

2022

## Put Your Hands Up, and Step Away from the Scrutiny: Lowering the Standard of Review for Large-Capacity Magazine Legislation

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Online ISSN: 2643-7759

### Recommended Citation

Morgan Carr, *Put Your Hands Up, and Step Away from the Scrutiny: Lowering the Standard of Review for Large-Capacity Magazine Legislation*, 16 FIU L. Rev. 431 (2022).

DOI: <https://dx.doi.org/10.25148/lawrev.16.2.10>

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**PUT YOUR HANDS UP, AND STEP AWAY FROM THE  
SCRUTINY: LOWERING THE STANDARD OF REVIEW FOR  
LARGE-CAPACITY MAGAZINE LEGISLATION**

*Morgan Carr*

**ABSTRACT**

This comment addresses the Ninth Circuit’s decision to apply strict scrutiny to a ban on large-capacity magazines in *Duncan v. Becerra*. Since its construction, the Second Amendment has afforded states the ability to regulate firearms in their respective jurisdictions. However, absent Supreme Court precedent designating a guiding standard of judicial review, American courts have come to a consensus that intermediate scrutiny is appropriate when a gun regulation does not impose a severe burden on the core protection guaranteed by the Second Amendment. Inconsistent with this approach, the Ninth Circuit used strict scrutiny to strike California legislation that regulated the possession of large-capacity magazines. Is applying the highest and most stringent standard of judicial review with a presumption of unconstitutionality to a ban on weapons capable of killing ten people in a matter of seconds consistent with the limitations on the scope of the Second Amendment in *District of Columbia v. Heller*? In light of legal precedent, the answer is likely no. Consequently, the use of strict scrutiny on such legislation prevents states from mitigating gun violence aided by large-capacity magazines in their communities.

ABSTRACT .....	431
I. INTRODUCTION .....	432
II. SUPREME COURT PRECEDENT GUIDING CURRENT SECOND AMENDMENT JUDICIAL INTERPRETATION AND APPLICATION .....	433
A. <i>Supreme Court Rules on Second Amendment Applicability to States and Citizens</i> .....	435
B. <i>Narrowing the Scope of the Second Amendment in United States v. Miller</i> .....	436
C. <i>D.C. v. Heller Shifts Protection Toward an Individual Right to Self Defense</i> .....	437
D. <i>Second Amendment Incorporation Through the Due Process Clause</i> .....	439
1. Confirmed Self Defense as Second Amendment’s Core Protection.....	439

	2. Brady Campaign Requested a Designated Standard of Review .....	440
III.	<i>DUNCAN V. BECERRA</i> : DEPARTING FROM TRADITION .....	441
	A. <i>Strict Scrutiny v. Intermediate Scrutiny</i> .....	441
	B. <i>Routine Application of Intermediate Scrutiny to Content-Neutral Gun Restrictions</i> .....	443
	C. <i>Consequences of Strict Scrutiny Application in the Context of Duncan</i> .....	444
	1. Intra-Circuit Conflict .....	445
	2. Inter-Circuit Conflict .....	447
IV.	APPLICATION OF INTERMEDIATE SCRUTINY TO A BAN ON LARGE CAPACITY MAGAZINES .....	448
	A. <i>Interest and Fit in Duncan v. Becerra</i> .....	449
	B. <i>Interest and Fit in Appellate Cases Involving LCM Bans</i> .....	450
V.	DESIGNATING INTERMEDIATE SCRUTINY TO SECOND AMENDMENT CHALLENGES .....	451
	A. <i>Intermediate Scrutiny: Answering the Call for a Neutral Standard</i> .....	451
	B. <i>Intermediate Scrutiny: Striking Overreaching Gun Regulations</i> .....	453
V.	CONCLUDING REMARKS .....	454

## I. INTRODUCTION

Since 2008, modern American courts have struggled to find consistency and guidance in the application of the Supreme Court’s ruling in *District of Columbia v. Heller* to Second Amendment challenges.<sup>1</sup> As weaponry advances over time, the need for clarity becomes increasingly urgent. The lack of guidance regarding the scope of the Second Amendment and its effect on public safety recently challenged the Ninth Circuit in *Duncan v. Becerra*.<sup>2</sup> Sparked by mass gun violence, California enacted a ban on the possession, sale, and transfer of large capacity magazines (“LCMs”).<sup>3</sup> When the ban’s constitutionality was challenged, the court in *Duncan* applied a strict scrutiny standard of review to evaluate the claim and found that the “statute is a poor means to accomplish the state’s interests and cannot survive strict scrutiny.”<sup>4</sup>

1 See generally *District of Columbia v. Heller*, 554 U.S. 570 (2008).

2 See *Duncan v. Becerra*, 970 F.3d 1133, 1143 (9th Cir. 2020).

3 CAL. PENAL CODE § 32310(c) (Deering 2016) (criminalizing “any person in this state who possesses any large-capacity magazine, regardless of the date the magazine was acquired”).

4 *Duncan*, 970 F.3d at 1143.

Traditionally, courts have opted to review content-neutral gun regulations that do not severely burden the core of the Second Amendment using intermediate scrutiny.<sup>5</sup> This view is rooted in the idea that Americans are still capable of exercising their right to bear arms by other means;<sup>6</sup> for example, citizens can continue to adequately defend themselves using a handgun that holds limited rounds. However, the court in *Duncan* rejects this notion stating that California’s legislation bans an “entire class of arms,” similar to the regulation at issue in *Heller*.<sup>7</sup> The court further states that LCMs are commonly used in self-defense and the regulation would result in the confiscation of half of all LCMS in America today.<sup>8</sup> Thus, the court notes that the ban would be struck even when evaluated using intermediate scrutiny.<sup>9</sup>

However, the Ninth Circuit’s interpretation of *Heller* and application of strict scrutiny is inconsistent with the traditional approach to Second Amendment claims and rulings from the other federal appellate courts.<sup>10</sup> This comment will analyze the constitutional basis for the court’s application of strict scrutiny to strike a ban on LCMs as well as the recommended path forward. Until the Supreme Court designates a standard of review to Second Amendment claims, states like California are unable to efficiently mitigate the violence caused by large capacity magazines in their respective communities.

## II. SUPREME COURT PRECEDENT GUIDING CURRENT SECOND AMENDMENT JUDICIAL INTERPRETATION AND APPLICATION

This part will provide an overview of the Supreme Court’s historical segue into current law governing Second Amendment challenges. Today, we know the Second Amendment to be an individual right—applicable to the states—that allows citizens to bear arms for self-defense.<sup>11</sup> However, the Second Amendment was likely constructed with different intentions. At the time the Second Amendment was ratified in the late eighteenth century, Anti-

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<sup>5</sup> See *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010); see also *Kachalsky v. County of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) (holding that intermediate scrutiny is appropriate to evaluate a law restricting carrying firearms in public because it does not burden the “core protection” of self-defense in the home).

<sup>6</sup> See *Jackson v. City & County of San Francisco*, 746 F.3d 953, 964–65 (9th Cir. 2014).

<sup>7</sup> *Duncan*, 970 F.3d at 1156.

<sup>8</sup> *Id.* at 1157.

<sup>9</sup> *Id.* at 1165.

<sup>10</sup> See *Chester*, 628 F.3d at 683; *Kachalsky*, 701 F.3d at 93; *United States v. Emerson*, 270 F.3d 203, 259 (5th Cir. 2001).

<sup>11</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 644 (2008) (“[T]he inherent right of self-defense has been central to the Second Amendment right.”).

Federalists and Federalists alike insisted on a safeguard against federal government oppression through a national standing army by the procurement of civilian militias.<sup>12</sup> Thus, the drafters came to a solution by disallowing the federal government to disarm the citizens of the United States.<sup>13</sup> The Second Amendment exemplifies this compromise by stating, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”<sup>14</sup>

Legislative history reveals that most of the thirteen states enacted legislation intended to tailor Second Amendment application to its original purpose: to render in effect a militia comprised of males physically capable of acting in concert for the common national defense.<sup>15</sup> The following ordinances from Massachusetts, Virginia, and New York exemplify states’ interest in procuring a militia:

All single men between the ages of sixteen and forty-five must be enrolled in a Militia company;

Men must be registered and notified with a Militia company to obtain a firearm;

Two-thirds of the Militia company must be musketeers who carry a good fixed<sup>16</sup> musket; and

There shall be a private muster of every Militia company every two months.<sup>17</sup>

Today, the fundamental purpose of the Second Amendment has changed considerably since its construction over 230 years ago.<sup>18</sup> Subsequently, so has the law governing modern courts’ evaluation of Second Amendment claims. The subsections below track the Supreme Court’s rulings that mold the scope of the Second Amendment.

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12 THE FEDERALIST NO. 46 (James Madison) (“Let us not insult the free and gallant citizens of America with the suspicion, that they would be less able to defend the rights of which they would be in actual possession, than the debased subjects of arbitrary power would be to rescue theirs from the hands of their oppressors.”).

13 *Heller*, 554 U.S. at 598 (“During the 1788 ratification debates, the fear that the Federal Government would disarm the people in order to impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric.”).

14 U.S. CONST. amend. II.

15 The General Court of Massachusetts, January Session 1784 (Laws and Resolves 1784, c. 55, pp. 140, 142); The General Assembly of Virginia, October, 1785 (12 Hening’s Statutes c. 1, p. 9 et seq.); New York Act of 1786 (Laws 1786, c. 25) [hereinafter *Militia Laws*].

16 *See* *United States v. Miller*, 307 U.S. 174, 180 (1939) (“[A] ‘good fixed musket’ [is] not under bastard musket bore, not less than three feet, nine inches, nor more than four feet three inches in length, a priming wire, scourer, and mould, a sword, rest, bandoleers, one pound of powder, twenty bullets, and two fathoms of match.”).

17 *Militia Laws*, *supra* note 15.

18 *See generally* *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

A. *Supreme Court Rules on Second Amendment Applicability to States and Citizens*

In 1876, the Supreme Court ruled on its first challenge to the Second Amendment.<sup>19</sup> In the post-Civil war case *United States v. Cruikshank*, members of a white Democratic mob killed 100-280 newly freed slaves (“freedmen”) who were gathered at a local courthouse during a heated political skirmish.<sup>20</sup> Seventeen members of the Democratic mob, including defendant William Cruikshank, were indicted and charged for violating the Enforcement Act of 1870.<sup>21</sup> The Enforcement Act allowed for Federal prosecution against anyone who engaged in violent or murderous acts toward black people or obstructed their right to vote.<sup>22</sup> Among those provisions, the law targeted members of the Klu Klux Klan and other discriminatory groups by making it a felony for two or more people to conspire to deprive anyone of his constitutional rights.<sup>23</sup> The lower court found that Cruikshank violated the freedmen’s right to keep and bear arms, as the victims had no means to defend themselves.<sup>24</sup> Upon review, the Justices reversed the indictments and ruled that the Second Amendment restricts only the federal government from infringing upon Second Amendment protections.<sup>25</sup> The Court stated,

This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes . . .<sup>26</sup>

Ten years later, the Court reaffirmed the *Cruikshank* ruling in *Presser v. Illinois*, wherein Herman Presser, a member of the Socialist Labor Party, was indicted for leading a 400-member armed parade in the streets of Illinois. Presser argued that the charges violated his Second Amendment right to bear arms.<sup>27</sup> The Court affirmed the indictment by restating its earlier holding in

<sup>19</sup> *United States v. Cruikshank*, 92 U.S. 542 (1876).

<sup>20</sup> Leslie Friedman Goldstein, *The Second Amendment, the Slaughter-House Cases (1873), and United States v. Cruikshank (1876)*, 1 ALB. GOV’T L. REV. 365, 388 (2008).

<sup>21</sup> James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L.L. REV. 385, 401–02 (2014).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 401; see *Cruikshank*, 92 U.S. at 548.

<sup>24</sup> See *Cruikshank*, 92 U.S. at 548.

<sup>25</sup> *Id.* at 553.

<sup>26</sup> *Id.*

<sup>27</sup> *Presser v. Illinois*, 116 U.S. 252, 260 (1886).

*Cruikshank*: The Second Amendment restricts only the federal government, and states are free to regulate arms in their respective jurisdictions.<sup>28</sup> Therefore, Illinois's ordinance prohibiting unauthorized military assembly did not violate Presser's Second Amendment right.<sup>29</sup> By upholding Presser's indictment, the Court's ruling foreshadows the modern approach to Second Amendment claims: Second Amendment protections are not unlimited, and states can regulate gun use and possession so long as it does not burden the core of the right afforded.<sup>30</sup> Additionally, the Court noted, "[u]nder our political system [militias] are subject to the regulation and control of the State and Federal governments, acting in due regard to their respective prerogatives and powers."<sup>31</sup> The Supreme Court's decision in *Presser* is the Court's first small step away from the Second Amendment's characterization as a "civilian-militia right."

*B. Narrowing the Scope of the Second Amendment in United States v. Miller*

In 1939, The Supreme Court narrowed the scope of the Second Amendment. In *United States v. Miller*, the defendant was charged with illegally dealing firearms in violation of the 1934 National Firearms Act ("NFA").<sup>32</sup> The NFA required certain types of arms, including shotguns, to be registered with the Bureau of Alcohol, Tobacco, Firearms and Explosives.<sup>33</sup> Upon registration, the purchaser is to undergo a background check and pay a tax to what is now the Internal Revenue Service.<sup>34</sup> By shortening or "sawing-off" the eighteen-inch barrel of a standard shotgun, the weapon becomes: (1) concealable, (2) more deadly at close range, and (3) easier to aim at close range.<sup>35</sup> Thus, the NFA required that owners of a shotgun with a barrel shorter than eighteen inches obtain a tax-paid registration.<sup>36</sup>

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<sup>28</sup> *Id.* at 264–65.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 266 (stating "[a] state may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States.>").

<sup>31</sup> *Id.* at 267.

<sup>32</sup> *United States v. Miller*, 307 U.S. 174, 175–76 n.1 (1939).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Jesse David Fox, *Killing Them Not Softly: Talking to a Gun Expert About Sawed-Off Shotguns*, VULTURE (Dec. 3, 2012), <https://www.vulture.com/2012/12/talking-to-a-gun-expert-about-sawed-off-shotguns.html>.

<sup>36</sup> *Miller*, 307 U.S. at 175–76 n.1.

In *Miller*, the defendant challenged the constitutionality of the NFA after he was indicted for transporting and distributing unregistered sawed-off shotguns.<sup>37</sup> In response, the Court held that the NFA's prohibition of interstate unregistered arms dealing did not violate the Second Amendment.<sup>38</sup> The Court further stated that the Second Amendment only applies to "ordinary military equipment" that could "contribute to the common defense."<sup>39</sup> The Court ruled that because the modified shotgun at issue in *Miller* was not frequently used at the time in a military setting, the Second Amendment did not protect the men's possession of the modified shotgun.<sup>40</sup> In designating the requirement that weapons protected by the Second Amendment be "in common use at the time," the Court in *Miller* provides a basis for the modern notion that the possession of dangerous and unusual weaponry is not a right protected by the Second Amendment.<sup>41</sup> *Miller*, however, has created heavy disagreement amongst proponents on both sides of the argument regarding the Second Amendment's scope.<sup>42</sup> Over time, gun control advocates have used *Miller* to reject unconstitutionality claims against federal gun regulation by hinging on the limiting language that weapons be "in common use at the time."<sup>43</sup> Conversely, gun rights advocates have interpreted *Miller* to protect all weapons that aid in the preservation of a "well-regulated militia."<sup>44</sup>

### C. *D.C. v. Heller Shifts Protection Toward an Individual Right to Self Defense*

In 2008, The Supreme Court attempted to alleviate concerns regarding the aftermath of *Miller* and the scope of the Second Amendment.<sup>45</sup> In *District of Columbia v. Heller*, the District of Columbia passed legislation prohibiting

<sup>37</sup> *Id.* at 177.

<sup>38</sup> *Id.* at 178.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 179; *see also* *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) ("We think [the] limitation [that weapons be in common use at the time] is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'").

<sup>42</sup> "Justice Scalia rejected Justice Stevens' view that the holding of *Miller* was that the Second Amendment protects the right to keep and bear arms for certain military purposes, but does not curtail the legislature's power to regulate the nonmilitary use and ownership of weapons. Rather, *Miller* stood only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons." Daniel E. Feld, Annotation, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. Fed. 696 (Originally published in 1978).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *See generally Heller*, 554 U.S. at 575.



unregistered handgun possession and future registration of handguns.<sup>46</sup> The law, however, authorized the police chief to issue one-year licenses to policemen.<sup>47</sup> Respondent Heller, a D.C. policeman, attempted to register a handgun he wished to keep at home, but the District denied his application.<sup>48</sup> In the course of its reasoning, the Court deemed *Cruikshank* and *Presser* to be irrelevant precedent in determining the scope of the Second Amendment, as the Court ruled only on the issue of whether the Second Amendment was applicable to states and other citizens.<sup>49</sup> Here, the issue of the Second Amendment's applicability to state law was not at issue because Washington, D.C., is an arm of the federal government.<sup>50</sup> However, a footnote in the case foreshadowed the later holding of *McDonald v. Chicago*, which states that selective incorporation can likely provide the Court with legal precedent to hear Second Amendment challenges against state legislation.<sup>51</sup>

When evaluating *Heller*'s Second Amendment claim, the Supreme Court noted, "Like most rights, the right secured by the Second Amendment is not unlimited . . . the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."<sup>52</sup> However, the majority found that the possession of a handgun is completely consistent with the limitations set forth in *Miller* because the handgun is, "'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family.'"<sup>53</sup> Thus, the Court declared D.C.'s complete ban on handguns unconstitutional and noted that, "certain policy choices are off the table . . . includ[ing] the absolute prohibition of handguns held and used for self-defense in the home."<sup>54</sup> As a result, the Court introduced "self-defense in the home" as the core protection guaranteed by the Second Amendment.<sup>55</sup>

The Court reiterated assurances that the government has the power to prohibit "dangerous and unusual" weapons in light of the requirement—as set forth in *Miller*—that weapons be in "common use at the time."<sup>56</sup> Additionally, the majority in *Heller* interpreted *Miller* to be a shift in the right

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<sup>46</sup> *Id.* at 574–75.

<sup>47</sup> *Id.* at 575.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 620–21; see *United States v. Cruikshank*, 92 U.S. 542, 553 (1875); see *Presser v. Illinois*, 116 U.S. 252, 254 (1886).

<sup>50</sup> *Heller*, 554 U.S. at 620–21; see also *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>51</sup> *Heller*, 554 U.S. at 607 n. 20.

<sup>52</sup> *Id.* at 626.

<sup>53</sup> *Id.* at 628–29 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)).

<sup>54</sup> *Id.* at 636.

<sup>55</sup> *Id.* (stating that the absolute prohibition of handguns operable for self-defense within the home violates the "core" of the Second Amendment).

<sup>56</sup> *Id.* at 627.

to bear arms from a “collective right” to an “individual right.”<sup>57</sup> However, the Court provided a list of examples of where state regulation is likely constitutional:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>58</sup>

#### D. *Second Amendment Incorporation Through the Due Process Clause*

Two years after *Heller*, the Supreme Court tackled the long-standing question of whether the Second Amendment is applicable to the states in *McDonald v. City of Chicago*.<sup>59</sup> In *McDonald*, the petitioner challenged the constitutionality of a Chicago ordinance that prohibited possession of handguns in the city.<sup>60</sup> To evaluate the constitutionality of the city ordinance, the Court used the Fourteenth Amendment’s Due Process Clause to “selectively incorporate” the Second Amendment against the states.<sup>61</sup> The case most notably overruled both *Cruikshank* and *Presser*, which held that the Second Amendment did not apply to the states.<sup>62</sup> However, the Court provides additional points of guidance to modern courts regarding Second Amendment scope and application.

##### 1. Confirmed Self Defense as Second Amendment’s Core Protection

Notably, the holding of *McDonald* reaffirmed the ideology set forth in *Heller* that the core protection guaranteed by the Second Amendment is an individual right to self-defense.<sup>63</sup> The Court plainly summarized the holding: “[W]e held that individual self-defense is ‘the central component’ of the Second Amendment right.”<sup>64</sup> However, in striking the Chicago ordinance in

<sup>57</sup> *Id.* at 579.

<sup>58</sup> *Id.* at 626–27.

<sup>59</sup> See generally *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

<sup>60</sup> *Id.* at 750.

<sup>61</sup> *Id.* at 791.

<sup>62</sup> *Id.* at 758–59 (“*Cruikshank*, *Presser*, and *Miller* all preceded the era in which the Court began the process of “selective incorporation” under the Due Process Clause, and we have never previously addressed the question whether the right to keep and bear arms applies to the States under that theory.”).

<sup>63</sup> *Id.* at 777.

<sup>64</sup> *Id.* at 767 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

violation of the Second Amendment, the majority reiterated assurances to municipalities that the ruling in *McDonald* does not preclude all statutory limitations on the Second Amendment right.<sup>65</sup> The Court stated that “incorporation does not imperil every law regulating firearms.”<sup>66</sup> When evaluating whether an ordinance violates the Second Amendment, modern interpretations of *McDonald* require the limitation to severely burden the core protection guaranteed by the Second Amendment protection.<sup>67</sup>

## 2. Brady Campaign Requested a Designated Standard of Review

In *McDonald*, the decision to incorporate the Second Amendment to the states resulted in a plea for a designated standard of review by justices and parties alike.<sup>68</sup> During the *McDonald* proceedings, the Brady Campaign to Prevent Gun Violence (“the Brady Campaign”) filed a neutral amicus brief requesting the Court to delegate a standard of review to Second Amendment claims if it were to be incorporated against the states.<sup>69</sup> The Brady Campaign advocated for intermediate scrutiny; the Brady Campaign feared that “strict scrutiny [would be] used to prevent the government from fulfilling its duty to protect public safety.”<sup>70</sup> Similarly, Justice Steven’s dissent in *McDonald* touches on the longstanding concern regarding the lack of guidance in Second Amendment judicial review.<sup>71</sup> He stated, “[t]oday’s decision invites an avalanche of litigation that could mire the federal courts in fine-grained determinations about which state and local regulations comport with the *Heller* right—the precise contours of which are far from pellucid—under a standard of review we have not even established.”<sup>72</sup>

Yet, the Supreme Court opted not to designate a guiding standard of review to Second Amendment cases in *McDonald*.<sup>73</sup> Although the rulings in *Miller*, *Heller*, and *McDonald* attempted to more clearly determine the scope

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<sup>65</sup> *Id.* at 786.

<sup>66</sup> *Id.*

<sup>67</sup> See *United States v. Chester*, 628 F.3d 673, 682–83 (4th Cir. 2010); *Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); see also *United States v. Laurent*, 861 F. Supp. 2d 71, 101 (E.D.N.Y. 2011).

<sup>68</sup> See Brief for Amici Curiae Brady Center to Prevent Gun Violence, The International Association of Chiefs of Police, The International Brotherhood of Police Officers, and The National Black Police Association In Support of Neither Party at 4, *McDonald v. City of Chi.*, 561 U.S. 742 (2010) (No. 08-1521) [hereinafter *Brady Amicus Brief*]; see *Chicago*, 561 U.S. at 907–09 (Stevens J., dissenting).

<sup>69</sup> *Brady Amicus Brief*, *supra* note 68, at 4.

<sup>70</sup> *Id.*

<sup>71</sup> *McDonald*, 561 U.S. at 904 (Stevens J., dissenting).

<sup>72</sup> *Id.*

<sup>73</sup> See generally *McDonald*, 561 U.S. 742.

of the right to bear arms, the ambiguity in its application created more confusion and inconsistency in lower courts' evaluations of Second Amendment claims.<sup>74</sup> As a step toward clarity, a standard of review should be designated for Second Amendment claims in order to effectuate more consistent applications of *Heller* and *McDonald* in courts across the country.

### III. *DUNCAN V. BECERRA*: DEPARTING FROM TRADITION

As previously mentioned in Part II, the Justices in *Heller* provides a non-exhaustive list of instances where states should be allowed to regulate firearms.<sup>75</sup> The Court held that prohibitions on the following regulations are presumptively constitutional:

The possession of firearms by felons,

The possession of firearms by mentally ill,

Laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, and

Laws imposing conditions and qualifications on the commercial sale of arms.<sup>76</sup>

Legal scholars have termed this list the “*Heller* exceptions.”<sup>77</sup> If a state regulation falls within a public safety exception, the regulation is “presumptively constitutional,” and the court should use intermediate scrutiny to review the challenge, as rational-basis review was rejected by the Supreme Court in *Heller*.<sup>78</sup> Unfortunately, the applicable standard of review is not so clear to Second Amendment challenges where a gun regulation does not fit neatly within a public safety exception. In *Duncan v. Becerra*, the Ninth Circuit deviated from the traditional analysis lower courts use to decide which standard of review to apply to Second Amendment challenges.

#### A. *Strict Scrutiny v. Intermediate Scrutiny*

Strict scrutiny was first introduced in footnote four of *United States v. Carolene Products Co.*, which called for a narrower scope of the presumption

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<sup>74</sup> Compare *Jackson v. City & County of San Francisco*, 746 F.3d 953, 960–62 (9th Cir. 2014) (applying intermediate scrutiny to legislation that leaves alternative channels for citizens to exercise their right to bear arms open), with *Duncan v. Becerra*, 970 F.3d 1133, 1145 (9th Cir. 2020) (applying strict scrutiny to ban regulating the number of bullets a firearm can carry).

<sup>75</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008).

<sup>76</sup> *Id.*

<sup>77</sup> Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1372 (2009).

<sup>78</sup> *Id.* (“For all practical purposes, [the *Heller* exceptions] have been decided-and decided in favor of constitutionality.”).

of constitutionality when a law appears to facially conflict with a specific prohibition of the Constitution.<sup>79</sup> However, the first application of the heightened standard of review occurred in *Skinner v. Oklahoma* following the desterilization of a man considered to be a “habitual” criminal under the Oklahoma Habitual Criminal Sterilization Act of 1935.<sup>80</sup> The Court held that “strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.”<sup>81</sup> Moreover, the Court reasoned that because the right to reproduce is one of the most “basic civil rights of man,” and “fundamental to the very existence and survival of the race,” sterilization laws should be subject to strict scrutiny.<sup>82</sup>

Today, strict scrutiny has evolved into a two-part test—with the burden of proof placed on the government—to determine the legislation’s constitutionality.<sup>83</sup> To be deemed constitutional, the government must show that the law or regulation: (1) is necessary to a compelling state interest; and (2) is narrowly tailored to achieving this compelling state interest.<sup>84</sup> Modern applications of strict scrutiny have been traditionally limited to direct infringements that severely burden the core of the right guaranteed by the Constitution.<sup>85</sup>

Intermediate scrutiny, the second level of judicial review, made its first appearance in *Craig v. Boren*.<sup>86</sup> In the Court’s evaluation of the gender-based discrimination claim in *Craig*, the court stated, “[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”<sup>87</sup> Intermediate scrutiny provides a lower hurdle for the government to jump in order to prove legislative constitutionality.<sup>88</sup> As stated in *Craig*, to pass intermediate scrutiny, the government must prove that a law or regulation: (1) Furthers an important government interest by means that are; (2) substantially related to that

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79 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

80 *See Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

81 *Id.* at 541.

82 *Id.*

83 *See Duncan v. Becerra*, 970 F.3d 1133, 1143 (9th Cir. 2020).

84 *Id.*

85 *See United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010); *see also Kachalsky v. County of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012).

86 *See generally Craig v. Boren*, 429 U.S. 190, 191 (1976).

87 *Id.* at 197.

88 Tina Mehr & Adam Winkler, *The Standardless Second Amendment*, AM. CONST. SOC’Y, 4–5 (Oct. 2010), [http://www.acslaw.org/sites/default/files/Mehr\\_and\\_Winkler\\_Standardless\\_Second\\_Amendment.pdf](http://www.acslaw.org/sites/default/files/Mehr_and_Winkler_Standardless_Second_Amendment.pdf).

interest. Intermediate scrutiny is typically reserved for issues that do not burden the core of constitutionally enumerated rights.<sup>89</sup>

*B. Routine Application of Intermediate Scrutiny to Content-Neutral Gun Restrictions*

Although intermediate scrutiny is not explicitly delegated for use in Second Amendment challenges, courts consistently employ intermediate scrutiny to “content-neutral” gun control restrictions that do not severely burden the right guaranteed by the Second Amendment.<sup>90</sup> In *United States v. Chester*, the appellant challenged a federal law prohibiting those convicted of domestic misdemeanors from lawfully possessing a firearm.<sup>91</sup> When determining the standard of judicial review, the Fourth Circuit acknowledged that the ordinance at issue fell squarely within the exceptions listed in *Heller*.<sup>92</sup> However, the court noted that although the exceptions are characterized by the Supreme Court as “presumptively lawful,” the exceptions are not to be approximated with rational-basis review.<sup>93</sup>

Instead, the Fourth Circuit explicitly differentiates between the appropriate applications of strict scrutiny and intermediate scrutiny; the court “do[es] not apply strict scrutiny whenever a law impinges upon a right specifically enumerated in the Bill of Rights” due to the varying degrees of burden regulations may place upon enumerated rights.<sup>94</sup> The court further concluded that strict scrutiny is only appropriate for regulations imposing a severe burden on the Second Amendment right of self-defense.<sup>95</sup> The court held that intermediate scrutiny, however, is appropriate to review content-neutral time, place, and manner regulations.<sup>96</sup> Accordingly, the Fourth Circuit concluded that intermediate scrutiny is more appropriate than strict scrutiny to evaluate Chester’s challenge.<sup>97</sup> The court concluded, “we believe his claim is not within the core right identified in *Heller*—the right of a *law-abiding, responsible* citizen to possess and carry a weapon for self-defense—by virtue of Chester’s criminal history as a domestic violence misdemeanor.”<sup>98</sup>

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<sup>89</sup> *Craig*, 429 U.S. at 197.

<sup>90</sup> *See Chester*, 628 F.3d at 682.

<sup>91</sup> *Id.* at 674.

<sup>92</sup> *Id.* at 681.

<sup>93</sup> *Id.* at 679.

<sup>94</sup> *Id.* at 682.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 683.

<sup>98</sup> *Id.*

Taking the analysis a step further, the Second Circuit similarly held that gun regulations that do not burden an American citizen's Second Amendment right to self-defense *within the home* are subject to intermediate scrutiny.<sup>99</sup> In *Kachalsky v. County of Westchester*, five coplaintiffs challenged the state's denial of their full-carry applications under a New York statute requiring "proper cause"—a special need for self-protection distinguishable from the general public—to carry a firearm in public.<sup>100</sup> Four of the five plaintiffs made no attempt to show proper cause and argued that the Second Amendment "entitles [them] to an unrestricted permit without further establishing 'proper cause.'"<sup>101</sup> One of the plaintiffs stated, "[W]e live in a world where sporadic random violence might at any moment place one in a position where one needs to defend oneself or possibly others."<sup>102</sup>

When evaluating how closely to scrutinize the New York regulation, the court reiterated the holding in a previous Second Circuit opinion: "[H]eighted scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)."<sup>103</sup> However, the court more narrowly defined the core protection dictated by *Heller* by stating, "[W]e believe that applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits."<sup>104</sup> Because the proper cause requirement in the New York statute only regulated the ability to carry a firearm in public, the state did not infringe on the Second Amendment right to self-defense in the home and intermediate scrutiny was applied to scrutinize the ban.<sup>105</sup>

### C. *Consequences of Strict Scrutiny Application in the Context of Duncan*

The application of strict scrutiny to gun regulations that do not burden Americans' right to self-defense is unsupported by current case law. More specifically, the Ninth Circuit's use of strict scrutiny to review California's

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<sup>99</sup> See *Kachalsky v. County of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012).

<sup>100</sup> *Id.* at 84.

<sup>101</sup> *Id.* at 87.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 93 (quoting *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012)).

<sup>104</sup> *Id.* at 93.

<sup>105</sup> *Id.*

LCM ban in *Duncan* creates conflict and inconsistency within Ninth Circuit precedent and with precedent from sister circuits.<sup>106</sup>

### 1. Intra-Circuit Conflict

In 2015, the Ninth Circuit reviewed the district court’s denial of a preliminary injunction requested by challenger Leonard Fyock.<sup>107</sup> In *Fyock v. Sunnyvale*, the city of Sunnyvale, California passed legislation criminalizing the sale, purchase, transfer, and receipt of LCMs.<sup>108</sup> The district court held that intermediate scrutiny should be applied because a ban on LCM possession does not severely burden the core protection of the Second Amendment—self-defense in the home.<sup>109</sup> After reviewing evidence provided by the city, the district court concluded that the government’s ordinance is related to the important state interest of public safety, and the ordinance is a reasonable fit to promulgate the interest.<sup>110</sup> Thus, the district court denied Fyock’s motion for a preliminary injunction.<sup>111</sup> On appeal, the Ninth Circuit was not tasked with determining the merits of the case.<sup>112</sup> Instead, the court stated, “[i]nstead, we are called upon to determine whether the district court relied on an erroneous legal premise or abused its discretion in denying Fyock’s motion seeking preliminary injunctive relief.”<sup>113</sup>

Nonetheless, the Ninth Circuit provided commentary on the district court’s decision to apply intermediate scrutiny to Sunnyvale’s ban on LCMs.<sup>114</sup> The court first looked to the D.C. Circuit’s 2011 ruling in *Heller v. District of Columbia* (“*Heller I*”), which was the only appellate court as of yet to rule on the constitutionality of a prohibition of LCMs.<sup>115</sup> The court stated “D.C.’s ‘prohibition of . . . large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves.’”<sup>116</sup> The court in *Heller II* concluded that the prohibition of LCM’s burden on the core Second Amendment right was not substantial and

<sup>106</sup> See *Fyock v. Sunnyvale*, 779 F.3d 991, 994 (9th Cir. 2015); *United States v. Emerson*, 270 F.3d 203, 259 (5th Cir. 2001).

<sup>107</sup> *Fyock*, 779 F.3d at 994.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 999.

<sup>110</sup> *Id.* at 1000.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 995.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 999–1000.

<sup>115</sup> *Id.* at 999; see *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1262 (D.C. Cir. 2011).

<sup>116</sup> *Fyock*, 779 F.3d at 999 (quoting *Heller II*, 670 F.3d at 1262).



warranted application of intermediate scrutiny.<sup>117</sup> After reviewing the holding of *Heller II*, the Ninth Circuit in *Fyock* stated, “Consistent with the reasoning of our sister circuit, we also agree that intermediate scrutiny is appropriate.”<sup>118</sup>

Next, the Ninth Circuit evaluated the district court’s finding that intermediate scrutiny was appropriate under the facts of *Fyock*.<sup>119</sup> The district court found that Sunnyville’s ban implicates the Second Amendment but does not burden it severely.<sup>120</sup> The district court held that the ban on LCMs merely “restricts possession of only a subset of magazines that are over a certain capacity” and does not “restrict the possession of magazines . . . such that it would render any lawfully possessed firearms inoperable.”<sup>121</sup> The Ninth Circuit denied *Fyock*’s request to reweigh the evidence and determined that there was no abuse of discretion in finding that the ban withstood intermediate scrutiny.<sup>122</sup>

The Ninth Circuit in *Duncan* held that *Fyock* did not preclude the court from applying strict scrutiny to a ban on LCMs because the court did not decide *Fyock* on the merits of the case.<sup>123</sup> Rather, the court “held only that the district court did not abuse its discretion by choosing intermediate scrutiny . . . .”<sup>124</sup> Although the court in *Fyock* stated that its opinion provides “little guidance as to the appropriate disposition on the merits” of the case, the court in *Fyock* expressed explicit agreement with the reasoning of the D.C. Circuit in *Heller II*: LCMs do not severely burden the core of the Second Amendment as a ban on LCMs does not render citizens unable to defend themselves.<sup>125</sup>

Additionally, the Ninth Circuit distinguished the community subject to regulation in *Duncan* from the community subject to regulation in *Fyock*.<sup>126</sup> The court stated, “Sunnyvale is a small and affluent community. Its violent crime rate is less than half of the statewide violent crime rate.”<sup>127</sup> Thus, the court held that “[it] is perhaps understandable why our court in *Fyock* ruled as it did in light of the deferential standard of review and the unique facts

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<sup>117</sup> *Heller II*, 670 F.3d at 1262.

<sup>118</sup> *Fyock*, 779 F.3d at 999.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Duncan v. Becerra*, 970 F.3d 1133, 1162 (9th Cir. 2020).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1163; *Fyock*, 779 F.3d at 999; *Heller II*, 670 F.3d 1244, 1262 (D.C. Cir. 2011).

<sup>126</sup> *Duncan*, 970 F.3d at 1163.

<sup>127</sup> *Id.*

presented in the case.”<sup>128</sup> However, it is important to note that intermediate scrutiny does not provide so much governmental deference that it inhibits courts from striking overreaching gun regulations.<sup>129</sup> Unaccompanied by a presumption of constitutionality, intermediate scrutiny allows courts to weigh the policy interests at issue in both *Fyock* and *Duncan* more effectively.

## 2. Inter-Circuit Conflict

Additionally, the ruling in *Duncan* creates inter-circuit conflict, as circuit courts have repeatedly restrained from applying strict scrutiny to legislation that does not completely prohibit the complete possession of guns.<sup>130</sup> In *United States v. Emerson*, the Fifth Circuit acknowledged that the Second Amendment is to be regarded as an individual right instead of a militia right, as suggested by *Miller* and affirmed by *Heller*.<sup>131</sup> However, the court balked at the idea of applying strict scrutiny to Second Amendment challenges and remained cautious not to interfere with ordinary gun regulation.<sup>132</sup> The court attempted to distinguish between “reasonable” and “unreasonable” restrictions on the right to bear arms; the court concluded that a complete prohibition of guns inside the home will be deemed “unreasonable,” while a prohibition of a certain make or model of a firearm will be deemed “reasonable.”<sup>133</sup> Similarly, the court in *Jackson v. City & County of San Francisco* determined intermediate scrutiny to be appropriate for “reasonable restrictions on the time, place, or manner of a protected right...that ‘leave open alternative channels for communication of information.’”<sup>134</sup> The court further stipulated that reasonable restrictions are ones that regulate only the *manner* in which people can exercise their Second Amendment right.<sup>135</sup>

Similarly, the California ban at issue in *Duncan* did not call for the prohibition of guns inside the home.<sup>136</sup> Rather, the ban regulated the number

<sup>128</sup> *Id.*

<sup>129</sup> See *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 685 (6th Cir. 2016) (applying intermediate scrutiny to strike overreaching gun regulation prohibiting gun possession for those who have been committed to a mental institution).

<sup>130</sup> See *United States v. Emerson*, 270 F.3d 203, 259 (5th Cir. 2001); *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014).

<sup>131</sup> *Emerson*, 270 F.3d at 260.

<sup>132</sup> *Id.* at 261.

<sup>133</sup> *Id.* at 260.

<sup>134</sup> *Jackson*, 746 F.3d at 961 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

<sup>135</sup> *Jackson*, 746 F.3d at 961.

<sup>136</sup> CAL. PENAL CODE § 32310(c) (Deering 2016).

of bullets allowed in a gun's chamber.<sup>137</sup> Therefore, under *Emerson* and *Jackson*, the ban likely was a reasonable restriction that merely regulated the manner in which Californians can exercise their individual right to bear arms.<sup>138</sup> With clear precedent from inter and intra circuits to guide the court's analysis, the court in *Duncan* should have applied intermediate scrutiny to evaluate the state's ban of LCMs.

#### IV. APPLICATION OF INTERMEDIATE SCRUTINY TO A BAN ON LARGE CAPACITY MAGAZINES

Although it is unclear if the California legislation in *Duncan* would have survived intermediate scrutiny, legal precedent surrounding the case tends to answer the question in the affirmative.<sup>139</sup> To evaluate California's state interest and the relationship the ban had to the interest, it is most helpful to revisit *Fyock*, which was discussed in Part III. The Ninth Circuit in *Fyock* decided whether the district court abused its discretion in finding that Sunnyvale's ban survived intermediate scrutiny.<sup>140</sup> Relating to the first prong of intermediate scrutiny, the Ninth Circuit categorized Sunnyvale's interest in public safety as "self-evident" and an important governmental objective.<sup>141</sup> Next, the court referenced the evidence proving that there is a reasonable fit between the regulation and the important state interest.<sup>142</sup>

Sunnyvale presented evidence that the use of large-capacity magazines results in more gunshots fired, results in more gunshot wounds per victim, and increases the lethality of gunshot injuries. Sunnyvale also presented evidence that large-capacity magazines are disproportionately used in mass shootings as well as crimes against law enforcement, and it presented studies showing that a reduction in the number of large-capacity magazines in circulation may decrease the use of such magazines in gun crimes. Ultimately, the district court found that Sunnyvale "submitted pages of credible evidence, from study data to expert testimony to the opinions of Sunnyvale public officials, indicating that the Sunnyvale ordinance is substantially related to the compelling government interest in public safety."<sup>143</sup>

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<sup>137</sup> *Id.*

<sup>138</sup> *See Emerson*, 270 F.3d at 259–60; *Jackson*, 746 F.3d at 961.

<sup>139</sup> *See Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106 (3d Cir. 2018); *see also Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015).

<sup>140</sup> *Fyock v. Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015).

<sup>141</sup> *Id.* at 1000.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

Although the Ninth Circuit did not weigh the evidence or decide on the merits of the case in *Fyock*, the court stated that a ban on LCMs “is simply not as sweeping as the complete handgun ban at issue in *Heller* and does not warrant a finding that it cannot survive constitutional scrutiny of *any* level.”<sup>144</sup>

#### A. *Interest and Fit in Duncan v. Becerra*

In *Duncan*, California legislators attempted to regulate sale and possession of LCMs.<sup>145</sup> An LCM is commonly defined as any detachable ammunition feeding device with the capacity to accept more than ten rounds.<sup>146</sup> Courts and gun experts alike concede that LCMs are not designed or well-suited for self-defense, as their distinctive feature allows the shooter to rapidly fire ten or more bullets without having to reload.<sup>147</sup> A study published by the American Journal of Public Health shows that “LCMs provide a distinct advantage to active shooters intent on murdering numerous people: they increase the number of rounds that can be fired at potential victims before having to pause to reload or switch weapons.”<sup>148</sup> Further, the study shows that bans on LCMs are “associated with both lower incidence of high-fatality mass shootings and lower fatality tolls per incident. The difference in incidence and overall number of fatalities between states, with and without bans, was even greater for LCM-involved high-fatality mass shootings.”<sup>149</sup> Even when used in self-defense, courts have found that LCMs often result in “indiscriminate firing, and severe adverse consequences for innocent bystanders.”<sup>150</sup>

The state of California, in *Duncan*, cited to a similar study showing a decrease in fatalities when fewer bullets are administered.<sup>151</sup> The court, however, dismissed the court’s evidence and stated that “the study relied on by the state . . . shows that an overwhelming majority of mass shootings involved the use of multiple guns while a relative few definitively involved LCMs.”<sup>152</sup> California Attorney General Xavier Becerra openly defends

<sup>144</sup> *Id.* at 999 (emphasis added).

<sup>145</sup> *See Duncan v. Becerra*, 970 F.3d 1133, 1143 (9th Cir. 2020).

<sup>146</sup> *Large Capacity Magazines*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/> (last visited Apr. 2, 2021).

<sup>147</sup> *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. N.J.*, 910 F.3d 106, 112 (3d Cir. 2018).

<sup>148</sup> Louis Klarevas et al., *The Effect of Large-Capacity Magazine Bans on High-Fatality Mass Shootings, 1990–2017*, 109 AM. J. PUB. HEALTH 1754 (2019).

<sup>149</sup> *Id.* at 1759.

<sup>150</sup> *Ass’n of N.J. Rifle & Pistol Clubs, Inc.*, 910 F.3d at 112.

<sup>151</sup> *See Duncan v. Becerra*, 970 F.3d 1133, 1161 (9th Cir. 2020).

<sup>152</sup> *Id.*

California's ban on LCMs.<sup>153</sup> He argues that “the allowance of LCMs is a hostile attack on the Second Amendment.”<sup>154</sup> Attorney General Becerra supports the claim by noting that the core protection of the Second Amendment is self-defense, and Americans are unable to flee or intervene quickly in self-defense against LCMs.<sup>155</sup>

Although it is unclear whether the court in *Duncan* would have upheld the ban on LCMs had intermediate scrutiny been applied, courts have sustained similar bans due to the lower threshold intermediate scrutiny provides.<sup>156</sup> Intermediate scrutiny, while still allowing for a finding of unconstitutionality, ensures a fair balance between public interest and the right to bear arms.

### B. *Interest and Fit in Appellate Cases Involving LCM Bans*

Historically, states have been able to prove that there is an important and compelling state interest in regulating LCMS as well as a reasonable fit between the state interest and a complete ban on LCMs.<sup>157</sup> In *Association of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney General of New Jersey*, the Third Circuit upheld a New Jersey regulation prohibiting any weapon capable of holding ten bullets.<sup>158</sup> The court reasoned that LCMs are not suited for self-defense, and reducing the number of bullets will allow American citizens to effectively intervene and flee during mass shootings.<sup>159</sup> The Third Circuit upheld the New Jersey regulation and reasoned, in concert with the prosecution in *Duncan*, that the state had an important interest in public safety.<sup>160</sup> Additionally, the court found a reasonable fit between a ban on LCMs and public safety.<sup>161</sup> The court held that the prohibition of LCMs

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<sup>153</sup> Press Release, Attorney General Becerra Continues Defense of California's Ban on Acquisition and Possession of Large-Capacity Magazines (Aug. 28, 2020) available at <https://oag.ca.gov/news/press-releases/attorney-general-becerra-continues-defense-california%E2%80%99s-ban-acquisition-and>; see also Petition for Rehearing En Banc, *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020) (No. 19-55376).

<sup>154</sup> Press Release, Attorney General Becerra, *supra* note 153; *Duncan*, 970 F.3d at 1133.

<sup>155</sup> Press Release, Attorney General Becerra, *supra* note 153; *Duncan*, 970 F.3d at 1133.

<sup>156</sup> See *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106 (3d Cir. 2018); see also *Friedman v. City of Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015).

<sup>157</sup> See *Ass'n of N.J. Rifle & Pistol Clubs, Inc.*, 910 F.3d at 119–120; see also *Friedman*, 784 F.3d at 410, 412.

<sup>158</sup> See *Ass'n of N.J. Rifle & Pistol Clubs, Inc.*, 910 F.3d at 110.

<sup>159</sup> *Id.* at 119.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

allows civilians to flee and intervene during shootings, which respects the core of the Second Amendment—self-defense.<sup>162</sup>

In a similar fashion, the Seventh Circuit upheld the City of Highland Park, Illinois’s ban on LCMs and weapons capable of firing ten or more bullets.<sup>163</sup> In *Friedman v. City of Highland Park*, the city argued that the ban was necessary to protect its citizens against mass shootings like the massacre at Sandy Hook Elementary School in Connecticut.<sup>164</sup> In concurrence with the city’s argument, the court held that a ban on LCMs will decrease casualties in mass shootings.<sup>165</sup> Further, the court made a distinction between the prohibition of a handgun in *Heller* and the prohibition of “military-style weapons,” such as those prohibited in Highland Park’s ban.<sup>166</sup> The Seventh Circuit reasoned that this distinction allows the Court to categorize LCMs as “unusual deadly weapons,” which can be regulated under *Miller* and *Heller* because such weapons fall outside the scope of protection afforded by the Second Amendment.<sup>167</sup>

## V. DESIGNATING INTERMEDIATE SCRUTINY TO SECOND AMENDMENT CHALLENGES

### A. *Intermediate Scrutiny: Answering the Call for a Neutral Standard*

In the absence of a designated standard of review or formulated test guiding the review of Second Amendment challenges, courts and judges alike have been quick to craft make-shift solutions in an attempt to achieve clarity and consistency.<sup>168</sup> In *Heller*, Justice Breyer raised the first concern regarding the Supreme Court’s decision not to provide lower courts with a guiding standard of review.<sup>169</sup> In his dissent, Justice Breyer predicted inconsistent

<sup>162</sup> The Commissioner of the Baltimore Police Department explained the difference between using a ten round firearm versus a thirty, fifty, or one-hundred round firearm: “[the u]se of ten-round magazines would thus offer six to nine more chances for bystanders or law enforcement to intervene during a pause in firing, six to nine more chances for something to go wrong with a magazine during a change, six to nine more chances for the shooter to have problems quickly changing a magazine under intense pressure, and six to nine more chances for potential victims to find safety during a pause in firing. Those six to nine additional chances can mean the difference between life and death for many people.” *Id.* at 120. (alteration in original).

<sup>163</sup> *Friedman v. City of Highland Park*, 784 F.3d 406, 407, 412 (7th Cir. 2015).

<sup>164</sup> *Id.* at 418–19 (Manion, J., dissenting).

<sup>165</sup> *Id.* at 411 (majority opinion).

<sup>166</sup> *Id.* at 407–08.

<sup>167</sup> *Id.* at 409–10.

<sup>168</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008); *Mai v. United States*, 974 F.3d 1082, 1086–87 (9th Cir. 2020); see also *Tyler v. Hillsdale Cnty. Sherriff’s Dep’t*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring).

<sup>169</sup> *Heller*, 554 U.S. at 687–89 (Breyer, J., dissenting).

application of *Heller* and proposed a judge-empowering test that “asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.”<sup>170</sup> He justifies his proposition by stating that “any attempt *in theory* to apply strict scrutiny to gun regulations will . . . turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other.”<sup>171</sup> However, the presumption of unconstitutionality in the application of strict scrutiny will impede on a fair balance between the two interests; thus, a need for a more neutral standard of review is necessary.<sup>172</sup>

Justice Breyer’s proposal places a warning on the inevitable clash of interests—between public safety and the right to bear arms—arising out of Second Amendment issues. However, the Court in *Heller* declined to adopt Breyer’s “interest balancing test,” as the test is without precedent in the evaluation of claims regarding enumerated rights.<sup>173</sup> The Court further stipulated that the people of America have already balanced the interests—public-safety and the right to bear arms—by ratifying the Second Amendment.<sup>174</sup> The Court compares the Second Amendment interests to those of the First: “The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different.”<sup>175</sup>

Nevertheless, the Supreme Court’s rejection of Breyer’s Second Amendment specific standard of review does not indicate the Court’s refusal to designate one altogether. In *Heller*, the majority suggested that the Court would likely consider an expressed, traditional level of scrutiny.<sup>176</sup> Although Justice Breyer’s proposal rejects the traditional levels of review and lacks the legal precedent to be used in judicial analysis, his test calls for a neutral standard due to the pressing interest of public safety.<sup>177</sup> In light of the traditionally recognized judicial standards of review, intermediate scrutiny allows for compromise between Breyer’s call for a neutral standard and the majority’s adherence to legal precedent. Thus, an explicit designation of

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170 *Id.* at 689–90.

171 *Id.* at 689.

172 *Id.*

173 *Id.* at 634 (majority opinion).

174 *Id.* at 635.

175 *Id.*

176 *Id.*

177 *Id.* at 689 (Breyer, J., dissenting).

intermediate scrutiny to Second Amendment Claims remains consistent with the Court's ruling in *Heller*.

### B. *Intermediate Scrutiny: Striking Overreaching Gun Regulations*

After the Supreme Court's decision in *Heller*, courts across the country grappled with the Supreme Court's silence regarding the applicable standard of judicial review to Second Amendment claims.<sup>178</sup> In response, the Third Circuit in *United States v. Marzzarella* adopted a two-part inquiry to determine the judicial standard of review.<sup>179</sup> The first step in the test is to "ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."<sup>180</sup> If the challenged law does impose a burden, the court must determine how severely the law burden's the right.<sup>181</sup> If the law does not impose a severe burden, a less stringent standard of review is applied.<sup>182</sup> This test has also been employed by the Fifth and Ninth Circuits to determine which standard of review is used to evaluate Second Amendment challenges.<sup>183</sup>

With a different interpretation of *Heller*, the Sixth Circuit advocates for a test that looks more closely at the legislative history and tradition surrounding Second Amendment protection.<sup>184</sup> Although the Sixth Circuit typically employs the two-step inquiry used by the Third, Fifth, and Ninth Circuits to determine the level of scrutiny, the court in *Tyler v. Hillsdale County Sheriff's Dep't* concluded that the absence of a guiding standard and *Heller's* ambiguous dicta have enabled courts to haphazardly and routinely approve gun legislation without appropriate consideration.<sup>185</sup> The court in *Tyler* stated, "Instead of resolving questions such as the one we must confront, the Justices have told us that the matters have been left open."<sup>186</sup> The court further criticized *Heller* for suggesting that state gun legislation is inherently "presumptively lawful."<sup>187</sup> The court noted the "odd[ities] of courts

<sup>178</sup> See *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); see also *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 685–86 (6th Cir. 2016).

<sup>179</sup> *Marzzarella*, 614 F.3d at 89.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013) (developing a two-part test to determine the standard of review for Second Amendment challenges); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012) (adopting the two-part test used to determine standard of review for Second Amendment challenges).

<sup>184</sup> *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 685–87 (6th Cir. 2016).

<sup>185</sup> See *id.* at 686–89.

<sup>186</sup> *Id.* at 687 (quoting *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010)).

<sup>187</sup> *Id.* at 686–88.



that] rely solely on *Heller* to rubber stamp the legislature's power to permanently exclude individuals from [their] fundamental right...."<sup>188</sup>

Nonetheless, the court in *Tyler* utilized the two-part inquiry set forth in *Marzzarella* to determine that intermediate scrutiny is appropriate to evaluate a federal law prohibiting gun ownership for anyone who has been committed to a mental institution because the law does not severely burden the core protection guaranteed by the Second Amendment.<sup>189</sup> The court noted that "[u]nder intermediate scrutiny, a statute can permissibly regulate more conduct (or more people) than necessary."<sup>190</sup> However, the amount of overreach must be reasonable.<sup>191</sup> The court subsequently struck the ban and held that a prior involuntary commitment to a mental institution is not coextensive with a gun applicant's current mental health at the time of purchase.<sup>192</sup> Although the court found a legitimate and compelling state interest in public safety, the court concluded that there was insufficient evidence to find a reasonable fit between the state's objective and the regulation.<sup>193</sup> Thus, the express designation of intermediate scrutiny to Second Amendment challenges does not implicate the judiciary to rubberstamp gun legislation that is unreasonable or overreaching.

## V. CONCLUDING REMARKS

In the words of Justice Bryer, "[A]doption of a true strict-scrutiny standard for evaluating gun regulations would be impossible . . . [because] the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties."<sup>194</sup> Although there is much disagreement in interpreting the Supreme Court's decision in *Heller*, intermediate scrutiny likely provides courts with an appropriate standard of review to evaluate Second Amendment challenges. The Ninth Circuit's recent application of strict scrutiny to strike a ban on the possession of LCMs strengthens the demand for legislative or judicial intervention, as strict scrutiny does not allow courts to effectively take state interest into consideration when determining the constitutionality

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<sup>188</sup> *Id.* at 687.

<sup>189</sup> *Id.* at 690, 692.

<sup>190</sup> *Id.* at 698.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 688, 699.

<sup>193</sup> *Id.* at 693, 699.

<sup>194</sup> *District of Columbia v. Heller*, 554 U.S. 570, 689 (2008) (Breyer, J., dissenting).

of Second Amendment claims.<sup>195</sup> As shown in *Tyler*, courts are still able to strike overreaching gun regulations when applying intermediate scrutiny.<sup>196</sup>

More specifically, legislation prohibiting the possession of LCMs should invoke intermediate scrutiny, as a ban on LCMs does not substantially burden the core right of self-defense that is guaranteed by the Second Amendment. Conversely, the possession of LCMs likely burdens the core protection afforded by the Second Amendment, as their use in shootings increases fatalities and reduces the likelihood of civilian escape or intervention.<sup>197</sup> As stated by the Ninth Circuit and multiple courts thereafter, LCMs are not most suitable for self-defense.<sup>198</sup> Thus, the decision in *Duncan* to impose strict scrutiny upon the review of LCM regulation is a cry for commanding legislative or judicial interference. The Supreme Court's designation of intermediate scrutiny to Second Amendment challenges would provide courts with a guiding standard, while allowing them to make the necessary inquiry into the reasonableness of the regulation at issue.<sup>199</sup>

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<sup>195</sup> See *Duncan v. Becerra*, 970 F.3d 1133, 1164, 1169 (9th Cir. 2020).

<sup>196</sup> *Tyler*, 837 F.3d at 692, 699.

<sup>197</sup> Klarevas et al., *supra* note 148, at 1754.

<sup>198</sup> *Id.*; See *Fyock v. Sunnyvale*, 779 F.3d 991, 999–1000 (9th Cir. 2015); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 112 (3d Cir. 2018).

<sup>199</sup> See *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (distinguishing between reasonable and unreasonable infringements upon the Second Amendment).