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## **Doe v. Wilmington Housing Authority: The Common Area Caveat as a Paradigmatic Balance Between Tenant Safety and Second Amendment Rights**

### **Cover Page Footnote**

J.D. Candidate, January 2014, The Catholic University of America, Columbus School of Law; B.A. 2008, The University of Maryland, College Park. The author is grateful to Professor Marin R. Scordato, James T. Massey, and Laura Schwarz for their guidance in the writing process; everyone at Reno & Cavanaugh, PLLC for their continued support; and her Catholic University Law Review colleagues for their tremendous work preparing this piece for publication. Finally, she would like to thank her parents, Dr. and Mrs. Gil P. Acosta, and her two sisters, Camille and Gi-ann. The author is eternally grateful for their love and support.

# DOE V. WILMINGTON HOUSING AUTHORITY: THE COMMON AREA CAVEAT AS A PARADIGMATIC BALANCE BETWEEN TENANT SAFETY AND SECOND AMENDMENT RIGHTS

*Iyen Acosta*<sup>+</sup>

The gun rights debate is a staple of American culture, yet lack of guidance by the Supreme Court has left the scope of the Second Amendment unsettled.<sup>1</sup> Until recently, the Second Amendment was conspicuously absent from the

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1. See PATRICK J. CHARLES, *THE SECOND AMENDMENT: THE INTENT AND ITS INTERPRETATION BY THE STATES AND THE SUPREME COURT* 6 (2009) (noting that the Supreme Court has failed to adequately determine the scope of the Second Amendment); HARRY HENDERSON, *GUN CONTROL* 4 (2000) (stating that the national gun debate began in 1927 when the federal government first started regulating firearms); B. Bruce-Briggs, *The Great American Gun War*, PUB. INTEREST, Fall 1976, at 37 (noting that the “vigorous, often vociferous debate” over gun control in the United States has raged since the late 1960s); Richard Hofstadter, *America As a Gun Culture*, AMERICAN HERITAGE, Oct. 1970, at 4, 85 (criticizing the United States as being “the only modern industrial urban nation that persists in maintaining a gun culture” and questioning “how grave a domestic gun catastrophe would have to be in order to persuade” the country to adopt gun control reforms); Brad Bannon, *We Must Debate Gun Control Before Memory of Aurora Fades*, U.S. NEWS AND WORLD REPORT OPINION (Aug. 2, 2012), <http://www.usnews.com/opinion/blogs/brad-bannon/2012/08/02/we-must-have-gun-control-debate-before-memory-of-aurora-fades> (arguing that a discussion about gun control is long overdue and suggesting that the time was right in the aftermath of the mass shooting in Aurora, Colorado); Brian Montopoli, *Gun Control Debate Returns After Colorado Shooting*, CBS NEWS (July 21, 2012, 8:26 AM), [http://www.cbsnews.com/8301-503544\\_162-57476737-503544/gun-control-debate-returns-after-colorado-shooting/](http://www.cbsnews.com/8301-503544_162-57476737-503544/gun-control-debate-returns-after-colorado-shooting/) (quoting several politicians arguing for a renewed debate over gun control in the aftermath of the Aurora shooting); *Scalia Opens Door for Gun-Control Legislation, Extends Slow Burning Debate*, FOXNEWS (July 30, 2012), <http://www.foxnews.com/politics/2012/07/29/scalia-opens-door-for-gun-control-legislation/> (discussing Justice Scalia’s appearance on “FoxNews Sunday” where he said that gun-control legislation is still a possibility under the Second Amendment and acknowledged that *District of Columbia v. Heller* left the question of the constitutionality of limits on gun ownership open); James Taranto, *OK, Let’s Debate Gun Control! A Second Obama Term Could Kill the Second Amendment, Best of the World Today*, WALL ST. J. (July 23, 2012, 14:05 PM), <http://online.wsj.com/article/SB10000872396390444025204577544881193377296.html> (suggesting that the Supreme Court will play a major role in the gun control debate and acknowledging that new presidential appointees could affect the future of the Second Amendment).

Supreme Court docket.<sup>2</sup> Prior to the Supreme Court's recent decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago*,<sup>3</sup> the Court had not addressed the Second Amendment's range of protection since the late nineteenth century, when its holdings were limited at best.<sup>4</sup> This all changed in 2008.<sup>5</sup>

Prior to 2008, the few Supreme Court cases that addressed the Second Amendment's scope suggested that the Second Amendment generally restricted the federal government from infringing upon the right to bear arms<sup>6</sup> when it was reasonably related to militia service.<sup>7</sup> The militia interpretation predominated both case law and legal scholarship prior to 1960.<sup>8</sup> In contrast, the minority view interprets the Second Amendment as conferring an individual right to bear arms.<sup>9</sup> The "individual right" interpretation's increased popularity among legal scholars is a relatively new phenomenon in Second Amendment jurisprudence.<sup>10</sup>

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2. See ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 25 (2011) (noting that after ruling on a gun control case in 1939, the Court declined to rule on a Second Amendment case for seventy years); Sanford, Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989), reprinted in *GUN CONTROL AND THE CONSTITUTION: SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT* 137, 139 (Robert J. Cottrol ed., 1994) (stating that the Second Amendment has not been "at the forefront of constitutional discussion").

3. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008); *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010).

4. CHARLES, *supra* note 1, at 6; see also *infra* note 29 and accompanying text (taking note of the Court's late-nineteenth and early-twentieth century opinions in *United States v. Cruikshank*, *Presser v. Illinois*, and *United States v. Miller*).

5. See *infra* notes 10–14 and accompanying text.

6. See, e.g., *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (stating that the right to "bear[] arms for a lawful purpose. . . . is not a right granted by the Constitution;" rather, the Second Amendment declares that the right to bear arms "shall not be infringed by Congress").

7. See, e.g., *United States v. Miller*, 307 U.S. 174, 178 (1939) (stating that the purpose of the Second Amendment was "to assure the continuation and render possible the effectiveness of [militia] forces" and as such, "must be interpreted and applied with that end in view").

8. WINKLER, *supra* note 2, at 24–25 (discussing the "militia theory" of the Second Amendment, which courts used to reason that the Second Amendment "was not intended to protect an individual right to bear arms for self-protection"); ROBERT J. SPITZER, *THE RIGHT TO BEAR ARMS: RIGHTS AND LIBERTIES UNDER LAW* 51 (2011) (noting that prior to 1960, law journals and courts as far back as the late-nineteenth century interpreted the Second Amendment as applying exclusively to militias) [hereinafter SPITZER, *Right to Bear Arms*].

9. See George A. Mocsary, Note, *Explaining Away the Obvious: The Infeasibility of Characterizing the Second Amendment as a Nonindividual Right*, 76 FORDHAM L. REV. 2113, 2134 (2008) (describing the individual right model as protecting an individual's right to bear arms, regardless of whether he is involved in military service).

10. See Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, in *THE SECOND AMENDMENT IN LAW AND HISTORY*, 16, app. at 36–47 (Carl T. Bogus ed., 2000) (listing law journal articles addressing the right to bear arms chronologically from 1912–1999 and showing that articles advocating for the individual rights interpretation did not appear until 1967, but practically dominated legal scholarship by the mid-1980s) [hereinafter SPITZER, *Lost and*

The Supreme Court adopted the individual-rights-centered approach as applied to the federal government in *District of Columbia v. Heller* in 2008.<sup>11</sup> In *Heller*, the Supreme Court reversed almost seventy years of Second Amendment jurisprudence<sup>12</sup> by holding a D.C. ban on handguns unconstitutional, and thereby established that the Second Amendment guaranteed an individual right to bear arms.<sup>13</sup> In *McDonald v. City of Chicago*, the Supreme Court extended *Heller* and held that the Second Amendment right to bear arms is not limited to the District of Columbia (and the federal government) but also applies at the state and local government levels.<sup>14</sup> Proponents of the individual rights interpretation hailed these two decisions as validating their interpretation of the Second Amendment.<sup>15</sup> In the aftermath of the *Heller* and *McDonald* decisions, however, the question of how to comply with this radical development in Second Amendment jurisprudence remained.<sup>16</sup> State and local governments and the lower courts were left to grapple with how to implement the individual-rights interpretation.<sup>17</sup> Among these government agencies are public housing authorities that now have to

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*Found*]; see also SPITZER, *Right to Bear Arms*, *supra* note 8, at 51 (noting that the idea that the Second Amendment confers the right to bear arms on all citizens did not appear in law journal articles until the 1960s); WINKLER, *supra* note 2, at x (“Indeed, the gun rights movement so familiar to modern-day Americans is a relatively new phenomenon, even though the ability of individuals to bear arms is one of our oldest constitutional rights.”).

11. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (stating “that the Second Amendment conferred an individual right to keep and bear arms”).

12. Before *Heller*, the last Supreme Court case directly addressing the Second Amendment was *United States v. Miller*, which was decided in 1939. See *United States v. Miller*, 307 U.S. 174, 178 (1939); WINKLER, *supra* note 2, at 25 (noting that after *Miller*, the Supreme Court declined to rule on any Second Amendment issues for almost seventy years).

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

14. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (holding that the Second Amendment individual right to keep and bear arms applied to the individual states by operation of the Fourteenth Amendment).

15. See, e.g., Robert Barnes & Dan Eggen, *Supreme Court Affirms Fundamental Right to Bear Arms*, WASH. POST, June 29, 2010, at A1 (stating that the *McDonald* decision was “a long-sought victory for gun rights advocates”); Adam Liptak, *Justices Extend Firearm Rights in 5-4 Ruling*, N.Y. TIMES, June 29, 2010, at A1 (stating that “[t]he ruling is an enormous symbolic victory for supporters of gun rights”); Bill Mears, *High Court Strikes Down Gun Ban*, U.S. CNN.com (June 26, 2008, 7:24 PM), <http://www.cnn.com/2008/US/06/26/scotus.guns/> (“The National Rifle Association said the high court had given it the ammunition to challenge other cities’ gun-control measures.”).

16. See Stephen Kiehl, Comment, *In Search of a Standard: Gun Regulations After Heller and McDonald*, 70 MD. L. REV. 1131, 1137 (2011) (noting that neither *Heller* nor *McDonald* established a standard for reviewing existing gun laws under the new individual-rights interpretations).

17. See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 703 (2012) (highlighting that lower courts are struggling with “what level of scrutiny or test should be used to assess the validity of gun laws” in the wake of *Heller* and *McDonald* because neither court set out a clear standard to use in evaluating gun laws).

balance their duty to provide “decent and safe” affordable housing to their tenants<sup>18</sup> under the United States Housing Act of 1937<sup>19</sup> with implementing the individual-rights interpretation.

In 2010, residents of the Wilmington Housing Authority (WHA) filed suit against WHA for infringing their Second Amendment right to bear arms.<sup>20</sup> The original complaint was directed at a lease provision that prohibited all firearms on WHA property.<sup>21</sup> In an effort to comply with the *Heller* and *McDonald* decisions, WHA subsequently amended its firearms policy to provide for the legal use and possession of firearms on housing authority property with the caveat that firearms were strictly prohibited from the “common areas.”<sup>22</sup> In response, the residents amended their complaint to challenge the recently amended firearms policy, arguing that the common area caveat also violated their Second Amendment rights.<sup>23</sup> In a significant decision for public housing authorities across the country, the United States District Court of Delaware held in *Doe v. Wilmington Housing Authority* that the amended firearms policy and the common area caveat did in fact comply with the *Heller* and *McDonald* decisions and did not infringe on the residents’ Second Amendment right to bear arms.<sup>24</sup> Despite plaintiffs’ efforts to overturn the *Doe* decision on appeal,<sup>25</sup> the common area caveat provides housing authorities across the country with a paradigmatic balance between providing safe housing for their residents and respecting their residents’ Second Amendment rights.<sup>26</sup>

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18. 42 U.S.C. § 1437(a)(1) (2006); *Rivera v. Reading Hous. Auth.*, 819 F. Supp. 1323, 1329 (E.D. Pa. 1993), *aff’d sub nom. Rodriguez v. Reading Hous. Auth.* 8 F.3d 961 (3d Cir. 1996) (stating that “the purpose of the Housing Act is . . . to establish a program of federal aid to local agencies engaged in providing decent, safe, and sanitary housing for lower income families”); U.S. DEP’T OF HOUS. & URBAN DEV., In the Crossfire: The Impact of Gun Violence on Public Housing Communities 1 (2000), available at <http://archives.hud.gov/news/2000/crossfir.pdf> (noting the challenges public housing authorities faced in reducing gun violence).

19. See 42 U.S.C. § 1437 *et. seq.* (2006) (establishing a public housing agency to help states improve housing availability and conditions).

20. Verified Complaint for Injunctive Relief at 1, 3–4, *Doe v. Wilmington Hous. Auth.* 880 F. Supp. 2d 513 (D. Del. 2012), *appeal docketed* No. 12-3433 (3rd Cir. Aug. 29, 2012) (C.A. No. 1:10-00473-LPS), *cert. granted* (De. July 30, 2013) (No. 403,2013).

21. *Doe*, 880 F. Supp. 2d at 518 (noting that the lease agreement required residents “[n]ot to display, use or possess . . . any firearms . . . anywhere on the property of the Authority”).

22. *Id.* at 519–20.

23. *Id.* at 520.

24. *Id.* at 537–38.

25. Appellants Charles Boone and Jane Doe filed a Notice of Appeal in the United States District Court of Appeals for the Third Circuit on Aug. 27, 2012. Plaintiffs’ Notice of Appeal, *Doe*, 880 F. Supp. 2d at 513 (C.A. No. 1:10-00473-LPS).

26. See Sean O’Sullivan & Jesse Paul, *Gun Ruling May Become a Model for Nation*, (Wilmington, Del. News), USA TODAY (Aug. 1, 2012, 9:26 AM), <http://usatoday30.usatoday.com/news/nation/stoary/2012-01-01/gun-restrictions-wilmington/56644990/1> (noting that the *Doe* decision set a precedent for housing authorities and will have an effect on future cases handling similar issues)

Part I of this Note first provides an overview of Second Amendment jurisprudence prior to the *Heller* and *McDonald* decisions. Part I then analyzes the *Heller* and *McDonald* decisions in detail and surveys circuit court decisions interpreting *Heller* and *McDonald*. Next, Part I focuses on public housing authorities and the challenges of fulfilling their safe housing mandate. Part II of this Note examines *Doe*, providing information on the parties involved and the particular lease provisions questioned. Part II also expounds on the court's analysis of the constitutional question. Part III analyzes the *Doe* decision in light of judicial review and public policy considerations. This Note concludes by arguing that the common area caveat embodied in the *Doe* decision stands as a model firearms policy for public housing authorities. A policy that allows firearms within the individual unit, but prohibits firearms in common areas, allows housing authorities to strike a paradigmatic balance between fulfilling their mandate to provide safe housing to their tenants and respecting the individual right to bear arms.

## I. THE SECOND AMENDMENT AND PUBLIC HOUSING AUTHORITIES: AN OVERVIEW

### A. Second Amendment Jurisprudence from the Founders to the Twenty-First Century

The Second Amendment states, “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.”<sup>27</sup> Prior to 2008, the predominant, long-standing interpretation of this language was that the Second Amendment only protected the right to bear arms related to military purposes (militia interpretation).<sup>28</sup> At

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27. U.S. CONST. amend. II. The Second Amendment is generally understood to be composed of two distinct clauses. CHARLES, *supra* note 1, at 5. The first part, “[a] well regulated militia, being necessary to the security of a free State,” is the prefatory clause; the second part, “the right of the people to keep and bear arms, shall not be infringed,” is the operative clause. *Id.*; see also *District of Columbia v. Heller*, 554 U.S. 570, 577–98 (2008) (explaining the difference between the two clauses).

28. See *United States v. Miller*, 307 U.S. 174 (1939) (reasoning that the Second Amendment was only meant to be applied to the right to bear arms related to militia use); *Presser v. Illinois*, 116 U.S. 252 (1886) (reaffirming *Cruikshank* and stating that states cannot restrict the federal government's ability to maintain national security); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (holding that the Second Amendment does not grant a right to bear arms, but rather is meant to limit the power of the national government and allow for a militia); STEPHEN P. HALBROOK, *THE FOUNDERS' SECOND AMENDMENT ORIGINS OF THE RIGHT TO BEAR ARMS I* (2008) (noting that the long-standing interpretation of the Second Amendment was “that individuals have a right to possess and carry firearms and that an armed populace constitutes a militia”); SPITZER, *Right to Bear Arms*, *supra* note 8, at 84 (“For most of U.S. history, the law of the Second Amendment has been a settled matter, in that the amendment has been understood by the courts as pertaining only to citizen service in a government-organized and regulated militia.”).

first, legal scholars generally agreed with the militia interpretation.<sup>29</sup> However, in 2008, the Supreme Court ruled in *District of Columbia v. Heller* that a D.C. ban on handguns was a violation of the Second Amendment, and further, that the Second Amendment protects the *individual* right to bear arms, unconnected to military service (individual right interpretation).<sup>30</sup> As revolutionary as the *Heller* decision is, the Supreme Court was not yet finished redefining the scope of the Second Amendment. Two years later, in *McDonald v. City of Chicago*, the Supreme Court extended the *Heller* analysis to individual states through the Due Process Clause of the Fourteenth Amendment.<sup>31</sup> The following discussion provides an overview of this bifurcation in Second Amendment jurisprudence.

### 1. *The Supreme Court and the Militia Interpretation of the Second Amendment*

A series of three Supreme Court cases—*United States v. Cruikshank* (1876), *Presser v. Illinois* (1886), and *United States v. Miller* (1939)—provide the foundation for the previously dominant militia interpretation of the Second Amendment.<sup>32</sup> In *Cruikshank*, the Court addressed Section Six of the Enforcement Act of May 31, 1870 (the Enforcement Act),<sup>33</sup> which made it a felony “to prevent or hinder [the] free exercise and enjoyment of any right or privilege granted or secured to [a person] by the Constitution or laws of the United States.”<sup>34</sup> The defendants in *Cruikshank* were charged with eight

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29. See Paul Finkelman, “A Well Regulated Militia”: *The Second Amendment in Historical Perspective*, in *THE SECOND AMENDMENT IN LAW AND HISTORY*, *supra* note 10, at 146 (claiming that the basic purpose of the Second Amendment was to “prevent[] Congress from abolishing the organized, well-regulated militias of the states”); Steven J. Heyman, *Natural Rights and the Second Amendment*, in *THE SECOND AMENDMENT IN LAW AND HISTORY*, *supra* note 10, at 206 (concluding that the Second Amendment secured a “collective” right, and that “[i]f the Supreme Court were to read an individual right to arms into the Second Amendment, the result would be precisely the opposite of what the founders intended: to entrust the use and regulation of force to the community as a whole”); WINKLER, *supra* note 2, at 24 (explaining that the reasoning behind the militia theory was a concern that the federal government would be too powerful; therefore the Second Amendment was needed to ensure that the government could not disarm local militias, which were thought to protect the people as a whole).

30. *District of Columbia v. Heller*, 554 U.S. 570, 635–36 (2008) (explaining additionally that “it is not the role of this Court to pronounce the Second Amendment extinct”).

31. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3050 (2010) (holding that *Heller* also applied to States).

32. See SPITZER, *Lost and Found*, *supra* note 10, at 17 (explaining that the Supreme Court addressed issues relating to the Second Amendment in *Cruikshank*, *Presser*, *Miller v. Texas*, and *United States v. Miller* and consistently applied the militia interpretation of the Second Amendment). *Miller v. Texas* simply reaffirmed the Court’s holding in *Cruikshank* and as such is not provided in-depth treatment in this Note. See 153 U.S. 535, 538 (1894) (refusing to extend application of the Second and Fourth Amendments to the States).

33. *Cruikshank*, 92 U.S. at 548.

34. Enforcement Act of 1870, ch. 114, § 6, 16 Stat. 140, 141 (repealed 1910). The Enforcement Act generally guaranteed that all citizens were allowed to vote, regardless of “race, color, or previous servitude.” *Id.* at § 1.



counts of “banding” and “conspiring” for interfering with the rights of two African American men, including the right to vote and the right to bear arms.<sup>35</sup> The Court held that the right to bear arms “is not a right granted by the Constitution” and that the Second Amendment “has no other effect than to restrict the powers of the national government.”<sup>36</sup> In other words, the *Cruikshank* court held that the Second Amendment does not apply to the States.<sup>37</sup>

Eleven years later, the Supreme Court added another dimension to the Second Amendment’s application to the states in *Presser v. Illinois*.<sup>38</sup> In *Presser*, the plaintiff claimed that his criminal indictment under Article Eleven of the Illinois Military Code (IMC) was void because the statute under which he was convicted was unconstitutional.<sup>39</sup> The statute at issue prohibited a group of men from performing military drills with weapons in public, unless they had a valid license to do so.<sup>40</sup> The plaintiff argued that the relevant IMC section violated the Second Amendment.<sup>41</sup> The Court, however, disagreed and reaffirmed its holding in *Cruikshank* that the Second Amendment was “a limitation only upon the power of Congress and the National government.”<sup>42</sup> The *Presser* Court added, however, that it is necessary to allow citizens to bear arms as members of militias, because they are essential for national security.<sup>43</sup>

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35. *Cruikshank*, 92 U.S. at 548. *Cruikshank* was “the first Supreme Court case to give the Second Amendment any significant attention.” CHARLES, *supra* note 1, at 64 (2009).

36. *Cruikshank*, 92 U.S. at 553. The Court further stated that the Fourteenth Amendment only “prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but . . . does not . . . add any thing to the rights which one citizen has under the Constitution against another.” *Id.* at 554–55. In 1894, the Supreme Court reaffirmed its *Cruikshank* holding in *Miller v. State of Texas*. 153 U.S. 535, 538 (1894). In *Miller*, the Court addressed whether a Texas statute prohibiting the carrying of weapons violated the Second Amendment. *Id.* The Court held it as “well settled” that Second Amendment restrictions “operate only upon the Federal power;” therefore, such restrictions are not implicated in state proceedings. *Id.*; see also SPITZER, *Right to Bear Arms*, *supra* note 8, at 35 (discussing *Miller* and noting that “[a]gain, the Court said that the right to bear arms did not apply to the states”).

37. See SPITZER, *Right to Bear Arms*, *supra* note 8, at 33 (explaining the two principles established by *Cruikshank*: “first, that the Second Amendment poses no obstacle to at least some regulation of firearms; and second, that the Second Amendment is not incorporated, meaning that it pertains only to federal power, not state power.”).

38. 116 U.S. 252, 265 (1886).

39. *Id.* at 260–61.

40. *Id.* at 253 (Woods, J., Statement of Facts).

41. *Id.* at 260.

42. *Id.* at 265.

43. *Id.* (explaining that “all citizens capable of bearing arms constitute the reserved military force . . . and, in view of this prerogative of the general government, as well as of its general powers, the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms,” as it is necessary for national security); SPITZER, *Right to Bear Arms*, *supra* note 8, at 34–35 (highlighting that *Presser* reaffirmed the militia interpretation of the Second Amendment).

In *United States v. Miller*, the Court considered whether Section Eleven of the National Firearms Act violated the Second Amendment.<sup>44</sup> Section 11 required that firearms shipped, carried, or delivered in interstate commerce be registered and have a “stamp-affixed order.”<sup>45</sup> The defendants were charged with violating Section 11 by transporting a double-barrelled shotgun across state lines.<sup>46</sup> In upholding the charges, the Court stated, “we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”<sup>47</sup> The Court reasoned that the government did not show that the shotgun had a “reasonable relationship to the preservation or efficiency of a well regulated militia.”<sup>48</sup> The Court explained that the Second Amendment was intended to ensure that an effective militia would always be in place throughout the United States.<sup>49</sup> Stated differently, the Court found that the Second Amendment right to bear arms was specifically limited to bearing arms for military purpose.<sup>50</sup>

Thus, prior to 2008, Supreme Court jurisprudence firmly established that the Second Amendment right to bear arms only restricts the federal government and is only implicated with regards to military service.<sup>51</sup> State court decisions decided prior to 2008 paralleled the Supreme Court’s interpretation of the Second Amendment.<sup>52</sup>

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44. 307 U.S. 174, 176–77 (1939).

45. National Firearms Act, ch. 757, § 11, 48 Stat. 1236, 1239 (1934) (repealed Oct. 22, 1968).

46. *Miller*, 307 U.S. at 175.

47. *Id.* at 178.

48. *Id.* In 1982, the U.S. Court of Appeals for the Seventh Circuit was asked to address the constitutionality of a village ordinance prohibiting handgun possession within village borders. *Quilici v. Vill. of Morton Grove*, 695 F.2d 261, 263 (7th Cir. 1982). The court relied on *United States v. Miller* in holding that the Second Amendment right to bear arms was “inextricably connected to the preservation of a militia.” *Id.* at 270.

49. *Miller*, 307 U.S. at 178 (“With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made.”); see also SPITZER, *Right to Bear Arms*, *supra* note 8, at 36 (highlighting the Court’s message that the purpose of the Second Amendment was to maintain a militia).

50. *Miller*, 307 U.S. at 178; see SPITZER, *Right to Bear Arms*, *supra* note 8, at 36 (stating that under *Miller*, “citizens could only possess a constitutional right to bear arms in connection with service in a militia”).

51. See *supra* notes 31–50 and accompanying text. For an interesting argument against the militia-only restriction, see HALBROOK, *supra* note 28, at 333 (arguing that militias are obsolete today because of the existence of a standing army, but asserting that there is a right to bear arms because the second clause of the Second Amendment is not conditional on the first).

52. See Michael A. Bellesiles, *The Second Amendment in Action*, in *THE SECOND AMENDMENT IN LAW AND HISTORY*, *supra* note 10, at 71–72 (discussing how state courts consistently applied the militia theory in Second Amendment cases). Until the *McDonald* decision in 2010, lower courts understood that, under Supreme Court precedent, the Second Amendment restricted only the federal government from infringing upon the right to bear arms related to military use. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (applying the Second Amendment to the States). Operating with this understanding, legislatures

## 2. *Heller and McDonald: A Reversal in Second Amendment Jurisprudence*

Prior to *Heller*, it was noted that although, “the political significance of the Second Amendment is great; the legal significance of the Second Amendment is small.”<sup>53</sup> This sentiment was due in large part to the general consensus, discussed *infra*, that the Second Amendment was settled law and “generated relatively little constitutional law.”<sup>54</sup> Second Amendment interpretation did not become a controversial issue until the late twentieth century, having been “[f]or much of American history . . . a bedrock constitutional principle.”<sup>55</sup> The more recent debate over the merits of the individual right interpretation versus the militia interpretation in Second Amendment jurisprudence is arguably due to the predominant (and widely accepted) criticism of the individual right interpretation as being contrary to the Founders’ intent and Supreme Court decisions,<sup>56</sup> and that the interpretation grants an unnecessary “constitutional protection.”<sup>57</sup> Robert J. Spitzer noted in 2001 that, “the concerns that gave rise

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consistently passed firearms regulations that went unchallenged. Bellesiles, *supra*, at 71 (“Legislatures . . . worked on the assumption that they had a legitimate interest in passing acts to secure the public safety. As a consequence, measures that placed precise limitations on the use and possession of firearms passed largely unchallenged.”); *cf.* *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 156, 159 (1840) (holding that an article of the Tennessee Constitution that is similar to the Second Amendment only protected weapons used for “civil warfare” or “the common defence”); *see also* Robert J. Cottrol, *Introduction in GUN CONTROL AND THE CONSTITUTION SOURCES AND EXPLORATIONS ON THE SECOND AMENDMENT*, *supra* note 2, at xix (noting how the ideas developed in *Aymette* that (1) there is a difference between a carrying a concealed weapon and openly carrying a weapon and (2) that there are distinctions between weapon types, which make some “suitable for the common defense, while others are not” (“the civilized-warfare test”), have played an important role in cases addressing the right to bear arms). A shift in jurisprudence away from the militia interpretation began in 2001 with the Fifth Circuit’s decision in *United States v. Emerson*, 270 F.3d 203, 210–12 (5th Cir. 2001). In *Emerson*, the defendant challenged his conviction under 18 U.S.C. § 922(g)(8)(C)(ii) as “unconstitutional on its face under the Second Amendment.” *Id.* (the Court examined a motion to dismiss an indictment against the defendant that charged him with possession of a firearm in violation of a court order prohibiting such possession). The *Emerson* court interpreted the Supreme Court’s holding in *Miller* as neither supporting the militia interpretation nor the individual rights interpretation of the Second Amendment. *Emerson*, 270 F.3d at 224–27. Rather, the *Emerson* court held that the Second Amendment “protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms.” *Id.* at 260. In hindsight, the *Emerson* decision was likely an indicator of the growing popularity of the individual rights interpretation and a precursor to the *Heller-McDonald* decisions. *See* SPITZER, *Right to Bear Arms*, *supra* note 8, at 113 (noting that the Second Amendment reemerged in the courts in *Emerson*).

53. SPITZER, *Right to Bear Arms*, *supra* note 8, at 4.

54. *Id.* at 32.

55. Cottrol, *supra* note 52, at xi.

56. *See supra* Part I.A.1. and accompanying notes.

57. *See* Finkelman, *supra* note 29, at 146 (emphasizing that “[t]he Second Amendment does not protect the individual right to hunt deer, collect antique weapons, go to the firing range, or even own a licensed pistol,” because constitutional protection was not needed for these activities at the time the Bill of Rights was written, “and it is not needed today”); *see also* HALBROOK, *supra* note 28, at 177–78 (quoting Noah Webster, a contemporary of James Madison and

to the Second Amendment evaporated as reality changed—that is, as the country turned away from unorganized or general citizen militias, the Second Amendment was rendered obsolete.”<sup>58</sup> The Supreme Court’s opinion in *Heller* resurrected Second Amendment jurisprudence and reignited the controversy over how the Amendment should be interpreted.

*a. District of Columbia v. Heller: The Second Amendment as an Individual Right*

In *District of Columbia v. Heller*, the Supreme Court considered a Second Amendment challenge to a District of Columbia law prohibiting handguns in the home.<sup>59</sup> The respondent, Dick Heller, was a D.C. special police officer who was refused registration for a personal handgun intended for home use.<sup>60</sup> Heller wanted a handgun for personal use to protect himself from criminals who frequented an abandoned public housing project across the street from his home.<sup>61</sup> Heller argued that the Second Amendment’s protection is not limited to militia service, but rather provides for the individual right to bear arms for lawful purposes.<sup>62</sup> The petitioners, however, contended that the Second Amendment’s protection was limited to militia service.<sup>63</sup>

In reaching a decision in *Heller*, the Court first analyzed the plain meaning of the text of the Second Amendment.<sup>64</sup> The *Heller* Court made two important findings regarding the language of the Second Amendment. First, the Court found that the operative clause of the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”<sup>65</sup> Second, the Court found that although the prefatory clause does establish that one purpose of the Amendment was to ensure that an effective militia was in place, it “does not suggest that preserving the militia was the only reason” for

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Alexander Hamilton, who contended that providing a right to arms provision in the Constitution was as absurd as provisions that restricted Congress from passing laws that regulated how Americans ate or slept); SPITZER, *Right to Bear Arms*, *supra* note 8, at 59 (“The Second Amendment is simply unnecessary as a legal protection for personal defense or defense of the home today, just as it was two centuries ago. Indeed, as defined in the common law tradition, the self-defense principle supersedes even constitutional guidelines.”).

58. SPITZER, *Right to Bear Arms*, *supra* note 8, at 41.

59. *District of Columbia v. Heller*, 554 U.S. 570, 573 (2008).

60. *Id.* at 575.

61. WINKLER, *supra* note 2, at 41–42. Heller lived across the street from Kentucky Courts, a former public housing project run by the D.C. Department of Public and Assisted Housing. *Id.* Although Kentucky Courts was closed in 1997, it “remained a haven for drug addicts and dealers.” *Id.* Heller felt unsafe in the neighborhood and, once, even found a stray bullet fired into his front door. *Id.*

62. *Heller*, 554 U.S. at 577 (2008).

63. *Id.* (arguing that the Second Amendment “protects only the right to possess and carry a firearm in connection with militia service” (internal citations omitted)).

64. *Id.* at 576–98 (presenting a thorough analysis of both the operative and prefatory clauses of the Second Amendment).

65. *Id.* at 592.

the right.<sup>66</sup> The Court concluded that the reference to a “right of the people” in the Second Amendment provides a “strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.”<sup>67</sup> The Court further concluded that there was no evidence that the reference to bearing arms “bore a military meaning.”<sup>68</sup>

The Court also conducted a historic review of the Second Amendment to confirm the individual right interpretation.<sup>69</sup> The Court first reviewed provisions in state constitutions dealing with the right to bear arms that were passed at the same time as the Second Amendment.<sup>70</sup> The Court also surveyed various interpretations of the Second Amendment, beginning with the Amendment’s passage and through the end of the nineteenth century.<sup>71</sup> On the basis of this detailed analysis, the Court concluded that the Second Amendment protects an individual right to bear arms *separate from and unrelated to* militia services.<sup>72</sup>

The *Heller* Court also considered its own precedent in *Cruikshank*, *Presser*, and *Miller*, and concluded that its interpretation of the Second Amendment in the instant case was consistent with precedent.<sup>73</sup> First, the Court explained that its decision in *Cruikshank* supported the individual right interpretation because the Court’s description of the Second Amendment right as “bearing arms for a lawful purpose” does not make much sense if exercise of the right is limited to members of the militia.<sup>74</sup> Then the Court considered its holding in *Presser*, finding that *Presser* “said nothing about the Second Amendment’s meaning or scope” and therefore did not limit the Court’s ability to interpret these matters.<sup>75</sup> Finally, the Court qualified its prior holding in *Miller*,<sup>76</sup> finding that the holding was not based on the right to bear arms for military versus

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66. *Id.* at 595, 599.

67. *Id.* at 579–81 (explaining that interpreting the Second Amendment as only applying to militias fails to recognize that “the people” hold the right to bear arms).

68. *Id.* at 591.

69. *See id.* at 592–95 (presenting examples of the individualist view of the right to bear arms from both British and American history). The majority’s interpretation of historic evidence has been criticized as “a conservative stance” that “repressed, ignored, or referred to as erroneous” all evidence that did not support the individual right theory. CHARLES, *supra* note 1, at 6–7.

70. *Heller*, 554 U.S. at 600–03.

71. *Id.* at 605–19.

72. *See id.* at 635 (“In sum, we hold that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”)

73. *Id.* at 619–26.

74. *Id.* at 620 (quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1875)).

75. *Id.* at 620–21. Critics argued that by dismissing *Presser*, “the *Heller* majority missed the larger point” of the case—that the right to bear arms was a militia right. CHARLES, *supra* note 1, at 67–68.

76. *Heller*, 554 U.S. at 621–25.

non-military purposes, but rather was based on “the *type of weapon at issue*.”<sup>77</sup> As such, the Court explained that *Miller* “stands only for the proposition that the Second Amendment right, whatever its nature, extends only to certain types of weapons.”<sup>78</sup>

In concluding that existing precedent did not foreclose the individual right interpretation of the Second Amendment, Justice Scalia stated that “[i]t should be unsurprising that such a significant matter has been for so long judicially unresolved” because “[f]or most of our history the question did not present itself.”<sup>79</sup> It would only be two years until the Court applied this new interpretation of the Second Amendment to the states.<sup>80</sup>

*b. McDonald v. City of Chicago: The Second Amendment as a Restriction on State and Local Authority*

In response to the Court’s holding in *Heller*, four petitioners challenged a Chicago ordinance that effectively banned private handgun possession within the Chicago city limits.<sup>81</sup> The petitioners challenged the ordinance as a violation of their Second Amendment rights and, in agreement, the Court extended *Heller* to apply to state and local governments.<sup>82</sup> The legal question in *McDonald* was whether the Second Amendment applied to the individual states under the Fourteenth Amendment.<sup>83</sup> That question, in turn, required determining “whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty”<sup>84</sup> or “whether this right is ‘deeply rooted in this Nation’s history and tradition.’”<sup>85</sup> Justice Alito concluded that the right to

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77. *Id.* at 622–23.

78. *Id.* The Court’s characterization of *Miller* thusly has been criticized as “infer[ring] something from a court opinion that is not there.” CHARLES, *supra* note 1, at 68. Charles argues, that at no point does the *Miller* opinion refer “to ‘lawful purposes’ or to the use of firearms for civilian purposes.” *Id.*

79. *Id.* at 625–26.

80. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (holding that the Second Amendment applies to the states by virtue of the Due Process Clause of the Fourteenth Amendment).

81. *Id.* (the Chicago city ordinance required handgun owners to register their handguns, but simultaneously prohibited the registration of most handguns). It is not surprising that Chicago’s ordinance was the next Second Amendment case to reach the Supreme Court because “Chicago was the only major city to follow D.C.’s lead on banning handguns.” WINKLER, *supra* note 2, at 42.

82. *McDonald*, 130 S. Ct. at 3026. Justice Alito, using language similar to that used by Justice Scalia in *Heller*, stated that the Court had “never previously addressed the question whether the right to keep and bear arms applies to the States” applying the Due Process Clause’s “selective incorporation” theory. *Id.* at 3031.

83. *Id.* at 3036.

84. *Id.* (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)).

85. *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

keep and bear arms is a fundamental right, and as such, should be applied to the states through the Due Process Clause of the Fourteenth Amendment.<sup>86</sup>

As evidenced by *Heller* and *McDonald*, the Court all but abandoned the militia interpretation of the Second Amendment and abruptly replaced it with the individual right interpretation.<sup>87</sup> The Court's holdings mean that an individual, unrelated to any participation in militia services, has a right to bear arms, which is protected against encroachment by federal, state, and local government.<sup>88</sup>

c. *Lower Courts Confront the Heller-McDonald Aftermath*

*Heller* and *McDonald* are landmark decisions in Second Amendment jurisprudence.<sup>89</sup> As notable as they may be, they do not provide a clear path for the lower courts to follow in deciding the legitimacy of gun restrictions.<sup>90</sup> Arguably the most important question left unanswered is what level of scrutiny to apply when gun laws are challenged.<sup>91</sup> Without guidance from the Court, lower courts have addressed Second Amendment cases cautiously and practically, favoring an “interest-balancing approach” and applying intermediate scrutiny.<sup>92</sup>

Since the *Heller* and *McDonald* decisions were issued, circuit courts have developed various approaches to applying intermediate level scrutiny in

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86. *Id.* at 3042, 3050.

87. *See supra* Part I.A.2.a and I.A.2.b and accompanying notes.

88. *See supra* notes 72, 79, & 86.

89. Rostron, *supra* note 17, at 704–05.

90. *Id.* (noting that the Court's decisions “left important questions unanswered”); *see also* CHARLES, *supra* note 1, at 10 (stating that the *Heller* decision did not specify how the holding should be applied by lower courts).

91. Rostron, *supra* note 17, at 705. Courts generally choose from three levels of scrutiny in evaluating constitutional claims: rational basis, intermediate scrutiny, and strict scrutiny. Sarah Perkins, Note, District of Columbia v. Heller: *The Second Amendment Shoots One Down*, 70 LA. L. REV. 1061, 1074 (2010). Rational basis is the most deferential standard of review and is the form of judicial analysis applied when the statute in question “does not implicate a fundamental right or a suspect or quasi-suspect classification under the Due Process or Equal Protection Clause.” BLACK'S LAW DICTIONARY 1376 (9th ed. 2009). Under this standard of review, “the court will uphold a law if it bears a reasonable relationship to the attainment of a legitimate governmental objective.” *Id.* Intermediate scrutiny, or heightened scrutiny, is the standard of review applied when “a statute contains a quasi-suspect classification (such as gender or legitimacy).” *Id.* at 890. For a statute to be upheld under intermediate scrutiny, “the classification must be substantially related to the achievement of an important governmental objective.” *Id.* Strict scrutiny is the most demanding level of scrutiny and is “[t]he standard applied to suspect classifications (such as race) in equal protection analysis and to fundamental rights (such as voting rights) in due-process analysis. *Id.* at 1558. To meet this standard, “the state must establish that it has a compelling interest that justifies and necessitates the law in question.” *Id.*

92. Rostron, *supra* note 17, at 706–07.

Second Amendment cases.<sup>93</sup> In *United States v. Marzzarella*, the Third Circuit addressed whether a “conviction under 18 U.S.C. § 922(k) for possession of a handgun with an obliterated serial number” violates the Second Amendment.<sup>94</sup> In addressing this question in light of *Heller*, the *Marzzarella* court applied a two-pronged test.<sup>95</sup> The first prong of the *Marzzarella* test asks “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.”<sup>96</sup> If the conduct in question does not fall within the scope of the Second Amendment, further analysis is unnecessary.<sup>97</sup> If, however, the conduct does fall within the Second Amendment’s guarantee, then the court must apply “some form of means-end scrutiny.”<sup>98</sup> Under this second prong, if the challenged law meets the particular level of scrutiny applied, then it is upheld; if it fails to meet the level of scrutiny, the law is invalid as a violation of the Second Amendment.<sup>99</sup>

Applying the first prong, the *Marzzarella* court asked whether Section 922(k) regulates conduct protected by the Second Amendment.<sup>100</sup> First, the court noted that while *Heller* provided examples of lawful gun regulations, the list was not exhaustive, leaving room for court interpretation.<sup>101</sup> For example, the list did not include prohibitions on the possession of guns with altered or obliterated serial numbers, as codified under Section 922(k).<sup>102</sup> Furthermore, the court noted that Marzzarella kept the firearm in his home, “implicat[ing] his interest in the defense of hearth and home—the core protection of the Second Amendment.”<sup>103</sup> Because the court could not “be certain that the possession of unmarked firearms in the home is excluded from the right to bear arms,” the court assumed that Section 922(k) burdened conduct protected by the Second Amendment and moved to the second prong of the *Marzzarella* test.<sup>104</sup>

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93. See *United States v. Chester*, 628 F.3d 673, 608 (4th Cir. 2010) (applying “heightened constitutional scrutiny” to Second Amendment challenges and using the *Marzzarella* court’s two-pronged approach); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (adopting a two-pronged approach to Second Amendment challenges); *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (applying intermediate scrutiny to categorical limits on permitted firearm ownership).

94. *Marzzarella*, 614 F.3d at 87.

95. *Id.* at 89.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* (identifying the threshold inquiry as “whether the possession of an unmarked firearm in the home is protected by the right to bear arms”).

101. *Id.* at 92–93.

102. *Id.* at 93.

103. *Id.* at 94.

104. *Id.* at 95. The court, however, emphasized that it was only deciding whether the statute at issue passed constitutional muster, not whether Marzzarella’s possession of the unmarked firearm in his home was *actually* protected under the Second Amendment. *Id.* at 101.



With respect to the second prong of the *Marzzarella* test, the government argued for applying the rational basis test, but the court readily dismissed that argument, citing *Heller's* rejection of the test in Second Amendment challenges.<sup>105</sup> The defendant urged the court to apply strict scrutiny, contending that, “the right to bear arms is an enumerated fundamental constitutional right.”<sup>106</sup> The court also rejected that argument, reasoning that strict scrutiny should only apply to those laws that “severely limit the possession of firearms,” such as the ban overruled in *Heller*.<sup>107</sup> In contrast, Section 922(k) merely regulates the possession of handguns.<sup>108</sup> An individual “is free to possess any otherwise lawful firearm he chooses—so long as it bears its original serial number.”<sup>109</sup> Given this distinction, the *Marzzarella* court concluded that intermediate scrutiny should be applied to the challenged law.<sup>110</sup>

The *Marzzarella* court upheld the defendant’s conviction under Section 922(k), concluding that the statute passed intermediate scrutiny.<sup>111</sup> First, the court concluded that Section 922(k) serves an important government interest by enabling law enforcement to trace firearms via their serial numbers.<sup>112</sup> Then the court stated that it could not “conceive of a lawful purpose for which a person would prefer an unmarked firearm.”<sup>113</sup> Accordingly, the court concluded that “[r]egulating the possession of unmarked firearms . . . fits closely with the interest in ensuring the traceability of weapons.”<sup>114</sup>

In *United States v. Chester*, the Fourth Circuit addressed whether a conviction under 18 U.S.C. § 922(g)(9) violates the individual right to bear arms protected by Second Amendment.<sup>115</sup> The *Chester* court noted that under *Heller*, “the Second Amendment ‘was not unlimited’”; instead “[it] protected only weapons ‘typically possessed by law-abiding citizens for lawful purposes.’”<sup>116</sup> The *Chester* court further explained that because the *Heller* Court rejected rational basis scrutiny, “heightened constitutional scrutiny” should be applied.<sup>117</sup> The Fourth Circuit then looked to the Third Circuit’s

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105. *Id.* at 95–96 (citing *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008)).

106. *Id.* at 96.

107. *Id.* at 97 (citing *Heller*, 554 U.S. at 628–29).

108. *Id.*

109. *Id.* Under Section 922(k), an individual is “free to possess any otherwise lawful firearm he chooses—so long as it bears the original serial number.” *Id.*

110. *Id.* at 97.

111. *Id.* at 99.

112. *Id.* at 98.

113. *Id.* at 99.

114. *Id.*

115. 628 F.3d 673, 674 (4th Cir. 2010). Chester was indicted for possession of a firearm three years after being convicted of misdemeanor domestic assault and battery, in violation of 18 U.S.C. § 922(g)(9). *Id.* at 677.

116. *Id.* at 678 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 595, 625 (2008)).

117. *Id.* at 679–80.

two-pronged test for Second Amendment claims, as laid out in *Marzzarella*.<sup>118</sup> Because Section 922(g)(9) prevents an entire class of persons from owning firearms indefinitely, the *Chester* court reasoned that applying the first prong of the *Marzzarella* test required determining if those who had committed a misdemeanor domestic violence offense were unprotected by the Second Amendment.<sup>119</sup> Because the federal government did not take that position, the court assumed that the Second Amendment protected the defendant to some extent.<sup>120</sup>

The *Chester* court then addressed the second prong by “applying an appropriate form of means-end scrutiny.”<sup>121</sup> The *Chester* court noted that *Heller* did not specify what level of scrutiny to apply to Second Amendment challenged, except to say that something more than rational basis review was required.<sup>122</sup> The court refused to apply strict scrutiny to the statute, dismissing *Chester*’s argument that the statute “burdens an enumerated, fundamental right” as being “too broad.”<sup>123</sup> The court further reasoned that the defendant did not fall within the beneficiaries of “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 [his] criminal history as a domestic violence misdemeanor.”<sup>124</sup> The *Chester* court concluded that intermediate scrutiny should apply and, as such, the government had to show a reasonable relation between the challenged law and the important government interest the law is meant to promote.<sup>125</sup> The court explained that although the government “offered numerous plausible *reasons*” for why disarmament of the targeted offenders was substantially related to the government objective, it had failed “to offer sufficient *evidence*” establishing such substantial relationship.<sup>126</sup> Therefore, the court held that the government failed to meet its burden of proof under intermediate level scrutiny.<sup>127</sup> The case was remanded to the district court to allow the government the opportunity to meet its burden.<sup>128</sup>

In *United States v. Skoien*, the Seventh Circuit upheld 18 U.S.C. § 922(g)(9), the same statute at issue in *Chester*, which prohibited those convicted of a misdemeanor domestic violence crime from carrying firearms.<sup>129</sup> The

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118. *Id.* at 680.

119. *Id.*

120. *Id.* at 681.

121. *Id.* at 682.

122. *Id.*

123. *Id.* (explaining that “[i]n the analogous First Amendment context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right”).

124. *Id.* at 682–83 (citing *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. 614 F.3d 638, 639, 645 (7th Cir. 2010).

defendant, Steven Skoien, who had two prior domestic violence convictions, was found with three firearms in his possession, in violation of 18 U.S.C. § 922(g)(9).<sup>130</sup> In deciding *Skoien*, the Seventh Circuit addressed the question of “whether Congress is entitled to adopt categorical disqualifications [for carrying firearms] such as § 922(g)(9).”<sup>131</sup>

The *Skoien* court first noted that although *Heller* created an individual right to keep “operable handguns at home for self-defense,” questions, such as the one the court faced, were left unanswered.<sup>132</sup> Because the statute places “a categorical limit on the possession of firearms,” the court explained that it must be subject to more than rational basis review.<sup>133</sup> Rather, a stricter test applies; there must be a “substantial relation” between the categorical limit and the objective to be achieved by such limit.<sup>134</sup> In applying intermediate scrutiny, the *Skoien* court identified the “underpinning” of Section 922(g)(9) as the belief that those “who have been convicted of violence once—toward a spouse, child, or domestic partner, no less—are likely to use violence again.”<sup>135</sup> The *Skoien* court then held that this underpinning justified preventing the targeted offenders from possessing firearms, undoubtedly an important government objective to which the statute is substantially related.<sup>136</sup>

The cases decided thus far generally agree on applying intermediate scrutiny to Second Amendment challenges. This consensus, however, is tempered by the fact that only three years have passed since the Supreme Court decided *McDonald*.<sup>137</sup> As other Second Amendment challenges pass through the courts, legislatures, local governments, and other government-related entities must work within this limited body of law.

#### B. Housing Authorities and the Second Amendment

The United States Housing Act of 1937 (the 1937 Act) mandates that public housing authorities provide safe housing to all of their tenants.<sup>138</sup> Understandably, this mandate occasionally conflicts with “the uniquely strong attachment” the United States has to guns.<sup>139</sup> This attachment is evidenced

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130. *Id.* at 639. Mr. Skoien was sentenced to two years in prison. *Id.*

131. *Id.*

132. *Id.* at 640.

133. *Id.* at 641.

134. *Id.* at 641–42.

135. *Id.* at 642.

136. *Id.* at 642–45.

137. *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

138. See 42 U.S.C. § 1437(a) (2006) (“It is the policy of the United States . . . to assist States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families”); 42 U.S.C. § 1437c-1(d)(14) (2006) (requiring public housing agencies to establish a “safety and crime prevention” plan).

139. See SPITZER, *supra* note 8, at 2 (suggesting that America’s attachment to guns is preventing stricter gun laws).

both by the number of firearms currently owned by U.S. residents—an estimated three hundred million<sup>140</sup>—and by the fact that “the United States consistently maintains the highest per capita rate of gun deaths of any industrialized nation.”<sup>141</sup> As of 2010, public housing authorities in the United States provided residencies for more than one million households.<sup>142</sup> Thus, gun control and gun-related crime are issues that housing authorities must directly address.<sup>143</sup>

Public housing authorities are created through state enabling statutes<sup>144</sup> and are uniquely governed by the interplay of federal, state, and local regulations.<sup>145</sup> The largest public housing authorities are generally situated in highly populated cities in the United States.<sup>146</sup> The most populated cities in the

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140. James D. Agresti & Reid K. Smith, *Gun Control Facts*, JUST FACTS, (last revised Feb. 11, 2013), <http://www.justfacts.com/guncontrol.asp> (estimating in 2010 that 300 million firearms were currently owned in the United States); Amy Roberts, *By the Numbers: Guns in America* CNN (Aug. 9, 2012, 1:31 PM), <http://www.cnn.com/2012/08/09/politics/btn-guns-in-america/index.html> (stating that as of 2009, there were 310 million nonmilitary firearms in the United States).

141. SPITZER, *supra* note 8, at 2.

142. Jamie L. Wershba, *The Second Amendment Under a Government Landlord: Is There a Right to Keep and Bear Legal Firearms in Public Housing?*, 84 ST. JOHN'S L. REV. 995, 998 (2010).

143. See U.S. DEP'T OF HOUS. & URBAN DEV., *supra* note 19, at 29–30 (noting that the Department of Housing and Urban Development has the responsibility of “ensur[ing] that residents of communities receive the necessary support to eliminate gun violence in their neighborhoods”). Since the 1990s, “housing assistance in the United States has undergone a profound transformation.” Susan J. Popkin et al., *Public Housing Transformation and Crime: Making the Case for Responsible Relocation*, 14 CITYSCAPE: J. POL'Y DEV. & RES. 137, 139 (2012). The rationale behind the changes was that replacing distressed public housing developments with combination mixed-income communities would allow public housing residents to “benefit both socially and economically from living in more diverse, higher-opportunity neighborhoods.” *Id.*

144. See, e.g., CAL. HEALTH AND SAFETY CODE §§ 34201(c), 34242 (West 1999); GA. CODE ANN. § 8-3-4 (2004); ILL. COMP. STAT. ANN. 10/1-10/3 (West 2008); MD. CODE ANN., HOUS. & CMTY. DEV. § 12-103 *et. seq.* (LexisNexis 2006).

145. Brief for Amicus Curiae Brady Center to Prevent Gun Violence as Amicus Curiae in Support of Defendants at 10, *Doe v. Wilmington Hous. Auth.*, 880 F. Supp. 2d 513 (D. Del. 2012) (C.A. No. 10-0473-LPS), *cert. granted* (De. July 30, 2013) (No. 403, 2013) (noting that housing authorities “are governed by a unique combination of federal, state, and local regulations” and are “[j]ointly overseen by HUD, state and local authorities”). For example, the Wilmington Housing Authority is subject to the provisions of the 1937 Housing Act, the Delaware Housing Law, and the Wilmington City Code of Ordinances. See *Doe*, 880 F. Supp. 2d at 518, 535 (finding that the Wilmington Housing Authority was created pursuant to title 31, section 4303, and that the Authority is subject to federal mandates, including the mandate to create safety plans under 42 U.S.C. § 1437c-1(d)(14)(A)); DEL. CODE ANN. tit. 31, § 4302 (2009) (providing for the creation of public housing authorities to provide safe housing in the State).

146. The Council of Large Public Housing Authorities (CLPHA) is a non-profit organization composed of housing authorities in almost every major metropolitan area in the United States. *About CLPHA*, <http://clpha.org/about>. CLPHA membership is restricted to large public housing authorities, defined as those “public housing authorities that administer more than 1,200

United States have the highest crime rates.<sup>147</sup> As such, public housing residents continue to face higher rates of crime and gun-related violence than other populations.<sup>148</sup> In 2000, the United States Department of Housing and Urban Development (HUD) released a report detailing their study of gun violence in public housing.<sup>149</sup> The report found that public housing residents “are over twice as likely to suffer from firearm-related victimization as other members of the population.”<sup>150</sup> In 1998, there were approximately 360 gun-related homicides in sixty-six of the largest public housing authorities in the United States.<sup>151</sup>

Despite these statistics, HUD does not have an official policy regarding the right to bear arms in public housing.<sup>152</sup> The *Heller* and *McDonald* decisions

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combined units and vouchers.” *Become a CLPHA Member*, CLPHA, <http://clpha.org/becomeaclphamember> (last viewed Aug. 8, 2013). CLPHA members include the Atlanta Housing Authority, Baltimore City Housing Authority, Chicago Housing Authority, District of Columbia Housing Authority, Houston Housing Authority, Los Angeles City Housing Authority, New York City Housing Authority, Richmond Redevelopment and Housing Authority, and San Francisco Housing Authority. *CLPHA Member Directory*, CLPHA, <http://clpha.org/memberdirectory> (last visited Aug. 8, 2013).

147. See *Uniform Crime Reports: Table 2 Crime in the United States by Community Type, 2011*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-2> (last visited Aug. 17, 2013) (reporting that metropolitan areas had the highest rate of violent crime in 2011, with a rate of 410.3 violent crimes per 100,000 inhabitants compared to 186.1 violent crimes per 100,000 inhabitants in nonmetropolitan cities).

148. U.S. DEP’T OF HOUS. & URBAN DEV., *supra* note 18, at 2, 5, 18 (highlighting the report’s findings that gun violence is a serious problem in public housing, not only in cities, but also in small and medium-sized metropolitan areas, which “experienced rates of gun violence similar to those in larger metropolitan areas”); see also Brief for Brady Center to Prevent Gun Violence as Amicus Curiae in Support of Defendants, *supra* note 145, at 13, (acknowledging that “[g]un violence has and continues to pose a unique threat to public housing residents”).

149. See U.S. Dep’t of Hous. & Urban Dev., *supra* note 18, at 1 (explaining that the report provides “the first-ever comprehensive analysis of gun-related violence in public housing communities”).

150. *Id.* at 2, 14 (finding that between 1995 and 1997 the rate of gun victimization was 4 per 1,000 among persons not in public housing, compared to 10 per 1,000 among person in public housing). The study also found that guns cause significant financial damage. *Id.* at 2, 21 (noting that public housing authorities have spent more than four billion dollars since 1990 on crime reduction and prevention efforts).

151. *Id.* at 15. Among these sixty-six housing authorities were the Chicago Housing Authority, District of Columbia Housing Authority, Los Angeles Housing Authority, and New York City Housing Authority. *Id.* at 16.

152. Wershbale, *supra* note 142, at 1013–14; see U.S. DEP’T OF HOUS. & URBAN DEV., PUBLIC HOUSING OCCUPANCY GUIDEBOOK 189 (2003), available at <http://www.hud.gov/offices/pih/programs/ph/rhiip/phguidebooknew.pdf> (stating that a provision regarding weapon possession is option in public housing authority leases). The fact that public housing only serves lower-income individuals helps to explain the lack of an official policy regarding firearms, as such a policy could be considered discriminatory. The *Doe* plaintiffs adopted this argument in their amended complaint:

Wealthier persons who live in another type of government housing are not deprived of the right to keep and bear arms. Similarly, people who can afford to live in private

provide public housing authorities a baseline from which to draft or amend their firearms policies, but confusion remains about how to appropriately implement the policies.<sup>153</sup> These decisions present a confusing baseline for public housing authorities because public housing developments are “both government-owned buildings and citizen dwellings.”<sup>154</sup> In the twenty years before *Heller*, very few cases dealt with public housing firearms policies.<sup>155</sup> In the four years since *Heller*, at least three cases aside from *Doe* have been filed.<sup>156</sup> As the only case that has been decided on the merits, *Doe* presents an

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housing are not deprived of this right. Defendants’ above-described deprivation of Plaintiff’s civil rights under color of law has been and continues to be intentional, ongoing and in a discriminatory manner, based (at minimum) upon Plaintiff’s economic and/or social status.

Second Amended Complaint at 4–5, *Doe v. Wilmington Hous. Auth.*, 880 F.Supp.2d 513 (D. Del. 2012) *appeal docketed* 12–3433 (3d Cir. Aug. 29, 2012) (CA No. 10-0473-LPS), *cert. granted* (De. July 30, 2013) (No. 403,2013). The argument that racism and disproportionate discrimination underlie firearms policies and gun control laws is not novel. *See, e.g.*, Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. C.R.L.J. 67, 67–68 (1991) (discussing the prejudices behind the enactment of gun laws, such as the notion that African-Americans and poor people should not be trusted with guns); Clayton E. Cramer, *The Racist Roots of Gun Control*, KAN. J.L. & PUB. POL’Y, Winter 1995, at 17(1995) (arguing that history shows “compelling evidence that racism underlies gun control laws”).

153. *See* Wershale, *supra* note 140, at 995–96 (explaining that while *Heller* and *McDonald* helped to articulate the right to bear arms, gun regulation remains a complicated issue, particularly in the public housing setting).

154. *Id.* at 1033–34 (explaining that *Heller* and *McDonald* did not strictly preclude firearm regulation in public housing, but the regulation permitted depends on the property involved).

155. *See, e.g.*, *Richmond Tenants Org., Inc. v. Richmond Redev. & Hous. Auth.*, 751 F. Supp. 1204, 1206–07 (E.D. Va. 1990), *aff’d* 1991 U.S. App. LEXIS 27694 (4th Cir. 1991) (upholding as reasonable a lease provision that prohibited the possession of certain types of weapon, but concluding that a clause prohibiting “any weapon of any type” was too broad); *Doe v. Portland Hous. Auth.*, 656 A.2d 1200, 1201, 1204 (Me. 1995) (declaring that a housing authority lease provision prohibiting tenants from possessing firearms on public housing property was preempted by a state law regulating restrictions on firearms); *Lincoln Park Hous. Comm’n v. Andrew*, No. 244259, 2004 WL 576260, at \*1, \*4 (Mich. Ct. App. Mar. 23, 2004) (*per curiam*) (affirming an eviction based on violation of a lease agreement that prohibited firearms on the housing authority property, holding that defendant had failed to show that the firearms prohibition was not substantially related “to the health, safety and general welfare” of public housing tenants); Wershale, *supra* note 142, at 1034 (stating that in 2010, “[p]ublic housing firearm bans have not recently been challenged in a substantial manner”).

156. For example, only one day after *Heller* was decided, the National Rifle Association (NRA) filed a lawsuit against the San Francisco Housing Authority arguing that a lease provision that prohibited the possession of firearms on housing authority property violated the for Second and Fourteenth Amendments. Complaint for Declaratory and Injunctive Relief at 2, *Doe v. S. F. Hous. Auth.*, No. 3:08-cv-03112-TEH (N.D. Cal. June 27, 2008). The San Francisco Housing Authority, and the John Stewart Company, the housing authority’s property manager, subsequently settled the lawsuit by agreeing to amend the firearms policy to apply only to “the unlawful ownership, unlawful possession, unlawful transportation, or unlawful use of firearms and/or ammunition.” Stipulation re Settlement and Dismissal Without Prejudice at 2–3, *Doe*, No. 3:08-cv-03112-TEH. A lawsuit was filed in 2011 against the District of Columbia Housing Authority based on a lease provision that prohibited “storing, maintaining, using, distributing,

important threshold discussion and analysis of Second Amendment jurisprudence, specifically, safety on public housing property.<sup>157</sup>

## II. DOE V. WILMINGTON HOUSING AUTHORITY

A workable and effective gun control policy on housing authority property is an integral part of providing the “safe housing” for housing authority tenants that is mandated by the 1937 Act.<sup>158</sup> On May 26, 2010, a suit was filed against the Wilmington Housing Authority (WHA) challenging a firearms policy that strictly prohibited residents and members or guests of residents from possessing firearms on housing authority property.<sup>159</sup> WHA subsequently

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purchasing or selling” firearms on public housing authority property. Complaint at 2–3, *Scott v. D.C. Hous. Auth.*, No. 1:11-cv-01342-GK (D.D.C. July 22, 2011). The lawsuit was dismissed in February 2012. Notice of Dismissal, *Scott*, No. 1:11-cv-01342-GK. The NRA reported that the suit was dismissed after the housing authority agreed to change the lease provision to allow for lawful gun possession. *NRA-ILA Legal Update–March 2012*, NRA-ILA: INSTITUTE FOR LEGISLATIVE ACTION (Mar. 22, 2012), <http://www.nra-ila.org/legal/nra-ila-legal-update/nra-ila-legal-update-march-2012.aspx>. In April of 2012, a lawsuit was filed against the Warren County Housing Authority based on a lease provision that prohibits “any member of the household, a guest, or another person under the Resident’s control to use, possess, or have control over firearms.” Complaint for Declaratory and Injunctive Relief, at 1, 4, *Winbigler v. Warren County Hous. Auth.*, No. 4:12-cv-04032-SLD-JAG (C.D. Ill. Apr. 3, 2012). The trial in *Winbigler* is currently set for November 18, 2013. Minute Entry for Proceedings Held Before Mag. J. John A. Gorman, *Winbigler*, No. 4:12-cv-04032-SLD-JAG.

157. See *Doe v. Wilmington Hous. Auth.*, 880 F.Supp.2d 513, 535–37 (D. Del. 2012), *appeal docketed* No. 12-3433 (3d. Cir. Aug. 29, 2012) (C.A. No. 1:10-00473-LPS), *cert. granted* (De. July 30, 2013) (No. 403,2013) (determining that WHA’s Revised Policy to limit the right to bear arms in common areas had to be evaluated using intermediate scrutiny and finding that the common area provision reasonably fit the WHA’s interest in protecting the safety of its residents).

158. 42 U.S.C. § 1437c-1(d)(14) (2006) (outlining the requirement that Public Housing Authorities have a comprehensive safety plan in place).

159. Verified Complaint for Injunctive Relief at 2–3, *Doe v. Wilmington Hous. Auth.*, 880 F.Supp.2d 513 (D. Del. 2012), (C.A. No. 1:10-00473-LPS), *cert. granted* (De. July 30, 2013) (No. 403,2013). The WHA lease provision at issue stated that residents were “not to display, use, or possess or allow members of Resident’s household or guests to display, use or possess any firearms, (operable or inoperable) or other dangerous instruments or deadly weapons as defined by the laws of the State of Delaware anywhere on the property of the Authority.” *Id.* at 2. The Caesar Rodney Institute conducted an investigation of Delaware housing authorities and found that all four housing authorities (the Delaware State Housing Authority, the Dover Housing Authority, the Newark Housing Authority, and the Wilmington Housing Authority) banned residents from owning firearms. Lee Williams, *Delaware Public Housing: Defenseless by Decree*, CAESAR RODNEY INSTITUTE (Feb. 1, 2010), <http://www.caesarrodney.org/pdfs/WHAMainPDF1.pdf>. The NRA learned of these policies through the report issued by the Caesar Rodney Institute and proceeded to file a lawsuit against the Wilmington Housing Authority, alleging Second and Fourteenth Amendment violations. Lee Williams, *NRA sues Wilmington Housing Authority for violating residents’ Second Amendment rights*, CAESAR RODNEY INSTITUTE, BLOG (May 26, 2010) <http://criblog.wordpress.com/2010/05/26/breaking-news-nra-sues-wilmington-housing-authority-for-violating-residents%E2%80%99-second-amendment-rights>. The Caesar Rodney Institute is a non-profit, non-partisan “research and education organization” focused on the Delaware community. *About Us*, CAESAR RODNEY INSTITUTE, <http://caesarrodney.org/index.cfm?ref=18100> (last visited Aug. 8, 2013).

amended its firearms policy to prohibit firearms only in common areas on housing authority property.<sup>160</sup> The plaintiffs amended their original complaint to include the revised firearms policy, contending that even the common area caveat violated their Second Amendment right to bear arms.<sup>161</sup>

The plaintiffs in *Doe* were a woman identified only as “Jane Doe” and Charles Boone.<sup>162</sup> As a result of their lease agreements and “House Rules” of the facilities, both Doe and Boone were prohibited from possessing firearms on WHA property and faced eviction if they did so.<sup>163</sup> The defendants in *Doe* were the WHA and Frederick S. Purnell, Sr., WHA’s executive director.<sup>164</sup> WHA is a public corporate body of the State of Delaware tasked with providing safe, affordable public housing to the City of Wilmington.<sup>165</sup> WHA is one of the largest Public Housing Authorities in Delaware, serving over 7,000 residents in nearly 2,000 units in the City of Wilmington.<sup>166</sup> The Brady Center to Prevent Gun Violence<sup>167</sup> was admitted as amicus curiae for the defendants.<sup>168</sup>

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160. *Doe*, 880 F. Supp. 2d at 519–20 (noting that the WHA passed Resolution No. 10-25 on June 28, 2010, formally adopting the revised Firearms and Weapons Policy).

161. *Id.* at 520.

162. *Id.* at 518. Doe lived at The Park View, a privately-owned complex managed by WHA. *Id.* Boone lived at South Ridge Apartments, a WHA-owned-and-operated facility. *Id.*

163. *Id.* Doe’s lease agreement with WHA incorporated various House Rules, including one that stated that “[t]enant is not permitted to display or use any firearms, BB guns, pellet guns, slingshots, or other weapons on the premises.” *Id.* Boone’s lease agreement originally included a provision stating that residents were “[n]ot to display, use, or possess . . . any firearms, (operable or inoperable) or other dangerous instruments or deadly weapons as defined by the laws of the State of Delaware anywhere on the property of the Authority.” *Id.*

164. *Id.*

165. *About Us*, WILMINGTON HOUSING AUTHORITY, <http://www.whadelaware.org/index.php> (last visited Nov. 14, 2012) (explaining that WHA’s mission has expanded to include “develop[ing] safe, decent, and affordable housing”); *see also* DEL. CODE ANN. tit. 31, §§ 4302–4304 (2009 & Supp. 2012) (stating that housing authorities are vested with all powers necessary and appropriate to “promote and protect the health, safety, morals and welfare of the public”). Among the purposes of the general Delaware State Housing Authority, delineated in the enabling law, is to establish and implement policies that “eliminate drug and crime problems” for public housing residents. *Id.* at § 4002(a)(7) (2009).

166. *The Basics of Who We Are*, WILMINGTON HOUSING AUTHORITY, [http://whadelaware.org/Inside/about\\_us.php](http://whadelaware.org/Inside/about_us.php) (last visited Nov. 14, 2012).

167. The National Council to Control Handguns was founded in 1974, renamed Handgun Control, Inc. in 1980, and then renamed the Brady Campaign to Prevent Gun Violence in 2001. *Our History*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/?q=our-history> (last visited Nov. 16, 2012). The Brady Campaign works to reduce gun violence by lobbying “to pass, enforce, and protect sensible laws and public policy that address gun violence at the federal and state level.” *Our Work*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/?q=our-work> (last visited Nov. 16, 2012).

168. *Doe*, 880 F. Supp. 2d at 520. The Brady Center argued in its amicus curiae brief that outside the right to bear arms for self-defense, the Supreme Court “has never recognized a broad right to carry or use guns on state-owned and managed property.” Brief for Amicus Curiae Brady Center to Prevent Gun Violence in Support of Defendants, *supra* note 145, at 1. The Brady



*A. The District Court Upholds the Common Area Caveat*

WHA formally adopted its amended firearms policy in October 2010, in response to the *McDonald* decision.<sup>169</sup> The plaintiffs challenged paragraphs three and four of the new policy, which provide that

Residents, members of a resident’s household, and guests . . .

3. Shall not display or carry a firearm or other weapon in any common area, except where the firearm or other weapon is being transported to or from the resident’s unit, or is being used in self-defense.

4. Shall have available for inspection a copy of any permit, license, or other documentation required by state, local, or federal law for the ownership, possession, or transportation of any firearm or other weapon, including a license to carry a concealed weapon as required by 11 Del C. § 1441, upon request, when there is reasonable cause to believe that the law or this Policy has been violated.”<sup>170</sup>

The plaintiffs challenged the lease as violating their Second and Fourteenth Amendment rights, even though neither plaintiff owned a firearm.<sup>171</sup>

The district court first addressed the *Heller* and *McDonald* decisions and highlighted that “*Heller* suggested that the ‘core’ of the Second Amendment right is the right of ‘law-abiding, responsible citizens to use arms in defense of hearth and home.’”<sup>172</sup> The court further explained, “the *McDonald* Court described its ‘central holding in *Heller*’ as being that ‘the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.’”<sup>173</sup> After surveying Third Circuit decisions that had considered *Heller* and *McDonald*, the court settled on applying the *Marzzarella* test, as that case had “most extensively” considered the *Heller* and *McDonald* decisions.<sup>174</sup>

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Center further argued that the WHA policies are consistent with *Heller* and *McDonald* because they “fully preserve Plaintiffs’ right to keep and use guns in the home for self-defense.” *Id.* at 2–3.

169. *Doe*, 880 F. Supp. 2d at 519 (noting that the new policy replaced the corresponding provisions in both Doe and Boone’s original lease agreements).

170. *Id.* at 519–20 (emphasis omitted).

171. *Id.* at 520–21. The defendants argued that the plaintiffs did not have standing to bring the suit against WHA because the plaintiffs did not own firearms and did “not really disagree with the Revised Policy.” *Id.* at 522–23. The district court, however, held that the threat of eviction and the dispute as to the constitutionality of the revised policy were sufficient to establish standing. *Id.* The district court dismissed the plaintiffs’ challenge to the constitutionality of the original lease as moot, because the revised policy effectively replaced the original lease. *Id.* at 523–24.

172. *Id.* at 526 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008)).

173. *Id.* (quoting *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3044 (2010)).

174. *Id.* The Brady Center to Prevent Gun Violence advocated for the application of *Marzzarella* to *Doe*. Brief for Brady Center to Prevent Gun Violence as Amicus Curiae in Support of Defendants, *supra* note 145, at 5–6.

In applying the first prong of the *Marzzarella* test, the *Doe* court addressed whether the Revised Policy burdens conduct protected by the Second Amendment.<sup>175</sup> The court agreed with WHA that “the common areas are community spaces that WHA has the right and obligation to regulate.”<sup>176</sup> The *Doe* court contrasted the common areas, over which no single resident has control, with a resident’s own apartment, from which the resident is able to exclude all others.<sup>177</sup> The court concluded that the common area caveat regulates conduct that is beyond “the ‘core’ of what is protected by the Second Amendment.”<sup>178</sup>

The court next asked whether the conduct would still fall within the scope of the Second Amendment if it does not fall within the traditional core of Second Amendment protection.<sup>179</sup> The plaintiffs argued that *Heller*’s emphasis on defense of the home does not foreclose the need for defense in other areas outside of the home.<sup>180</sup> WHA contended instead that *Heller* “is limited to protecting a citizen’s right to possess a weapon in one’s home and does not stretch to public places.”<sup>181</sup> The *Doe* Court ultimately “decline[d] to determine whether Second Amendment rights extend outside of the ‘hearth and home.’”<sup>182</sup> The *Doe* court explained that both the Supreme Court and the Third Circuit had declined to expressly extend the Second Amendment beyond the home; furthermore, the Supreme Court had repeatedly warned other courts to “proceed with caution.”<sup>183</sup>

Having sidestepped the question, the *Doe* court still had to decide whether the common area caveat violated the Second Amendment.<sup>184</sup> Though some gun regulations are “presumptively lawful,” the court followed Third Circuit precedent to avoid the presumptively lawful analysis.<sup>185</sup> Instead, the court assumed that the common area caveat was not presumptively lawful and proceeded to evaluate the regulations’ constitutionality.<sup>186</sup> The *Doe* court declined to apply the rational basis test, as proscribed by *Heller*.<sup>187</sup> The court also rejected the reasonable regulation test, the standard proposed by amicus, The Brady Center, finding the test did “not provid[e] enough protection” for

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175. *Doe*, 880 F. Supp. 2d at 528.

176. *Id.* at 529.

177. *Id.* at 528–29.

178. *Id.* at 529 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008)).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* at 530 (quoting *Heller*, 554 U.S. at 634).

183. *Id.*

184. *Id.*

185. *Id.* at 530–31.

186. *Id.* at 531.

187. *Id.* at 532 (citing *Heller*, 554 U.S. at 628 n. 27) (“In *Heller*, the Supreme Court explicitly declared that Second Amendment challenges may not be subjected merely to rational basis review.”).

Second Amendment rights.<sup>188</sup> The court instead determined that intermediate scrutiny should be applied, reasoning that, similar to the District of Columbia ban in *Heller*, the WHA's revised firearms policy did not completely ban firearms.<sup>189</sup> Instead the court noted that the revised policy "expressly recognizes a right to possess firearms in the home," and contained a self-defense exception.<sup>190</sup>

Under *Marzzarella*, there must be a substantial government interest behind the regulation, "the fit between the challenged regulation and the asserted objective [must] be reasonable," and the regulation must not be unnecessarily burdensome.<sup>191</sup> The *Doe* court concluded that the first part of the intermediate scrutiny analysis was undisputedly satisfied, given that the plaintiffs conceded that WHA had a substantial interest in ensuring the safety of its residents.<sup>192</sup> Then the court evaluated whether the fit between the common area caveat and WHA's safety interest was reasonable, and concluded that "as a matter of common sense," it was reasonable.<sup>193</sup> The *Doe* court went on to say that in light of the WHA's responsibility to provide safe housing, their "determination that safety is best promoted by prohibiting possession of firearms in common areas . . . is not so unreasonable as to fail intermediate scrutiny."<sup>194</sup> In short, the *Doe* court upheld the common area caveat under intermediate scrutiny and dismissed the plaintiffs' constitutional challenge to sections three and four of the WHA's revised firearms policy.<sup>195</sup>

#### B. Reactions to *Doe* and the Common Area Caveat

The district court decided *Doe* on July 27, 2012<sup>196</sup> and the plaintiffs filed an appeal with the Third Circuit on August 27, 2012.<sup>197</sup> Because the case is less

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188. *Id.* at 533.

189. *Id.* at 534–35.

190. *Id.*

191. *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010).

192. *Doe*, 880 F. Supp. 2d at 535 ("[T]he stated goal of the Common Area Provision is to promote and protect the safety of WHA residents, their guests, and WHA employees . . . WHA, as a state agency, has an important and substantial interest in protecting the health, safety, and welfare of its residents, their guests, its employees, and the public at large while on WHA property.").

193. *Id.* at 535–36.

194. *Id.* at 537. The plaintiffs had argued that the common area caveat created "an absurd result" in that it "limit[ed] a tenant's Second Amendment rights to only those occasions when tenants are transporting their weapons to and from their units, while denying tenants the same protection when they undertake any other activity within the common area." *Id.* The court agreed with the plaintiffs that the policy caused this effect, but stated that the result was not absurd and did not render the lease provision unconstitutional. *Id.*

195. *Id.* at 537 (granting defendants' motion for summary judgment).

196. *Id.* at 541.

197. Plaintiff's Notice of Appeal, *supra* note 25. The plaintiffs in *Doe* "did not appeal the District Court's ruling dismissing their Second Amendment claims," but did appeal "the District Court's rulings on their state constitutional claims." Certification of Questions of Law at 8, *Doe*

than two years old and primarily concerns local issues, most reactions to *Doe* are local to the Delaware community and the parties involved in the actual case.<sup>198</sup> Purnell, WHA's Executive Director, hailed the decision as a "good day" for public housing residents, stating that the policy was intended to protect tenants' safety, not limit their rights.<sup>199</sup> Dan Gross, President of the Brady Campaign and the Brady Center to Prevent Gun Violence, praised *Doe*, stating that it affirmed that "common-sense restrictions" on carrying guns in public do not violate the Second Amendment.<sup>200</sup> Daniel Vice, the senior attorney for the Brady Center, said that because *Doe* is the first case to approve restrictions on guns in public housing, it provides "an important precedent for other housing authorities around the country."<sup>201</sup> Interestingly, the Delaware General Assembly seemed to share these sentiments on the common area caveats.<sup>202</sup>

Before the initial complaint in *Doe* was filed, Democratic Representative John C. Atkins and Republican Senator Joseph Booth jointly sponsored Delaware House Bill 357 (H.B. 357) and introduced the bill to the 145<sup>th</sup> Delaware General Assembly on February 18, 2010 in response to the original firearms policies of several Delaware public housing agencies.<sup>203</sup> As originally introduced, H.B. 357 sought to prohibit all state agencies from regulating, restricting, or otherwise prohibiting firearms, except for security reasons at governmental buildings.<sup>204</sup> The bill was reportedly introduced as "a legislative maneuver" to pressure the Delaware State Housing Authority, Dover Housing Authority, and WHA to withdraw their firearms prohibitions.<sup>205</sup> H.B. 357 was subsequently amended to specifically limit public housing authorities from

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v. Wilmington Hous. Auth., No. 12-3433 (3d Cir. July 18, 2013). On July 18, 2013, the Third Circuit certified to the Delaware Supreme Court "unresolved questions about how Article I, § 20 of the Delaware Constitution limits restrictions that may be placed on the right to bear arms." *Id.* at 2. The Delaware Supreme Court accepted cert by order dated July 30, 2013. Order at 2, *Doe v. Wilmington Hous. Auth.*, No. 403,2013 (Del. July 30, 2013).

198. See *infra* notes 219–23 and accompanying text.

199. Sullivan & Paul, *supra* note 26.

200. Press Release, Brady Campaign to Prevent Gun Violence, Court Dismisses Challenge to Delaware Public Housing Gun Restrictions (July 31, 2012) <http://www.noodls.com/view/noodl/15360788.brady-center-to-prevent-gun-violence/court-dismisses-challenge-to-delaware-public-housing-res>.

201. O'Sullivan & Paul, *supra* note 26.

202. See *infra* notes 203–09.

203. H.B. 357, 145th General Assemb. (Del. 2010).

204. *Id.* The original prohibition stated that "[n]o public body in this state shall have or exercise the authority to regulate, prohibit, restrict or license the ownership, transfer, possession or transportation of arms, firearms, components of firearms, ammunition or components of ammunition except as expressly and specifically authorized by act of the General Assembly." *Id.*

205. Lee Williams, *House Bill 357 Introduced to Overturn Public Housing Gun Bans*, CAESAR RODNEY INSTITUTE (Feb. 18, 2010), <http://www.caesarrodney.org/pdfs/WHABillStoryPDF.pdf>.

prohibiting the lawful ownership and possession of firearms.<sup>206</sup> A later amendment, however, provided that the public housing agencies have the authority to regulate firearms in “common areas of property” that they own and operate.<sup>207</sup> Although H.B. 357, as amended, is currently stalled in the Delaware Senate Finance Committee,<sup>208</sup> the common area caveat clearly has some support from the Delaware General Assembly.<sup>209</sup>

Beyond this local attention, the *Doe* holding and the common area caveat have, thus far, garnered no attention from HUD or industry groups such as CLPHA<sup>210</sup> or the National Association of Housing and Redevelopment Officials (NAHRO).<sup>211</sup> Before *Doe* was officially filed, Maria Bynum, the spokesperson for HUD’s field office in Philadelphia, which oversees the Delaware area, told the Caesar Rodney Institute that HUD does not have an

206. H. Substitute 1 for H.B. 357, 145th Gen. Assemb. (Del. 2010) (prohibiting public housing authorities from “hav[ing] or exercis[ing] the authority to regulate, prohibit or otherwise restrict a lessee/tenant of a dwelling owned and operated by such public housing authority from lawfully owning or possessing ammunition, arms or components thereof in such dwelling for the defense of self, family, home and State, and for hunting and recreational use and transporting such ammunition, arms or components thereof to and from such dwelling”). *Id.* The bill was initially amended to ensure that public housing authority residents “are afforded the same rights as all citizens of Delaware.” *Id.*

207. H. Amend. 3 to H. Substitute 1 for H.B. 357, 145th Gen. Assemb. (Del. 2010) (adding a subsection stating that “[n]othing herein shall be construed to prohibit or otherwise restrict a public housing authority from regulating, prohibiting or otherwise restricting the possession of a firearm(s) in the common areas of property owned or operated by a public housing authority, including, but not limited to, playgrounds, community centers, daycare centers or office space”).

208. *See H. Substitute 1 for H.B. 357 w/H. Amend. 3, 145th Gen. Assemb.*, DEL. GEN. ASSEMB., <http://legis.delaware.gov/LIS/lis145.nsf/93487d394bc01014882569a4007a4cb7/eeb8cbe512243bfc852577190070cc81?OpenDocument> (last visited Aug. 18, 2013) (listing the current status of the bill as sent to the Senate Finance Committee on June 23, 2010).

209. *See supra* notes 206–07.

210. A basic search of the CLPHA website for “Wilmington Housing Authority,” “firearm,” or “gun” provides only one relevant result—a link to a June 26, 2008 CLPHA Weekly Report about the Asset Management Improvement Act of 2008. *See June 26, 2008 CLPHA Weekly Report*, CLPHA (June 26, 2008), <http://www.clpha.org/2008report0626?s=firearm> (discussing an amendment to the Asset Management Improvement Act of 2008 that would prevent housing authorities from prohibiting legal firearm possession through lease agreements).

211. A basic search of the NAHRO website for “Wilmington Housing Authority,” “firearm,” or “gun” provides only one relevant result—a link to a Top Story regarding the Housing Preservation and Tenant Protection Act of 2010. *House Committee Passes “Housing Preservation and Tenant Protection Act of 2010, Top Stories*, NAHRO (Aug. 31, 2010), <http://www.nahro.org/house-committee-passes-housing-preservation-and-tenant-protection-act-2010> (analyzing, among other things, a debate as to “whether residents receiving federal housing assistance should be allowed to own guns”). The Act was never enacted. *H.R. 4868 (111th): Housing Preservation and Tenant Protection Act of 2010, Bills*, GOV. TRACK, <http://www.govtrack.us/congress/bills/111/hr4868> (last visited Aug. 10, 2013). NAHRO “is the leading housing and community development advocate” for affordable housing in the United States. *About NAHRO*, NAHRO, <http://www.nahro.org/about-nahro> (last visited Aug 2, 2013). NAHRO’s membership includes about 23,000 housing agencies and officials. *Mission Statement*, NAHRO, <http://www.nahro.org/nahro-mission> (last accessed Nov. 19, 2012).

official policy relating to restrictions on firearms in public housing.<sup>212</sup> Bynum also told the Caesar Rodney Institute also that “[l]eases are a local thing that HUD does not control.”<sup>213</sup> Also before the lawsuit was filed, Bill Maher, general counsel for NAHRO, stated that NAHRO supports “reasonable restrictions on gun possession” by public housing authorities, but that under *McDonald*, public housing authorities “can’t ban [gun possession] outright.”<sup>214</sup>

### III. ANALYZING DOE AND THE COMMON AREA CAVEAT

Given the prior precedent and public policy considerations implicated by the common area caveat, the *Doe* court correctly upheld the common area caveat.<sup>215</sup> To determine whether the common area caveat violated the Second Amendment, the *Doe* court worked within the framework of the Supreme Court’s *Heller* and *McDonald* decisions and the Third Circuit’s *Marzzarella* test.<sup>216</sup> The common area caveat is, at its core, a regulation that balances the individual right to bear arms and tenant safety in common areas.<sup>217</sup> Considering the limitations placed on gun regulations by *Heller* and *McDonald*, the *Doe* court correctly concluded that the common area caveat is constitutional.<sup>218</sup>

Under *Heller* and *McDonald* it is apparent that the Second Amendment provides an individual right to bear arms.<sup>219</sup> *Heller* and *McDonald* establish that rational basis review is not the appropriate standard of review to apply to Second Amendment challenges.<sup>220</sup> However, the Court declined to explain in either *Heller* or *McDonald* what specifically constitutes a Second Amendment violation or what standard of review is appropriate in evaluating Second Amendment claims.<sup>221</sup> The *Doe* court recognized this, and looked to the Third Circuit’s *Marzzarella* decision for guidance.<sup>222</sup>

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212. Lee Williams, *HUD: Public Housing gun bans a local decision*, CAESAR RODNEY INSTITUTE (Feb. 9, 2010), <http://www.caesarrodney.org/pdfs/WHAlegalfolloPDF.pdf>.

213. *Id.*

214. Ideas and Trends, *Wilmington Housing Authority Plans to End Ban on Gun Possession*, 38 HOUSING & DEV. REP. [CURRENT DEV.] 520, 520 (2010).

215. See *infra* notes 242–44 and accompanying text.

216. See *supra* notes 172–74 and accompanying text.

217. See *Doe v. Wilmington Hous. Auth.*, 880 F. Supp. 2d 513, 536–37 (D. Del. 2012), (C.A. No. 1:10-00473-LPS), *cert. granted* (De. July 30, 2013) (explaining that the WHA’s obligation to ensure the safety of all people on their property justifies the burden the common area caveat imposes on the tenants’ right to bear arms).

218. The plaintiffs arguably agree, as they did not appeal the District Court’s dismissal of their Second Amendment claims. See Plaintiff’s Notice of Appeal, *supra* note 25.

219. See *supra* text accompanying notes 87–88.

220. See *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008).

221. See *supra* notes 89–92.

222. See *supra* note 174 and accompanying text.

The *Doe* court was right to apply the two-pronged *Marzzarella* test<sup>223</sup> conservatively, declining to determine whether the individual right to bear arms extended to common areas,<sup>224</sup> but still proceeding to analyze whether the common area caveat withstood intermediate level scrutiny.<sup>225</sup> If the first prong of the *Marzzarella* test is answered in the negative, then no further analysis is required.<sup>226</sup> The *Doe* court was correct to be cautious, and rather than decide this question, proceeded to the second prong of the *Marzzarella* test.<sup>227</sup> This conservative approach to the question of Second Amendment protections allowed the *Doe* court to conduct the intermediate scrutiny analysis without setting a precedent that could prove problematic in the future.<sup>228</sup> The *Doe* court's approach was also prudent in light of the fact that neither the Supreme Court nor the Third Circuit "have expressly recognized a Second Amendment right" outside of the home.<sup>229</sup>

Furthermore, even if Third Circuit precedent had not prescribed intermediate scrutiny, the *Doe* court correctly declined to apply strict scrutiny to the common area caveat analysis.<sup>230</sup> The common area caveat can be distinguished from the ban on firearms like the District of Columbia ban that was overturned in *Heller*,<sup>231</sup> or the statutorily-mandated ban overturned in *McDonald*.<sup>232</sup> In fact, the common area caveat arguably provides for the individual right to bear arms by specifically restricting firearms only in common areas, subject to two exceptions—transportation "to or from the resident's unit" and self-defense.<sup>233</sup> Given that *Heller* and *McDonald* explicitly prohibit applying rational basis review, while also, arguably, implicitly prohibiting strict scrutiny analysis in cases such as the one at issue, the *Doe* court was left with no other choice but to apply intermediate scrutiny.<sup>234</sup>

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223. See *supra* notes 95–100 and accompanying text.

224. See *supra* notes 182–83 and accompanying text.

225. See *supra* notes 184–95 and accompanying text.

226. *Id.* (explaining that under the first prong, if the conduct does not fall "within the scope of the Second Amendment's guarantee," the court's "inquiry is complete").

227. *Doe v. Wilmington Hous. Auth.*, 880 F.Supp.2d 513, 530–32.

228. See *Doe*, 880 F.Supp.2d at 530–31 (upholding the revised firearms policy under intermediate scrutiny, but declining to rule on whether *Heller* applies outside of the home).

229. *Id.* at 530.

230. See *infra* 231–34 and accompanying text.

231. See *District of Columbia v. Heller*, 576 U.S. 570, 574–75 (2008) (explaining nature of the D.C. firearms ban at issue).

232. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (describing the Chicago firearms ordinance at issue).

233. *Doe*, 880 F. Supp. 2d at 534–35.

234. *Id.* at 532–34 (explaining the court's decision to apply intermediate scrutiny in light of *Heller*'s rejection of rational basis review for Second Amendment challenges and the fact that strict scrutiny should only be applied in cases where gun possession is severely limited).

In applying intermediate scrutiny to the common area caveat, the court must determine whether the restriction of firearms in common areas is “substantially related” to achieving an important governmental purpose.<sup>235</sup> Under *Marzzarella*, the court must also be satisfied that the challenged regulation fits reasonably with the governmental purpose and does not unnecessarily burden the individual right to bear arms.<sup>236</sup> WHA, like all other housing authorities, is mandated by the 1937 Act to provide safe housing for its tenants.<sup>237</sup> Even the plaintiffs in *Doe* conceded that ensuring the safety of WHA’s residents qualified as an important governmental purpose.<sup>238</sup> Thus, the *Doe* court appropriately concluded that the first part of the intermediate scrutiny test was satisfied.<sup>239</sup> Furthermore, a workable and effective gun control policy is arguably an integral part of WHA’s safety interests.<sup>240</sup> The common area caveat simultaneously acknowledges the importance of the Second Amendment by allowing for the possession of legal weapons in a tenant’s unit and provides a mechanism for ensuring tenant safety outside of the unit, that is in the common areas.<sup>241</sup> Thus, the *Doe* court was correct to conclude “as a matter of common sense” that there is a reasonable fit between the common area caveat and WHA’s interest in ensuring tenant safety in the common areas.<sup>242</sup>

#### IV. CONCLUSION

The common area caveat allows housing authorities to strike a delicate balance between respecting the individual right to bear arms and fulfilling their mandate under the 1937 Act to provide safe housing to their tenants. A recent survey of 335 public housing authorities revealed that only forty-one percent had firearms prohibitions in place.<sup>243</sup> By adopting the common area caveat, public housing authorities will be able to provide greater safety for their tenants, while simultaneously respecting the tenants’ Second Amendment

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235. See *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (explaining that an essential requirement of scrutiny is showing that the statute or regulation in question is “substantially related to an important governmental objective”).

236. *United States v. Marzzarella*, 614 F.3d 85, 98 (3d Cir. 2010).

237. See 42 U.S.C. §§ 1437(a), 1437(c)-1(d)(14) (2006); DEL. CODE ANN. tit. 31, §§ 4302–4304 (2009 & Supp. 2012).

238. *Doe*, 880 F. Supp. 2d at 535 (D.Del. 2012).

239. *Id.*

240. See *id.* (noting that “the stated goal of the Common Area Provision is to promote and protect the safety of WHA residents, their guests, and WHA employees. . . WHA, as a state agency has an important and substantial interest in protecting the health, safety, and welfare of its residents, their guests, its employees, and the public at large while on WHA property”).

241. *Id.* at 533 (explaining that the common area caveat does not completely ban the possession of firearms, but instead allows residents to exercise their Second Amendment rights within their own homes).

242. *Id.* at 535–36.

243. *Wilmington Housing Authority Plans to End Ban on Gun Possession*, *supra* note 214.



rights. After all, safety on public housing authority property should not be subordinated to gun rights.<sup>244</sup>

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244. See Brief for Brady Center to Prevent Gun Violence as Amicus Curiae in Support of Defendants, *supra* note 156, at 2 (“Public housing safety must not be forsaken in the drive for new, and ever-expanding, gun rights”).

