the status quo in the sense that it is now binding precedent for courts, legislatures, and citizens within the Fourth Circuit, questions remain. Which analytical framework was correct? Can the problematic common-use test—which had, until this decision, played a critical role in deciding the constitutionality of assault weapon and LCM bans<sup>177</sup>—really be ignored? How far does the military-usefulness test reach? And is the town that *Heller* built, perhaps, big enough for the two of them? Both opinions claimed faithfulness to the Court's decision in *Heller*, and backed their respective opinions with textual analyses that seemed to support their interpretations.<sup>178</sup> But both opinions also vigorously attacked the other as flagrant contradictions to the “clear” commands of *Heller*.<sup>179</sup> The problem in engaging with such inquiries, of course, is that they assume the existence of answers, or, even more troublesome, of satisfactory ones.

### III. LESSONS FROM THE *KOLBE* CASE: THE SHADOW OF *HELLER* AND UNCERTAIN FUTURE OF THE COMMON-USE TEST

#### A. *Pulling the Threads Together: The Kolbe Case as a Microcosm for the Lower Courts' Struggles with Heller*

Until the Fourth Circuit's en banc decision in the *Kolbe* case, courts evaluating firearm and LCM bans under the common-use test were confronted with three options: (1) assess the evidence for common use and lawful purpose, then make an uncertain determination one way or the other;<sup>180</sup> (2) assume, without deciding, that the at-issue firearms and magazines satisfy the common-use test to resolve the case on less ambiguous grounds;<sup>181</sup> or (3) abandon the framework

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177. See *supra* notes 118–119; see also *supra* Sections II.B., II.C.

178. For the majority, see *Kolbe*, 849 F.3d at 136–37. For the dissent, see *id.* at 152–53.

179. For the majority, see *id.* at 142–44. For the dissent, see *id.* at 155–57.

180. See, e.g., *Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2016), *vacated en banc*, 849 F.3d 114 (4th Cir. 2017) (finding the firearms and LCMs banned by the FSA to “unequivocally” be in common use, despite the fact that the conclusions it drew from the evidence were exactly opposite that of the district court); *Colo. Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014), *vacated and remanded*, 823 F.3d 537 (10th Cir. 2016) (agreeing with the parties' stipulation that the at-issue firearms and LCMs were in common use for self-defense).

181. See, e.g., *New York State Rifle & Pistol Ass'n v. Cuomo* (“NYSRPA”), 804 F.3d 242, 257 (2d Cir. 2015) (assuming for the sake of argument that the at-issue firearms and LCMs were in common use for lawful purposes “in the absence of clear guidance from the Supreme Court or stronger evidence in the record”); *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244, 1260 (D.C. Cir. 2011) (refusing to resolve the question of common use, despite leaning towards agreement with the plaintiff's contention that the at-issue firearms and LCMs were in common use); *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 789 (D. Md. 2014), *aff'd in part, rev'd in part sub nom.* *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), and *aff'd*, 849 F.3d 114 (4th Cir. 2017) (en banc) (citing Fourth Circuit precedent to justify assuming, without deciding, that the firearms and LCMs banned by the FSA to be in common use).

surrounding common use altogether in favor of a wholly new means of deciding Second Amendment challenges.<sup>182</sup> Finding none of these avenues satisfactory, the court, in crafting its military-usefulness test, established a fourth option: without disturbing the overall analytical framework, substitute the common-use test for an analysis that avoids the troublesome questions raised by its ambiguities.<sup>183</sup>

The Fourth Circuit's decision in *Kolbe* was greeted with outrage from gun-rights organizations,<sup>184</sup> praise from gun-control advocates,<sup>185</sup> and skepticism from legal commentators.<sup>186</sup> Many critics dismissed the circuit's military-usefulness test

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182. See, e.g., *Friedman v. Highland Park*, 784 F.3d 406, 408–10 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (abandoning the two-step framework for test that asked “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.” (citations omitted)).

183. “It is more appropriate, however, in light of the dissent’s view that such constitutional protection exists, that we first acknowledge what the Supreme Court’s *Heller* decision makes clear: Because the banned assault weapons and large-capacity magazines are ‘like’ ‘M-16 rifles’—‘weapons that are most useful in military service’—they are among those arms that the Second Amendment does not shield.” *Kolbe v. Hogan*, 849 F.3d 114, 134 (4th Cir. 2017).

184. See, e.g., *Fourth Circuit Court of Appeals Ignores Heller: No Protection for Guns It Deems “Dangerous,”* NRA-ILA (Feb. 22, 2017), <https://www.nra.org/articles/20170222/fourth-circuit-court-of-appeals-ignores-heller-no-protection-for-guns-it-deems-dangerous> (promising to continue the fight in *Kolbe* all the way to the Supreme Court); Matthew Larosiere, *How the Fourth Circuit’s Support For ‘Assault Weapon’ Bans May End Them*, THE FEDERALIST (Mar. 28, 2017), <http://thefederalist.com/2017/03/28/fourth-circuits-support-assault-weapon-bans-may-end/> (positing that the fourth circuit’s decision may lead the Supreme Court to hold assault weapons bans unconstitutional); Roger J. Katz & Stephen L. D’Andrilli, *Fourth Circuit Takes Pot Shots at Heller in the Circuit’s Poorly Reasoned Opinion*, AMMOLAND: SHOOTING SPORTS NEWS (Feb. 27, 2017), <https://www.ammoland.com/2017/02/4th-circuit-pot-shots-heller-poorly-reasoned-opinion/#axzz4dokpWveX> (disparaging the Fourth Circuit’s “atrocious decision” as antithetical of the Supreme Court’s decisions in *Heller* and *McDonald*).

185. See, e.g., Mark Joseph Stern, *Appeals Court Rules that Second Amendment Doesn’t Protect Right to Assault Weapons*, SLATE (Feb. 21, 2017, 5:07 PM), [http://www.slate.com/blogs/the\\_slatest/2017/02/21/appeals\\_court\\_holds\\_second\\_amendment\\_doesn\\_t\\_protect\\_assault\\_weapons.html](http://www.slate.com/blogs/the_slatest/2017/02/21/appeals_court_holds_second_amendment_doesn_t_protect_assault_weapons.html) (applauding the Fourth Circuit’s “fact-based analysis and grounding in real-world experience”); Alex Yablon, *Is the AR-15 a ‘Weapon of War’?*, THE TRACE (Feb. 23, 2017), <https://www.thetrace.org/2017/02/assault-rifles-ban-ar-15-weapon-of-war/> (positing that “the unequivocal language in Tuesday’s opinion could provide legal cover for other states that want to follow Maryland’s example”).

186. See, e.g., Alison Frankel, *Second Amendment Does Not Apply to Assault Weapons: En Banc 4th Circuit*, REUTERS (Feb. 22, 2017, 4:05 PM), <http://www.reuters.com/article/us-otc-guns-idUSKBN1612PU> (analyzing the *Kolbe* decision and calling it a “bold and potentially controversial stand”); Joseph Blocher, *The Fourth Circuit’s “Assault Weapons” Ruling: Alternative Holdings and Alternative Weapons*, AM. CONSTITUTION SOC’Y FOR LAW & POLICY: ACS BLOG (Feb. 27, 2017), <https://www.acslaw.org/acsblog/all/kolbe-v.-hogan> (discussing the *Kolbe* case as a case about “alternatives”).

as an outlier, a textbook example of activist judges conjuring law from thin air.<sup>187</sup> But these assessments miss the point: the Court's holding was neither a judicial magic trick nor a disconnected decision from *Heller*. Instead, the Fourth Circuit's military-usefulness test represents the culmination of the lower courts' frustration with the quagmire surrounding *Heller*'s discussion of common use. Rather than step into the uncertain ground of the common-use inquiry or passively maintain the status quo by assuming the existence of a definitive answer, the Fourth Circuit chose to blaze a new trail that replaced the long-accepted threshold inquiry of Second Amendment challenges while still, in its view, remaining faithful to *Heller*.<sup>188</sup>

And, until—as this Note argues it should—the Supreme Court weighs in, who is to say that this is the wrong approach to the common-use question? Judge Traxler's dissent argues that the “consensus” within the federal circuits is to evaluate common use through “an objective and largely statistical inquiry.”<sup>189</sup> But the divergent perspectives on the “relevant statistic”<sup>190</sup> and sufficient threshold for satisfying that inquiry—highlighted by the *Kolbe* case and other cases throughout the federal courts—call the existence of any real consensus into question.<sup>191</sup>

Moreover, the legitimate concerns surrounding the practical consequences of the common-use test cannot be ignored. The en banc majority in *Kolbe* outlined two scenarios designed to shed light on these issues:

Consider, for example, short-barreled shotguns and machine guns.  
But for the statutes that have long circumscribed their possession,  
they too could be sufficiently popular to find safe haven in the Second

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187. Katz & D'Andrilli, *supra* note 184.

188. *Kolbe*, 849 F.3d at 141 (“We are confident that our approach here is entirely faithful to the *Heller* decision and appropriately protective of the core Second Amendment right.”).

189. *Id.* at 153 (Traxler, J., dissenting) (quoting *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016)).

190. *Hollis*, 827 F.3d at 449 (“These cases indicate there is considerable variety across the circuits as to what the relevant statistic is and what threshold is sufficient for a showing of common use.”).

191. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. Cuomo* (“NYSRPA”), 804 F.3d 242, 257 (2d Cir. 2015) (assuming for the sake of argument that the at-issue firearms and LCMs were in common use for lawful purposes “in the absence of clear guidance from the Supreme Court or stronger evidence in the record”); *Fyock v. Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) (holding that the trial court's did not abuse its discretion by concluding that LCMs were in common use, despite the plaintiffs introduction only of sales statistics and marketing materials to demonstrate common use); *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244, 1260–61 (D.C. Cir. 2011) (refusing to resolve the question of common use, despite leaning towards agreement with the plaintiff's contention that the at-issue firearms and LCMs were in common use); *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 788 (D. Md. 2014), *aff'd in part, rev'd in part sub nom. Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), and *aff'd*, 849 F.3d 114 (4th Cir. 2017) (en banc) (assessing common use by the actual number of individuals in possession of the banned firearms and LCMs and their actual use in self-defense); *Colo. Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014), *vacated and remanded*, 823 F.3d 537 (10th Cir. 2016) (agreeing with the parties' stipulation that the at-issue firearms and LCMs were in common use for self-defense).

Amendment. Consider further a state-of-the-art and extraordinarily lethal new weapon. That new weapon would need only be flooded on the market prior to any governmental prohibition in order to ensure it constitutional protection.<sup>192</sup>

These hypotheticals are potent examples of the risks associated with the rigid enforcement of the common-use test. Proponents of the common-use inquiry, however, contend that Justice Breyer's dissent in *Heller* raised these same concerns, which did not dissuade the Court from adopting the common-use test, thus foreclosing their continued viability in arguments over common use.<sup>193</sup> However, this argument ignores the fact that *Heller* no more contains an explicit rejection of Justice Breyer's dissatisfaction with potentially reducing the Second Amendment to a popularity contest than it does an explicit endorsement of the common-use test.<sup>194</sup>

But *Kolbe*'s influence extends beyond its decision to employ a new test for evaluating the extent of the Second Amendment's protections; the district court, appellate panel, and en banc circuit's conflicting discussions of common use are emblematic of the lower courts' continuing struggle to keep faith with *Heller*'s commands.

#### ***B. A Catalyst for Guidance: Why the Supreme Court Should Review Kolbe***

On March, 21, 2017, during Justice Neil Gorsuch's confirmation hearing before the Senate Judiciary Committee, the following exchange between Justice Gorsuch and Senator Diane Feinstein occurred:

SENATOR FEINSTEIN: . . . Justice Scalia also wrote that weapons most useful in military service, M-16 rifles and the like, may be banned without infringing on the Second Amendment. Do you agree with that statement, that under the Second Amendment, weapons that are most useful in military service, M-16 rifles and the like, may be banned?

JUDGE GORSUCH: *Heller* makes clear the standard we judges are supposed to apply. The question is whether it's a gun in common use for self-defense, and that may be subject to reasonable regulation. That's the test as I understand it. There's lots of ongoing litigation about which weapons qualify on those standards.<sup>195</sup>

This question was intended to cut right to the heart of *Kolbe*, and Justice Gorsuch's response could be read as a clear condemnation of the Fourth Circuit's decision to abandon the question of common use. But Justice Gorsuch's passing reference to "lots of ongoing litigation about which weapons qualify on those standards"<sup>196</sup>

192. *Kolbe*, 849 F.3d at 141.

193. *See id.* at 153 (Traxler, J., dissenting).

194. *See id.* at 141–42 (majority opinion) ("Meanwhile, the *Heller* majority said nothing to confirm that it was sponsoring the popularity test.").

195. Johannes Paulsen, *Gorsuch to Feinstein: Heller Is the Law of the Land*, THE TRUTH ABOUT GUNS (Mar. 21, 2017), <http://www.thetruthaboutguns.com/2017/03/johannes-paulsen/gorsuch-feinstein-heller-law-land/>.

196. *Id.*

downplays the dire straits the standard “*Heller* makes clear . . . judges are supposed to apply”<sup>197</sup> finds itself in today.

In the near-decade following its decision in *Heller*, the Supreme Court has repeatedly refused to go beyond its initial discussion of the proper analytical framework courts should use to evaluate Second Amendment challenges.<sup>198</sup> In fact, the Court’s only subsequent discussion of the Second Amendment, its recent *per curiam* decision in *Caetano v. Massachusetts*, continued to avoid the larger uncertainties of *Heller*.<sup>199</sup> *Caetano* concerned a woman’s conviction under a Massachusetts law banning the possession of stun guns, after she successfully ward off an allegedly abusive ex-boyfriend by pointing a stun gun she had acquired at him.<sup>200</sup> Instead of engaging in an analysis of the Massachusetts ban’s constitutionality, the Court simply vacated the Massachusetts Supreme Judicial Court’s decision on grounds that its analytical framework for resolving Second Amendment challenges directly conflicted with the black-letter language of *Heller*.<sup>201</sup>

In a concurring opinion joined by Justice Thomas, Justice Alito agreed with the Court’s rejection of the state court’s divergence from *Heller*, but he admonished it for not taking the extra step to declare the at-issue law unconstitutional as violating the Second Amendment.<sup>202</sup> The pertinent inquiry, Justice Alito stated, “is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today,” and the lawful possession of stun guns in over forty-five states unequivocally satisfied this inquiry.<sup>203</sup>

While the Court’s scattered discussions of the Second Amendment in the years following *Heller* and *McDonald* have quickly been incorporated within the arguments of common-use proponents,<sup>204</sup> their lack of precedential weight leaves the questions surrounding the common-use test’s application woefully unanswered.

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197. *Id.*

198. *See* *Friedman v. Highland Park*, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447; *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), *cert. denied* 135 S. Ct. 2799 (2015); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied* 134 S. Ct. 2134 (2014); *Kachalsky v. Cacace*, 701 F.3d 81 (2d Cir. 2012), *cert. denied* 133 S. Ct. 1806 (2013).

199. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (*per curiam*). The Court’s short opinion focused entirely on attacking the validity of the state court’s framework. *Id.* at 1027–28. The concurring opinion by Justice Alito and joined by Justice Thomas, on the other hand, engaged in a much deeper discussion of the failings of the state court and the sorrowful condition of Second Amendment jurisprudence. *Id.* at 1030–31 (Alito, J., concurring).

200. *Id.* at 1028.

201. *Id.*

202. *Id.* at 1033 (“This Court’s grudging *per curiam* now sends the case back to that same court. And the consequences for *Caetano* [the plaintiff] may prove more tragic still, as her conviction likely bars her from ever bearing arms for self-defense.”).

203. *Id.* at 1032 (“The more relevant statistic is that ‘[h]undreds of thousands of Tasers and stun guns have been sold to private citizens,’ who it appears may lawfully possess them in 45 States.” (citations omitted)).

204. *See supra* notes 171–76 and accompanying text.

The *Kolbe* courts' conflicts over the common-use test—from the district court's extensive-but-ultimately-hesitant analysis<sup>205</sup> to the appellate panel's confident rejection of the district court's findings<sup>206</sup> to the en banc court's circumvention of common use altogether<sup>207</sup>—are thus a microcosm of the larger problems surrounding *Heller*. But this microcosm status not only sows fertile ground for academic inquiry; it also can serve as a profoundly appropriate stage on which the Supreme Court can finally reexamine and resolve the ambiguities of its *Heller* decision, particularly the common-use test.

*Kolbe* illuminates the lower courts' continuing struggles with *Heller*'s common-use test and counsels heavily in favor of Supreme Court review.<sup>208</sup> One of the core principles the Court has articulated for deciding whether to grant a petition for certiorari in a particular case is whether “a United States court of appeals has decided an important question of federal law that has not been, and should be, settled by this Court.”<sup>209</sup> The district court, appellate panel, and en banc court's divergent approaches and conclusions in resolving—or avoiding—the common-use test represent a muddled answer to a critically important question of federal law that should be settled by the Supreme Court.<sup>210</sup>

Moreover, the contentious debate over the proper analytical framework for the common-use test, as demonstrated at each stage of the *Kolbe* case, will continue as other circuits face constitutional challenges to firearm and LCM bans and other similar types of legislative responses to mass shootings.<sup>211</sup> This same debate also has and will continue to flare up in other areas of Second Amendment jurisprudence as courts grapple with the various interpretations of *Heller* and its related cases.<sup>212</sup> By any definition, therefore, the issue of the proper analytical approach to the common-use test for resolving Second Amendment challenges has remained unsolved—despite nearly nine years of the lower courts' best efforts—and should be answered by the Supreme Court. After all, the Court is the judicial body best

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205. *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 784–89 (D. Md. 2014), *aff'd in part, rev'd in part sub nom. Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), and *aff'd Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc).

206. *Kolbe v. Hogan*, 813 F.3d 160, 174–76 (4th Cir. 2016), *vacated en banc*, 849 F.3d 114 (4th Cir. 2017).

207. *Kolbe v. Hogan*, 849 F.3d 114, 135–36 (4th Cir. 2017) (en banc).

208. Specifically, the different approaches to the common-use test adopted and discussed by the courts in *Kolbe* provides fertile ground from which the Supreme Court can easily identify and target the problematic aspects of the test. *See O'Malley*, 42 F. Supp. 3d at 784–89 (D. Md. 2014), *aff'd in part, rev'd in part sub nom. Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), and *aff'd Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc); *Hogan*, 813 F.3d at 174–76 (4th Cir. 2016), *vacated en banc*, 849 F.3d 114 (4th Cir. 2017); *Kolbe*, 849 F.3d at 135–36 (4th Cir. 2017) (en banc).

209. SUP. CT. R. 10(c).

210. *See supra* notes 205–08 and accompanying text.

211. Six circuits—the First, Third, Fifth, Eighth, Sixth, and Tenth—have yet to weigh in on the constitutionality of and proper analytical approach to resolving LCM prohibitions at the appellate level.

212. *See, e.g., Tyler v. Hillsdale Cty. Sheriff's Dept.*, 837 F.3d 678 (6th Cir. 2016) (The Sixth Circuit en banc court reversed an appellate ruling that strict scrutiny was the proper standard for resolving Second Amendment claims in favor of intermediate scrutiny).

equipped to provide lower courts with clarity as to the meaning and practical effects of *Heller* on Second Amendment jurisprudence.

### CONCLUSION

By extensively examining each stage of *Kolbe*'s application of the common-use test, this Note has provided a unique perspective on the state of the test nine years into the post-*Heller* world. Thus, the conflicts and questions brought to the surface by the disagreements between the trial court, the appellate panel, and the en banc court function as a litmus test from which to measure the health of Second Amendment jurisprudence since the Court's decision in *Heller*. From this perspective, this Note's analysis of the *Kolbe* case leads to an inescapable conclusion: *Heller*'s articulation of common use has failed to provide courts with an adequate guide through which to navigate Second Amendment challenges. Nine years is long enough. The time has come to act, and the *Kolbe* case provides the perfect stage for the Supreme Court to engage in a meaningful reexamination of *Heller*'s common-use test.