

KOLBE V. HOGAN

Timothy Ososkie '16

ABSTRACT: In the 2016 case Kolbe v. Hogan, the U.S. Fourth Circuit Court of Appeals upheld a challenge to Maryland's 2013 Firearm Safety Act (FSA), a radical expansion of Maryland's existing gun-control laws, on the grounds that the District Court at Baltimore did not consider the "assault weapons" ban with the proper level of scrutiny. Though they concluded that the FSA's regulations substantially burdened the core protections of the Second Amendment, the Fourth Circuit Court did not declare the FSA to be unconstitutional, but merely remanded the case back to the District Court for a more scrupulous review. As the first instance where a U.S. court of appeals required strict scrutiny in the consideration of an "assault-weapons" ban, the Kolbe decision nonetheless represents a significant development in gun control litigation. The long term effects of the decision are far from apparent, but gun rights advocates are celebrating the Court's recognition of the Second Amendment's fundamental protections as much needed and perhaps overdue.

* Timothy Ososkie graduated Magna Cum Laude from Grove City College in 2016 with highest honors in Political Science and a minor in Economics. Passionate about Constitutional rights and free-market economics, Tim plans to gain experience in a related role and is seriously considering a career in law. He hails from Bellefonte, Pennsylvania, and alongside his academic and occupational pursuits, he is an active piano student and outdoor enthusiast.

I. INTRODUCTION

In the recent case of *Kolbe v. Hogan*, the United States Fourth Circuit Court of Appeals decided a challenge to a 2013 Maryland arms prohibition statute, the Firearm Safety Act (FSA), declaring that the U.S. District Court at Baltimore’s application of intermediate scrutiny to their consideration of a ban on “assault weapons” and “larger-capacity” magazines did not sufficiently pass Constitutional muster.¹ Citing *District of Columbia v. Heller*, *Heller and McDonald v City of Chicago*, and their own subsequent precedent, the Fourth Circuit Court concluded that Maryland law implicated the core protection of the Second Amendment, namely “the right of law abiding citizens to use arms in defense of hearth and home.”² The panel, however, affirmed neither the plaintiff’s Equal Protection challenge nor their appeal that the law is void for vagueness.³

While the status of Maryland firearms law is yet precarious, gun rights advocates have some legitimate reason to celebrate this decision, especially given the tenor of the corresponding national debate over Second Amendment policy. Taking into account the precedent set by the *Heller*, *McDonald*, and *Kolbe* cases, one may be somewhat confident that states do not have near the length of free rein to subvert the Second Amendment as many previously thought. The *Kolbe* case does not, however, represent in any way a

1 *Kolbe v. Hogan*, No. 14-1945, slip op. at 6, (4th Cir. Feb. 4 2016), <http://www.ca4.uscourts.gov/opinions/published/141945.p.pdf>.

2 *D.C. v. Heller*, 554 U.S. 570, 635 (2008).

3 *Kolbe*, slip op. at 6-7.

panacea for those seeking relief from legislation hostile to the Second Amendment. Rather, if nothing else, the case has offered the nation a rare opportunity to pause and consider the restraint with which the courts were intended to handle issues of such great constitutional import.

II. PROCEDURAL HISTORY

The plaintiffs Stephen Kolbe and Andrew Turner were joined in their challenge of Maryland’s FSA by Wink’s Sporting Goods Inc. and Atlantic Guns Inc. Additionally, several trade, hunting, and gun-owners’ rights organizations joined as plaintiffs on their own behalf and also on behalf of their members.⁴ Days before the Firearm Safety Act (“FSA”) took effect on September 27, 2013, the plaintiffs filed a motion for a Temporary Restraining Order and sought declaratory and injunctive relief, arguing that (1) the ban on possession of so-called “assault rifles” and the detachable magazine limitation within the FSA abridged their rights under the Second Amendment,⁵ (2) that the exemption for retired police officers under the FSA violates the Equal Protection Clause of the Fourteenth Amendment,⁶ and (3) that the term “copies”⁷ as it is applied in Maryland’s “assault weapon” ban is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment.⁸ The defendants, Governor

4 *Id.* at 12-13.

5 *Id.* at 13.

6 *Id.*

7 Md. Pub. Safety Code §5-101(r)(2) (2013).

8 *Kolbe*, slip op. at 13.

Martin O'Malley of Maryland (2007-2015), Larry Hogan (2015-), Maryland Attorney General Douglas Gansler, and Maryland State Police Superintendent Marcus Brown filed a Motion to Dismiss the Plaintiffs' Third Amended Complaint on November 22, 2013.

Following the district court's denial of the plaintiffs' Motion for Temporary Restraining order, the parties filed cross motions for summary judgment on the merits, and the district court determined that intermediate scrutiny applied to Second Amendment claims.⁹ Summary judgment was thereby granted to the state, the court concluding that under intermediate scrutiny, Maryland's ban on "assault" rifles and "large capacity" detachable magazines "met the applicable standards and was thus valid under the Second Amendment."¹⁰ The district court also granted summary judgment for the State on the Plaintiffs' Equal Protection claim, holding that retired officers "are differently situated" than ordinary citizens who wish to obtain "assault rifles."¹¹ And finally, the district court granted summary judgment for the State on the Plaintiffs' vagueness claim, concluding that the ban on "assault rifles or their copies" sets forth "an identifiable core of prohibited conduct."¹² The Plaintiffs challenged each of the district court's rulings.¹³

Throughout the proceedings of the subsequent

9 *Id.*

10 *Id.*; *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 797 (D. Md. 2014).

11 *O'Malley*, 42 F. Supp. 3d at 798.

12 *Id.* at 802.

13 *Kolbe*, slip op. at 14.

challenge, a multitude of amici, including twenty-one states and the National Rifle Association, joined the Plaintiffs. Significantly fewer joined the defendants, including eight states, the District of Columbia, and the Brady Center to Prevent Gun Violence. The challenge was decided by the Fourth Circuit Court on February 4, 2016 in favor of the Plaintiffs, the court holding that strict scrutiny is the proper standard of review for bans on common arms, such as those involved in *Kolbe v. Hogan*.¹⁴

III. BACKGROUND

In April 2013, Maryland passed the Firearms Safety Act (“FSA”), which bans law-abiding citizens, except for retired law-enforcement officers, from possessing what Chief Judge Traxler in his opinion described as “the vast majority of semi-automatic rifles commonly kept by several million American citizens for defending their families and homes and other lawful purposes.”¹⁵ The FSA constituted a radical expansion of Maryland’s existing gun-control laws. Prior to passage of the FSA, Maryland law permitted citizens in good standing to possess semi-automatic rifles after passing an extensive background check.¹⁶ Following passage of the law on October 1, 2013, it was a crime to

¹⁴ David Kopel, *Kolbe v. Hogan: 4th Circuit Requires Strict Scrutiny for Maryland Ban on Magazines and Semiautomatics*, WASH. POST (Feb. 4, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/04/kolbe-v-hogan-4th-circuit-requires-strict-scrutiny-for-maryland-ban-on-magazines-and-semiautomatics/?utm_term=.33f5e08758b7.

¹⁵ *Kolbe*, slip op. at 6.

¹⁶ *Kolbe*, slip op. at 7-8.

“possess, sell, offer to sell, transfer, purchase, or receive” or transport into Maryland any weapon defined as an “assault weapon,”¹⁷ “or their copies.”¹⁸ Also included in the FSA were impositions of new restrictions on the acquisition of certain detachable magazines deemed “large capacity”¹⁹ in the state of Maryland.²⁰ Prior to passage, Maryland law permitted the acquisition of and transfer of detachable magazines with a capacity of up to 20 rounds. The FSA imposed significant alterations to said law. Under the FSA, it is illegal to “manufacture, sell, offer for sale, purchase, receive, or transfer a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm.”²¹ Unlike the enumeration in the so-called “assault weapon” restriction, though, the FSA does not expressly prohibit the transportation of detachable magazines into Maryland from out of state.

Exceptions to the FSA are few. The statute allows the continued possession and transportation of the prohibited class of rifle if the owner “lawfully possessed” or “completed an application to purchase” prior to the FSA’s implantation on October 1, 2013.²² Additionally, the FSA’s prohibitions do not apply to certain classes of individuals. Among the excepted individuals are active law enforcement officers and licensed firearm dealers under certain

17 Md. Crim. Law Code §4-303 (a).

18 Md. Pub. Safety Code § 5-101(r)(2).

19 *Kolbe*, slip op. at 74.

20 *Id.* at 10.

21 *Id.*

22 *Id.* at 10-11.

circumstances.²³ Another exception allows retired state or local law enforcement officers to possess the banned class of weapon and detachable magazines, given the prohibited items were “sold or transferred to the [retired agent] by the law enforcement agent on retirement,” or the retired agent “purchased or obtained” the weapon “for official use with the law enforcement agency before retirement.”²⁴ The stated objectives of the FSA upon passing included the usual rationale: “keep[ing] guns away from criminals,” and lowering the rate of gun deaths from incidents like “murders, suicides, and accidents,” all, of course, while “protecting legal gun ownership.”²⁵

IV. THE CASE

The plaintiffs challenged the FSA on the basis of three objections. Principally, they challenged that the FSA implicates their Second Amendment right—“the right of law-abiding responsible citizens to use arms in defense of hearth and home.”²⁶ As this challenge was upheld by the Court, more time is spent in its discussion here. Second, the plaintiffs raised a challenge that the exception to the ban for retired officers violates the Equal Protection Clause, asserting that retired police officers are, in fact, “similarly situated” with the public at large, and yet receive different

23 Md. Crim. Law Code §§ 4-302(1), (3); *Kolbe*, 14-1945 at 10-11.

24 Md. Crim. Law Code § 4-302(7)(i), (ii); *Kolbe*, slip op. at 10-11.

25 *Kolbe*, 14-1945 at 55, 57.

26 *D.C. v. Heller*, 554 U.S. 570, 635 (2008).

treatment under the law.²⁷ Third, the plaintiffs challenged that the FSA is “void for vagueness” in that it prohibits possession of “copies” of the specifically banned firearms banned in the FSA,²⁸ while yet leaving the exact meaning of “copies” undefined, in their view violating Due Process.

V. JUDICIAL REASONING

A. THE SECOND AMENDMENT CHALLENGE

The Court turned first to the Plaintiffs’ Second Amendment Challenge to the FSA’s ban on semi-automatic rifles and “LCM’s.” For this particular challenge, the Court applied a “two-part approach”—one it had previously fashioned for use in cases involving Second Amendment challenges.²⁹ First, the Court asked “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”³⁰ If to the first question the answer is no, “the challenged law is valid.”³¹ If, the Court further explains, “the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.”³² The Court first moved to establish whether the FSA burdens constitutional conduct.

Pivotal in the Court’s reasoning and final decision concerning the Second Amendment challenge was the

²⁷ *Kolbe*, slip op. at 48.

²⁸ *Id.* at 6.

²⁹ *U.S. v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

fundamental “individual right to possess and carry weapons in case of confrontation,”³³ that “the central component of the Second Amendment right” is individual self-defense,³⁴ and that the right to keep arms is at its greatest strength in “the home, where the need for defense of self, family, and property is most acute.”³⁵ Bearing in mind the provisions of the FSA, establishing the illegality of any citizen to “possess, . . . purchase, or receive” an “assault weapon,”³⁶ the statute prohibits a law-abiding citizen from keeping any such weapons in the home for any reason, including the “defense of self, family,” or property. Accordingly, the Court concluded, the conduct regulated by the FSA includes the heretofore discussed individual’s possession of a firearm in the home for self-defense. Additionally, the Fourth Circuit relied on the Supreme Court’s historical analysis of the traditional understanding of the Second Amendment right, which concluded that “the right of law-abiding, responsible citizens to use arms in defense of hearth and home” lies at the core of the Second Amendment.³⁷

Therefore, the Court reasoned that “any prohibition or restriction imposed by the government on the exercise of this right in the home clearly implicates conduct protected by the Second Amendment.”³⁸ However, the Court first needed to establish whether the “particular class of weapons” prohibited

33 D.C. v. Heller, 554 U.S. 570, 592 (2008).

34 McDonald v. Chicago, 561 U.S. 742, 767.

35 Heller, 554 U.S. at 628.

36 Md. Crim. Law Code § 4-303(a).

37 Heller, 554 U.S. at 635.

38 Kolbe, slip op. at 17.

by the statute are themselves protected by the Second Amendment.³⁹ Citing the Heller case’s historical analysis,⁴⁰ the Fourth Circuit Court noted that the right to keep and bear arms “as a matter of history and tradition, is not unlimited,” and that even law-abiding citizens do not have “a right to keep and carry any weapon whatsoever in any manner and for whatever purpose.”⁴¹ The Court’s reasoning, then, hinged on the burden of establishing whether the class of firearms in question fit within three parameters of the historically and judicially established limitations of the Second Amendment, namely, that they are (1) commonly possessed by law-abiding citizens⁴² for (2) lawful purposes,⁴³ and are not (3) “dangerous and unusual.”⁴⁴

1. COMMONLY POSSESSED

The burden of establishing the common possession of the semi-automatic rifles in question was not particularly difficult for the Court, as numerous courts previously considering the same question have found a preponderance of evidence in support of “common use by law abiding citizens.”⁴⁵ The Court concluded that it is beyond dispute

39 *Id.* at 18.

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

41 *Kolbe*, slip op. at 17.

42 *Id.* at 18.

43 *Heller*, 554 U.S. at 625.

44 *U.S. v. Marzzarella*, 614 F.3d 85, 90 (3d Cir. 2010).

45 *See, e.g., Heller v. D.C.*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) (*Heller II*). (“We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in ‘common use,’ as the plaintiffs contend. Approximately 1.6 million AR-15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5

that law-abiding citizens commonly possess semi-automatic rifles such as those under the umbrella of “AR” and “AK” variant rifles.⁴⁶ Between the years of 1990 and 2012, for example, more than eight million AK and AR variant rifles were manufactured in or imported into the United States.⁴⁷ For perspective, the Court noted that “in 2012, the number of AR and AK-style weapons manufactured and imported into the United States was more than double the number of Ford F-150 trucks sold, the most commonly sold vehicle in the United States.”⁴⁸ The overwhelming weight of evidence was stacked against the Defendants on this point.

In tandem with the discussion of common possession of semi-automatic rifles, the Court also affirmed that LCM’s are likewise commonly possessed by law-abiding citizens, with more than seventy-five million in circulation in the United States. In fact, virtually 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.”⁴⁹ The Court likewise considered and rejected the State’s argument that the Second Amendment does not apply to detachable magazines because magazines are not firearms—i.e. “bearable arms.”⁵⁰ Proceeding with Maryland’s logic, they argued, the government could circumvent *Heller*,

percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market.”).

46 *Kolbe*, slip op. at 21.

47 *Id.* at 21.

48 *Id.* at 22.

49 *Fyock v. City of Sunnyvale*, 25 F.Supp.3d 1267, 1275 (N.D. Cal. 2014).

50 *Kolbe*, slip op. at 22-23.

which established that the state cannot ban handguns kept in the home for self-defense, simply by banning the possession of particular components of firearms, “such as the firing pin” in most any firearm.⁵¹ Such prohibition would render firearms useless, and would make exercising the right to bear arms impossible. A right to keep and bear arms necessarily “implies a corresponding right” to possess “component parts necessary to make the firearm operable.”⁵² The same reasoning applied to the magazines in question—that to the extent certain firearms are equipped with detachable magazines and are in common use, “there must also be an ancillary right to possess the magazines necessary to render those firearms operable.”⁵³

2. LAWFUL PURPOSES

The plaintiffs both sought to acquire and keep the rifles in question in their homes primarily for self-defense. Among other evidences showing that the primary reason for acquiring the weapons in question is for self-defense, the BATF uncharacteristically indicated in a 1989 report that self-defense was indeed a suitable purpose for semi-automatic rifles. Maryland conversely argued that there is nothing on record that reflects that said weapons are commonly used for self-defense, especially in Maryland’s case, premised on the plaintiffs’ lack of evidence that “assault weapons” have actually been used in self-defense in Maryland. The Court

51 *Id.* at 23.

52 *Id.* at 23-24.

53 *Id.*

denied the state's reasoning on the grounds that it flowed out a "hyper-technical, out-of context parsing"⁵⁴ of the Supreme Court's statement in *Heller* that "the sorts of weapons protected were those in common use at the time."⁵⁵

Whereas the state interpreted the statement erroneously as depending on how often semi-automatic rifles or LCM's are *actually* used in self-defense, the proper standard under *Heller* is whether the weapons and magazines are "typically possessed by law-abiding citizens for lawful purposes" *as a matter of history and tradition*, not in some conception of contemporary common practice. The Court found "nothing" in the record demonstrating the state's implicit claim that law-abiding citizens have been historically prohibited from possessing semi-automatic rifles and LCM's. To the contrary, and noted by the Court, firearms have a strong historical precedent of common use, at least a century long.⁵⁶

3. "DANGEROUS AND UNUSUAL" WEAPONS

Finally, the state, creatively gerrymandering the *Heller* statement that "dangerous and unusual" weapons are not those typically possessed by law-abiding citizens for lawful purposes, argued that the banned rifles in this case are "unusually dangerous."⁵⁷ Contrarily, in distinguishing between Second Amendment protected and unprotected

54 *Id.* at 26.

55 *D.C. v. Heller*, 554 U.S. 570, 627 (2008).

56 *Kolbe*, slip op. at 28.

57 *Id.* at 29.

weapons, *Heller* focused on “whether the weapons were typically or commonly possessed,” not whether they reached some undefined level of “dangerousness,” as the State of Maryland erroneously purported. The Court concluded on this point that there is no precedent to suggest that in considering Second Amendment challenges the Court must decide whether a weapon is “unusually dangerous,” and that such a standard would entail obvious difficulties in application in the long-run.⁵⁸ In sum, the Court decided that semi-automatic rifles and LCM’s are commonly used for lawful purposes and are thus covered by the Second Amendment.

B. APPROPRIATE LEVEL OF SCRUTINY

The strict-scrutiny standard requires the government to prove its restriction is “narrowly tailored to achieve a compelling government interest,”⁵⁹ and that the law must employ the least restrictive means to achieve the government’s compelling interest. To select the proper level of scrutiny, the Court considers “the nature of the conduct being regulated” and the extent to which the new law burdens the right in question.⁶⁰ On both counts, the Court found that the FSA’s ban “implicates that core of the Second Amendment.”⁶¹ First, the ban burdens the availability and use of an entire class of firearms for self-defense in the home, where the Second

58 *Id.* at 31.

59 *Abrams v. Johnson*, 521 U.S. 74, 82 (1997).

60 *Kolbe*, slip op. at 34.

61 *Id.* at 35.

Amendment protection is strongest.⁶² Second, as the Court has heretofore established that the weapons in question are protected by the Second Amendment, the FSA's total prohibition would in practice substantially burden the core Second Amendment right mentioned above. Additionally, the FSA would burden every instance in which a semi-automatic rifle is "preferable to handguns or bolt-action rifles," further implicating the Second Amendment on the grounds that many said instances are lawful purposes protected therein. Bearing in mind that the FSA "restricts that right of Maryland's citizens to select the means"⁶³ by which they exercise their well-established Second Amendment right, the Court concluded with certainty that the "district court did not evaluate the challenged provisions of the FSA under the proper standard of strict scrutiny, and the State did not develop the evidence or arguments required to support the FSA under the proper standard." They therefore vacated the district court's order as to the Plaintiffs' Second Amendment challenge and remanded the court to apply strict scrutiny.⁶⁴

C. THE EQUAL PROTECTION CHALLENGE

The Plaintiffs' second appeal, challenging the exemption of retired police officers from the FSA's restrictions, was hinged upon the Equal Protection Clause, which guarantees that no state shall "deny to any person

⁶² D.C. v. Heller, 554 U.S. 570, 635 (2008).

⁶³ *Kolbe*, slip op. at 38.

⁶⁴ *Kolbe*, slip op. at 45-46.

within its jurisdiction the equal protection of the laws.”⁶⁵ The Court sided with the state on this issue, concluding that the district court correctly determined that retired police officers are not “similarly situated” with the public at large “for purposes of the Maryland Firearm Safety Act. The “similarly situated” standard requires the plaintiff to identify persons “materially identical” to him or her who has yet received different treatment under the law. Therefore, the two groups in question must be “identical or directly comparable in all material respects”⁶⁶—or, as the First Circuit stipulated, “apples should be compared to apples.”⁶⁷

Under the FSA, retired officers enjoy two privileges that the public does not.⁶⁸ The exceptions were noted above, and the Court cited numerous examples of similar exceptions, common in other firearms regulations. The plaintiffs’ challenge that Maryland’s law renders the FSA unconstitutional, then, faced an uphill battle from the start. The plaintiffs argued that, when it comes to owning the FSA-prohibited items, retired police officers and the public at large are “similarly situated.” The Court found the plaintiffs’ argument flawed in that retired law enforcement officers are, by the Court’s definition, different from the public in three particularly relevant ways.

The first dissimilarity the Court noted was that of

65 U.S. Const. amend. XIV, § 1.

66 *LaBella Winnetka, Inc. v. Vill. of Winnetka*, 628 F.3d 937, 942 (7th Cir. 2010).

67 *Barrington Cove Ltd. P’ship v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001).

68 *Kolbe*, slip op. at 49.

the unique “combination of training and experience related to firearms.”⁶⁹ They concluded that the combination of retired officers’ practical duty experience and specific and formal training endow them with a “special familiarity” with the specific weapons they are legally permitted to obtain through the FSA.⁷⁰ The second dissimilarity noted by the Court is the “special degree of trust” granted to police officers upon their entry into public service.⁷¹ As a matter of employment, the Court argued that officers are required by law to meet the highest standards of conduct as they utilize their authority to arrest, detain, and use force. Their publicly-oriented responsibilities, then, set them apart in that they are used to acting in the public interest in a way that does not apply to the public at large, that is, their professional ethos situates them differently from the average citizen. Third is the reality of the unique threats with which officers have been trained to deal and continue to face post-retirement. The Court concluded that the possibility of retaliatory violence, for which strong evidentiary precedent exists and which “continues following retirement” makes law enforcement officers different from employees of any other non-combat role.⁷²

D. THE VOID FOR VAGUENESS CHALLENGE

Finally, the Plaintiffs contended that the FSA is unconstitutionally vague—that it was not “drafted with

⁶⁹ *Id.* at 50.

⁷⁰ *Id.* at 52.

⁷¹ *O’Donnell v. Barry*, 148 F.3d 1126, 1135 (D.C. Cir. 1998).

⁷² *Kolbe*, slip op. at 54-55.

sufficient clarity to allow the ordinary citizen to understand when a firearm qualifies as a copy,” which the statute prohibits.⁷³ Therefore, the Plaintiffs argued that the FSA violates Due Process, which requires that “a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal.”⁷⁴ The void-for-vagueness doctrine, on which the plaintiffs’ challenge is predicated, requires that a penal statute likewise define a criminal offense with “sufficient definiteness” that ordinary people can understand what conduct is prohibited.”⁷⁵ The State urged the Court to apply the rule set forth in *United States v. Salerno*, requiring that Plaintiffs establish that “no set of circumstances exists under which the Act would be valid.”⁷⁶

In the end, the Court rejected the Plaintiffs’ void-for-vagueness contention on several grounds. Perhaps the most simple is their consensus that the phrase “assault weapons and their copies” has a “plainly legitimate sweep” and is not unconstitutionally vague. Although not defined, the Court reasoned that the “plain” meaning of the word “copy” is not beyond the grasp of an ordinary citizen in the same way that possession of an imitation firearm during the commission of a crime is likewise prohibited.⁷⁷ More explicitly, the Court also cited the Maryland Attorney General’s guidance on the

73 *Id.* at 61.

74 *U.S. v. Sun*, 278 F.3d 302, 309 (4th Cir. 2002).

75 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

76 *U.S. v. Salerno*, 481 U.S. 739, 745 (1987).

77 *U.S. v. Fontaine*, 697 F.3d 221, 226-27 (3d Cir. 2012).

meaning of the word “copy” provided in the Public Safety code, i.e. “similar in its internal components and function to the designated weapon.”⁷⁸ Important to note is that cosmetic similarity to the said “assault weapon” *alone* would not bring the weapon within the scope of the FSA.

It was argued by the Plaintiffs that the typical gun owner would have no way of knowing whether the specific internal components of one firearm are interchangeable with another, but the Court found their argument to be inadequate for two reasons. Paramount was the Plaintiffs’ lack of identification of any firearm that they would not risk possessing because of uncertainty over the meaning of “copy.” Secondly, the Court found it telling that the weapons the Plaintiffs, according to their own testimony, wished to acquire are all clearly prohibited under the FSA. For that reason, the Court concluded that the Attorney General’s clarification of “copy” was sufficiently valid in its intended application. Finally, the Court’s rejection of the vagueness challenge was based on the fact of historical record of the list of “assault weapons or their copies,” on Maryland public record for more than 20 years.⁷⁹ Though possession of the weapons listed was not prohibited prior the FSA, the Court rightly pointed out that an individual could not acquire an “assault weapon” or “copy” without submitting to a background check. The Plaintiffs’ failure to provide an instance where the term “copy” created uncertainty in this

⁷⁸ Md. Pub. Safety Code 5-101(r)(2).

⁷⁹ *Kolbe*, slip op. at 65.

case was pivotal.

VI. IMPLICATIONS AND CONCLUSION

In some ways, *Kolbe v. Hogan* represents both a relief from a trend and more of the same. A citizen with even a superficial conception of American society and the laws of governance therein is well aware of the social, political, and emotional waves that so often toss public opinion to and fro. These trends are especially prevalent and often most volatile within the Second Amendment arena, where no less than the most fundamental right—the right to defend one’s life⁸⁰—and the most politically expedient emergency—the loss of life—seem to be in constant conflict. For this reason alone, the Fourth Circuit Court’s objectivity in *Kolbe* must be commended, whether or not their decision yields any lasting impact on the Second Amendment discourse.

The trend, of course, within American society is one that has for years focused not upon the actors but the prop (here, firearms) in his or her hand. Maryland’s proposed Firearm Safety Act constitutes the most contemporary example of that skewed focus, and offers more of the same legislative activism. *Kolbe v. Hogan* plainly demonstrates that the battle over gun rights is far from over. Despite the oft-cited landmark Supreme Court decision in *District of Columbia v. Heller* where the Court held that the Second Amendment protects the individual’s right to keep and bear arms, laws such as Maryland’s FSA continue to be passed, seemingly in

⁸⁰ *D.C. v. Heller*, 554 U.S. 570, 635 (2008).

hopes that sympathetic judges will be found here and there to lend an ever-willing rubber stamp.⁸¹ The *Kolbe v. Hogan* decision, though, is an unexpected break in the momentum and has provided a much-needed constitutional reality check.

The Fourth Circuit Court did not declare the FSA unconstitutional; such was stated explicitly in the Court's final opinion.⁸² What it did rule is that the proper test of the constitutionality of restrictive laws like the FSA is distinctive from that applied by the district court. In fact, the *Kolbe* decision is the first instance where a United States court of appeals required strict scrutiny in the consideration of a ban on so-called "assault weapons" and detachable magazines.⁸³ The Fourth Circuit prudently affirmed through its decision that fundamental rights are not so easily up for grabs, and that compelling government interest and minimal restriction are and must continue to be the standard measures of review in similar cases. The case now (February 2016) returns to the district court with instructions from the Fourth Circuit to reconsider the FSA under *strict* scrutiny, and though there is no reason to presume the district court will do an about face on the FSA, there is certainly legitimate cause

81 *George Leef, Fourth Circuit Court Gets the Second Amendment Right: Americans Can Choose How Best to Defend Themselves*, FORBES MAG., (Feb 10, 2016), <http://www.forbes.com/sites/georgeleef/2016/02/10/fourth-circuit-gets-the-second-amendment-right-americans-can-choose-how-best-to-defend-themselves/#27f13e865f4f>.

82 *Kolbe*, slip op. at 46.

83 *Breaking News: Federal Court of Appeals to Review Important Gun Rights Decision*, NRA INST. FOR LEGIS. ACTION, (Mar. 4, 2016), <https://www.nrailes.org/articles/20160304/federal-court-of-appeals-to-review-important-gun-rights-decision>.

