IN THE SUPREME COURT OF THE STATE OF VERMONT
DOCKET NO. 2019-266

State of Vermont, Appellant

v.

Max Misch, Defendant-Appellee

APPEAL FROM SUPERIOR COURT, CRIMINAL DIVISION (BENNINGTON)
Docket No. 173-2-19 Bncr

AMICUS BRIEF OF GIFFORDS LAW CENTER, VERMONT MEDICAL SOCIETY, AND GUN SENSE VERMONT IN SUPPORT OF APPELLANT STATE OF VERMONT

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INTEREST OF *AMICI CURIAE*

Amicus curiae Giffords Law Center to Prevent Gun Violence, formerly the Law Center to Prevent Gun Violence, is a national, nonprofit organization dedicated to reducing gun deaths in America. The organization was founded in 1993 after a gun massacre at a San Francisco law firm, perpetrated by a shooter armed with semiautomatic pistols and large-capacity magazines, and was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization founded by former Congresswoman Gabrielle Giffords. Today, the organization provides legal expertise in support of effective gun safety laws, and has filed amicus briefs in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010), *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc), *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632 (Del. 2017), *National Shooting Sports Foundation, Inc. v. California*, No. S239397, 2018 Cal. LEXIS 4696 (Cal. Jun. 28, 2018), *Vt. Federation of Sportsmen's Clubs et al. v. Birmingham*, Dkt. No. 224-4-18 Wncv (Vt. Sup. Ct. July 24, 2018), and numerous other cases.

Amicus curiae Vermont Medical Society is a nonprofit member service organization with over 2,500 members, representing about 60% of practicing physicians and physician assistants in Vermont. It is dedicated to protecting the health of all Vermonters and to improving the environment in which Vermont physicians and physician assistants practice medicine. Consistent with its longstanding policy position, the Vermont Medical Society supports legislation like

Act 94 that restricts the sale and private ownership of large-capacity magazines. Vermont pediatrician Dr. Rebecca Bell testified in support of Act 94 on behalf of both the Vermont Medical Society and the Vermont Chapter of the American Academy of Pediatrics, explaining why firearms injuries and deaths are a public health crisis.

Amicus curiae GunSense Vermont, Inc. is a grassroots Vermont organization formed in 2013 following the shooting at the Sandy Hook elementary school in Connecticut. GunSense Vermont represents a growing coalition of concerned Vermonters who support common-sense laws designed to save lives and reduce gun violence. Its members include gun owners, non-gun owners, members of all three major political parties in Vermont, and others who recognize that gun violence poses a serious threat to public safety. GunSense Vermont supported Act 94, including its restriction on large-capacity magazines.

INTRODUCTION AND SUMMARY OF ARGUMENT

Large capacity magazines ("LCMs") holding more than 10 rounds of ammunition—in some cases up to 100 rounds—allow shooters to inflict mass casualties by continuously firing without pausing to reload. The fatality and injury numbers are staggering and speak for themselves. In 2011, a gunman at Congresswoman Gabrielle Giffords' constituent meeting in Tucson, Arizona fired 33 rounds in 15 seconds, hitting 19 victims and killing six; in 2012, the Sandy Hook gunman fired 154 rounds in minutes, killing 26 children and teachers; in 2015, the San Bernardino shooters shot over 100 rounds in three minutes, hitting 36 and

killing 14; in 2016, the Orlando gunman shot over 100 people, killing 49; in 2017, the Las Vegas gunman killed 58 and injured almost 500, firing nearly continuously into a crowd for approximately ten minutes; and in 2018, the shooter in Parkland, Florida used 30 to 40 round magazines to shoot 34 students, faculty, and staff and kill 17 of them.[1] LCMs are the common denominator.

The day after the Parkland school shooting last year, Vermonters were jolted by a frightening near-miss: the state police arrested an 18-year-old man who had detailed plans to use an AR-15 rifle, a 9mm handgun, and a 12-gauge shotgun to "beat the highest casualty count of all the other school shootings" at Fair Haven High School. He specifically planned to purchase ammunition that "he believed would cause greater casualties and injuries."[2] *See State v. Sawyer*, 2018 VT 43, ¶ 7, 187 A.3d 377, 381 (2018) (noting that the defendant "told the officers that he wanted to exceed the body count from the Virginia Tech shooting and that he had chosen his ammunition accordingly").

Following two months of hearings and deliberation, in April 2018 the Vermont Legislature passed several measures aimed at preventing gun

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[1] *See e.g.*, Alex Horton, *Las Vegas Shooter Modified a Dozen Rifles to Shoot Like Automatic Weapons,* Washington Post, Oct. 3, 2017, *available at* https://www.washingtonpost.com/news/checkpoint/wp/2017/10/02/video-from-las-vegas-suggests-automatic-gunfire-heres-what-makes-machine-guns-different/?; Joe Mozingo, *'The worst thing imaginable:' Bodies and blood everywhere after San Bernardino terrorist attack, DOJ report shows*, L.A. Times, Sept. 9, 2016, *available at* https://www.latimes.com/local/lanow/la-me-san-bernardino-terror--20160909-snap-story.html

[2] Charging Document, *State v. Sawyer*, Docket No. 142-2-18 Rdcr (Sup. Ct. Rutland Unit, Feb. 16, 2008), https://www.documentcloud.org/documents/4380795-Jack-Sawyer-Charging-Document.html#document/p3.

violence. *See* 2017 Adj. Sess., No. 94 ("Act 94"). Act 94 included a ban on the manufacture, possession, transfer, sale, purchase, or receipt in Vermont of LCMs. *Id.* § 8 (codified at 13 V.S.A. § 4021). Vermont's LCM legislation is similar to laws in other jurisdictions that have been upheld by the First, Second, Third, Fourth, Seventh, and D.C. Circuits, and by other state and federal courts. *See infra* § I.B.

This Court should affirm the decision below. First, Act 94's LCM restrictions are constitutional under any standard of review. LCMs pose an unjustifiable risk to public health and safety, as evidenced by history and common sense and as reflected in the decisions by numerous federal and state courts upholding similar laws. Second, the Court should reject Defendant's unprecedented and extreme interpretation of Article 16 of the Vermont Constitution. Consistent with precedent construing Article 16 and other provisions of the state constitution, the Court should defer to the Legislature's measured judgment that LCMs pose an unacceptable risk to public health and safety.

ARGUMENT

I. Vermont's LCM ban survives any standard of review.

When Governor Scott signed Act 94, Vermont joined state and local governments across the country that have saved lives by banning LCMs.[3] LCMs are

[3] *See* Cal. Penal Code §§ 16740, 32310 (West 2015); Colo. Rev. Stat. Ann. §§ 18-12-301(2), 18-12-302 (West 2013); Conn. Gen. Stat. Ann. §§ 53- 202w(a)(1), 53-202w(b) (West 2013); D.C. Code Ann. § 7-2506.01(b) (West 2012); Haw. Rev. Stat. Ann. §§ 134-1, 134-4, 134-8(c) (West 2013); Md. Code Ann., Crim. Law §§ 4-306(b)(1) (West 2013); Mass. Gen. Laws Ann. ch. 140, §§ 121, 131M (West 2014); N.J. Stat. Ann. §§ 2C:39-1(y), 2C:39-3(j), 2C:39-9(h) (West 2014); N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.10 (McKinney 2018);

repeatedly and predictably used in mass shootings and attacks on law enforcement officers because they allow shooters to fire more bullets without stopping. Shooters use LCMs to kill and wound more people—more parents, teachers, police officers, students, and children—much more quickly than they otherwise could with a single weapon. LCMs are intended for military-style assaults. They are not necessary or suitable for self-defense.

Act 94's ban on LCMs satisfies any level of judicial scrutiny. Multiple federal courts have upheld LCM restrictions under the Second Amendment, even applying heightened scrutiny. As explained below, *see infra* Part II, the Vermont Constitution permits reasonable regulations of firearms and does not require courts to apply heightened scrutiny. But with respect to Act 94, the State's indisputable interest in public safety is so compelling that the standard of review does not matter. The horrific toll of casualties and injuries from mass shootings and everyday gun violence confirms that Act 94's ban on LCMs survives scrutiny under any standard of review.

A. LCMs allow shooters to kill more people and thus pose an unjustifiable threat to public health and safety.

With LCMs, a shooter can fire more bullets without pausing to reload, inflicting mass casualties in an extremely short timeframe using a single weapon. This fact amply justifies Act 94. A review of mass shootings between 2009 and 2017

Cook Cnty., Ill., Code of Ordinances §§ 54-211 – 54-213; Boulder Revised Code §§ 5-8-2, 5-8-28; S.F. Police Code § 619; Sunnyvale, Cal., Municipal Code § 9.44.050. California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New York, and the District of Columbia define an LCM as a magazine capable of holding over 10 rounds, while Colorado defines an LCM as a magazine capable of holding over 15 rounds.

found that shootings involving LCMs resulted in twice as many fatalities, with 14 times as many injuries per incident on average, compared to those without.[4] Indeed, the horrific nature of mass shootings involving LCMs is now burned into the national consciousness and has irreparably scarred communities across the country:

- *August 2019*: A gunman in Dayton, Ohio used an assault weapon and a drum magazine that held 100 rounds to fire at least 41 rounds of ammunition in under 30 seconds, killing nine and wounding 26 others.[5] Just thirteen hours earlier in Texas, a shooter at an El Paso Walmart used large-capacity magazines to kill 22 people and injure 24 others.[6]

- *February 2018*: A gunman used a weapon equipped with 30- to 40-round magazines to kill 17 students and educators at a high school in Parkland, Florida.[7]

- *November 2017*: A gunman massacred 26 worshippers and injured 20 others during a church service in Sutherland Springs, Texas. Law enforcement "collected hundreds of shell casings from the church, including 15 magazines with 30 rounds each."[8]

- *October 2017*: A gunman opened fire from the 32nd floor of a hotel in Las Vegas, killing 58 people and injuring hundreds. He was armed with at least 20 firearms, including two assault rifles and 12 LCMs – each holding up to 100 rounds.[9]

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[4] Everytown Research, Analysis of Recent Mass Shootings (Dec. 2018), https://everytownresearch.org/reports/mass-shootings-analysis/.

[5] Holly Yan et al., *The Dayton Gunman Killed 9 People by Firing 41 Shots in 30 Seconds. A High-Capacity Rifle Helped Enable that Speed*, CNN (Aug. 5, 2019, 5:57 PM), https://www.cnn.com/2019/08/05/us/dayton-monday-shooter-stopped-in-seconds/index.html.

[6] Laura Santhanam, *What We Know About the El Paso and Dayton Shooters' Guns*, PBS (Aug. 6, 2019, 4:52 PM), https://www.pbs.org/newshour/nation/why-the-weapons-used-in-this-weekends-shootings-are-controversial

[7] See Marjory Stoneman Douglas High School Public Safety Commission Report, Fl. Dep't of Law Enforcement, at 32, 262-63 (Jan. 2, 2019), *available at* http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf.

[8] Jennifer Calfas and Mahita Gajanan, *What to Know About the South Texas Church Shooting*, Time Magazine, (Nov. 6, 2017), http://time.com/5010772/texas-sutherland-springs-church-shooting/.

[9] Larry Buchanan et. al., *Inside the Las Vegas Gunman's Mandalay Bay Hotel Suite*, N.Y. Times, (Oct. 4, 2017), https://www.nytimes.com/interactive/2017/10/04/us/vegas-shooting-hotel-room.html.

- *June 2016*: A gunman entered an Orlando, Florida nightclub with 30-round magazines and a semiautomatic rifle, shooting over 100 people and killing 49. His victims "suffered more than 200 gunshot wounds."[10]

- *December 2015*: Assailants shot 36 people in less than four minutes in an attack in San Bernardino, California.[11] The shooters were armed with "at least four high-capacity magazines and more than a thousand rounds of ammunition."[12]

- *December 2012*: A gunman killed 26 people at Sandy Hook Elementary School in Newtown, Connecticut. Twenty of the dead were young children. The gunman was armed with a Bushmaster XM-15 assault rifle, two handguns, multiple 30-round magazines, and hundreds of rounds of ammunition.[13]

- *July 2012*: A gunman using an assault weapon equipped with a 100-round drum magazine opened fire in a movie theater in Aurora, Colorado, shooting 58 people and killing 12.[14]

- *January 2011*: A gunman opened fire at Representative Gabrielle Giffords' constituent meeting in a supermarket parking lot in Tucson, Arizona. The gunman emptied his 30-round magazine, killing 6 and wounding 14, including Rep. Giffords.[15] The victim killed by the shooter's 13th bullet was a nine-year-old girl.[16]

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[10] Jack Date et al., *Orlando Shooter Bought Weapons at Nearby Gun Shop*, ABC News, (Jun. 13, 2016), https://abcnews.go.com/US/orlando-shooter-bought-weapons-nearby-gun-shop/story?id=39817471.

[11] Sherry Barkas, *California Massacre: Officers Relive Terror Attack*, Desert Sun, (Nov. 29, 2016), https://www.desertsun.com/story/news/local/rancho-mirage/2016/11/30/san-bernardino-mass-shootings-one-year-later-police-lt-michael-madden/94294804/.

[12] Mike McIntire, *Weapons in San Bernardino Shootings Were Legally Obtained*, N.Y. Times, (Dec. 3, 2015), https://www.nytimes.com/2015/12/04/us/weapons-in-san-bernardino-shootings-were-legally-obtained.html.

[13] Sandy Candiotti, Greg Botelho, and Tom Watkins, *Newtown Shooting Details Revealed in Newly Released Documents*, CNN, (Mar. 29, 2013), https://www.cnn.com/2013/03/28/us/connecticut-shooting-documents/index.html.

[14] James Dao, *Aurora Gunman's Arsenal: Shotgun, Semiautomatic Rifle, and, at the End, a Pistol*, N.Y. Times, (July 23, 2012), https://www.nytimes.com/2012/07/24/us/aurora-gunmans-lethal-arsenal.html.

[15] FBI Records: The Vault, 2011 Tucson Shooting Part 01 of 09, Case ID No. 89A-PX-86099, at p.15 of 120, https://vault.fbi.gov/2011-tucson-shooting/2011-tucson-shooting%20Part%2001%20of%2009/view.

[16] *See* 159 Cong. Rec. S2743 (daily ed. Apr. 17, 2013) (statement of Sen. Leahy) (quoting Judiciary Committee testimony of Captain Mark Kelly).

Medical research confirms that mass shootings involving LCMs are deadlier than ever before.[17] A research letter in the Journal of the American Medical Association described how, even as trauma medicine has improved, more patients are dying from gunshots because they have been shot multiple times, more severely.[18] Between 2000 and 2013 in one major American trauma center, the "number of severe [gunshot wounds] per patient increased significantly" and, as a result, patients were more likely to die from gunshots than they were in the preceding decade.[19] Increased gunshot mortality was unique: the trauma center did not observe the same mortality spike for any other class of traumatic injury, including stabbings, car crashes, and falls or accidents.[20] Other hospitals, cities, and states that have analyzed the number of gunshot wounds per patient have observed the exact same trend: more victims coming in with multiple bullet wounds, making them more likely to die from their injuries.[21]

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[17] *See, e.g.*, Jen Christensen, *Gunshot Wounds Are Deadlier Than Ever As Guns Become Increasingly Powerful*, CNN, (Jun. 14, 2016), http://www.cnn.com/2016/06/14/health/gun-injuries-more-deadly/.

[18] *See* A. Sauaia et al., *Fatality and Severity of Firearm Injuries in a Denver Trauma Center, 2000-2013*, 315 JAMA 2465 (Jun. 14, 2016), https://jamanetwork.com/journals/jama/fullarticle/2528198 (noting that in one trauma center, "[f]irearm in-hospital case-fatality rates increased, contrary to every other trauma mechanism, attributable to the rising severity and number of injuries").

[19] *Id.*

[20] *Id.*

[21] *See* J. George, *Shoot to Kill*, Baltimore Sun, (Sep. 30, 2016), http://data.baltimoresun.com/news/shoot-to-kill/ (in Maryland, statewide "the number of victims shot five to nine times doubled" from 2005 to 2015, "as did those shot 10 or more times"); D. Livingston et al., *Unrelenting Violence: An Analysis of 6,322 Gunshot Wound Patients at a Level I Trauma Center*, 76 J. Trauma Acute Care Surg. 2 (2014) (hospital in Newark, New Jersey saw that the percentage of patients with three or more bullet wounds increased from 10 percent in 2001 to 23 percent in 2011); *see also* "More People Dying from Gunshot Wounds as Chicago Marks 400 Homicides," Chicago Tribune, (Jul. 28, 2017),

Social science research also documents strong links between LCM use, deadly mass shootings, and everyday gun crimes. A 2016 analysis of mass shooting data by Dr. Louis Klarevas observed that high-fatality "gun massacres" have become deadlier and more frequent since 1966, reaching "unprecedented" levels in the past decade.[22] The analysis concluded that LCM use is "the factor most associated with high death tolls in gun massacres."[23] A 2017 study by Dr. Christopher Koper similarly found that LCMs are "particularly prominent in public mass shootings and those resulting in the highest casualty counts."[24]

The same study highlighted the role LCMs play in fueling gun crimes generally, finding that after federal magazine restrictions were repealed in 2004, criminals began using large-capacity firearms much more frequently. Such guns grew as a share of firearms recovered in crime by between 33% and 112% and were disproportionately used in murders of law enforcement officers.[25] Police surveys corroborate these results by confirming that since 2004, nearly 40% of the nation's major police departments reported marked increases in criminals' use of magazines holding more than ten rounds of ammunition.[26] As a result of the increased criminal

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https://www.chicagotribune.com/news/breaking/ct-400-homicides-chicago-violence-shootings-20170728-story.html.

[22] Louis Klarevas, Rampage Nation: Securing America from Mass Shootings, 78-79 (2016).

[23] *Id.* at 257; *see also id.* at 215-25.

[24] Christopher S. Koper et al., Criminal Use of Assault Weapons and High-Capacity Semi-Automatic Firearms: An Updated Examination of Local and National Sources, 95 J. of Urban Health (Issue 3) 313, 319 (2018).

[25] *Id.* at 313.

[26] Police Executive Research Forum, Guns and Crime: Breaking New Ground By Focusing on the Local Impact 24 (2010), https://www.issuelab.org/resources/14333/14333.pdf

use of LCMs, some police departments witnessed an uptick in gun fatalities despite *fewer* shootings, because shooters are firing more rounds during a single shooting.[27]

LCM bans are an evidence-based counter to the epidemic use of large magazines in mass shootings and crimes. Between 1994 and 2004, when federal law restricted the sale and possession of LCMs, both the number of large-scale mass shootings and the number of deaths during such shootings fell dramatically.[28] A 2019 Stanford study found that the federal restrictions were "associated with a 25 percent drop in gun massacres" and "a 40 percent drop in fatalities" between 1994 and 2004, compared to the decade before their adoption.[29] Another study concluded that during the federal ban period, "mass shooting fatalities were 70% less likely to occur."[30] Unfortunately, when the federal restrictions expired in 2004, deadly large-scale shootings spiked once more, and deaths involving LCMs *quadrupled*.[31]

With all this evidence that LCM access fuels deadly gun rampages, it is not surprising that one Boston University researcher identified LCM bans as the strongest driver of lower mass shooting rates at the state level. Using data from Stanford University's Mass Shooting Database, which defines a mass shooting as an

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[27] *Id.* at 12 (although Newark, New Jersey "made an enormous reduction in shooting incidents," the city saw "an increase of 11 percent in our murder rate, because more rounds are being fired in particular incidents").

[28] *See* Klarevas at 240-243 & n. 40.

[29] John Donohue and Theodora Boulouta, *That Assault Weapon Ban? It Really Did Work*, N.Y. Times, (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/opinion/assault-weapon-ban.html.

[30] Charles DiMaggio et al., Changes in US Mass Shooting Deaths Associated with the 1994-2004 Federal Assault Weapons Ban: Analysis of Open-Source Data, 86 Trauma Acute Car Surg. No. 1 11, 14 (2018).

[31] Klarevas at 350 n.40.

event with three or more casualties, Dr. Michael Siegel found that state laws prohibiting LCMs correlate with a 63% lower rate of mass shootings.[32] After considering "many possible socio-demographic factors," Dr. Siegel concluded that whether "a state has a large capacity ammunition magazine ban is the single best predictor of the mass shooting rate in that state."[33]

Opponents of magazine capacity regulation often respond to the expert consensus that LCM bans lower mass shooting deaths by falsely claiming that LCM regulations only harm law-abiding citizens engaging in self-defense because criminal shooters will ignore magazine restrictions or illegally obtain magazines out of state. In addition to being contradicted by the above evidence, this claim is wrong for two reasons. First, most mass shooters obtain their weapons lawfully. In a report examining active shootings from 2000 to 2013, the FBI concluded that "only very small percentages [of shooters] obtain[ed] a firearm illegally."[34] Lawmakers therefore can, and should, assume that prohibiting LCM possession will deter criminal use of LCMs. This type of reasonable assumption underlies virtually all laws aimed at regulating dangerous products. *Accord, e.g.*, *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1128-29 (7th Cir. 1995) ("Legislatures often

[32] Sam Petulla, *Here is 1 Correlation Between State Gun Laws and Mass Shootings*, CNN, (Oct. 5, 2017), https://www.cnn.com/2017/10/05/politics/gun-laws-magazines-las-vegas/index.html.

[33] Id.

[34] U.S. Dep't of Justice, Federal Bureau of Investigation, *A Study of the Pre-Attack Behaviors of Active Shooters in the United States Between 2000 and 2013* at 7 (June 2018), https://www.fbi.gov/file-repository/pre-attack-behaviors-of-active-shooters-in-us-2000-2013.pdf/view.

enact laws that reduce but cannot eliminate the effects of movements across municipal and state borders.").

Second, responsible self-defense rarely if ever involves firing anywhere close to 10 rounds. National Rifle Association surveys show that on average, self-defense involves approximately *two* rounds. *See Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017) (en banc) ("Studies of 'armed citizen' stories collected by the National Rifle Association, covering 1997-2001 and 2011-2013, found that the average number of shots fired in self-defense was 2.2 and 2.1, respectively"); *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 121 n.25 (3d Cir. 2018) ("The record reflects that most homeowners only use two to three rounds of ammunition in self-defense."). These statistics confirm that a 10-round magazine is more than enough for law-abiding, responsible citizens to defend themselves.

All this research, evidence, and testimony confirms what common sense and real-life experience tell us: When a person intent on killing can keep shooting without pause, more people will be injured and killed. When that shooter has to pause to reload, fewer people will be injured and killed. There are numerous, powerful examples illustrating the importance of this momentary pause to reload:

- When the Parkland shooter (who used 30- and 40-round LCMs) paused to reload, eight students were able to escape down a stairwell and survive the shooting.[35]

[35] Marjory Stoneman Douglas High School Public Safety Commission Report, Fl. Dep't of Law Enforcement, at 32 (Jan. 2, 2019), *available at* http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf; *see also id.* at 262 ("Eight 30- and 40-round capacity magazines were recovered from the scene.")

- During the mass shooting in Thousand Oaks, California (where the shooter used an LCM), rescuers were able to pull people through windows to safety as the gunman paused to reload.[36]

- When the Sandy Hook shooter (who used 30-round LCMs) stopped to reload, nine children were able to flee to safety.[37]

Restricting the sale and possession of LCMs saves lives, without compromising self-defense. The State's choice to do so falls well within its power to protect the health and safety of all Vermonters, regardless of the standard of review.

B. Courts have upheld LCM bans as permissible regulations to protect public safety and reduce crime.

With Act 94, Vermont joined eight other states and the District of Columbia, as well as a number of municipalities, that have banned or restricted access to LCMs. Multiple federal appellate courts, including the Second Circuit, have upheld these measures. *Worman v. Healey*, 922 F.3d 26, 30-31 (1st Cir. 2019); *Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 110; *Kolbe*, 849 F.3d at 121; *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 541-42 (10th Cir. 2016);[38] *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 247-48 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015); *Fyock v. Sunnyvale*, 779 F.3d 991,

[36] See Veronica Miracle, *Thousand Oaks Mass Shooting Survivor: "I Heard Somebody Yell, 'He's Reloading,'"* ABC News, (Nov. 8, 2018), https://abc7.com/thousand-oaks-survivor-i-heard-somebody-yell-hes-reloading/4649166/.

[37] Final Report, Sandy Hook Advisory Commission, at 12 (Mar. 6, 2015), *available at* http://www.shac.ct.gov/SHAC_Final_Report_3-6-2015.pdf.

[38] In *Colorado Outfitters*, the district court upheld the statute and the Tenth Circuit dismissed both the appeal and the underlying case for lack of standing.

994 (9th Cir. 2015);[39] *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1247-48 (D.C. Cir. 2011). Although these courts have taken different paths in their analysis, they reach the same result: the Second Amendment allows governments to ban or restrict access to LCMs.

For example, the Second Circuit rejected challenges to New York and Connecticut laws, enacted after the Sandy Hook massacre, that prohibit the sale of magazines holding more than 10 rounds. *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 247, 249-50. The court "assume[d] for the sake of argument" that LCMs are "protected by the Second Amendment" such that laws regulating them should be subject to heightened, intermediate scrutiny, but still held that the LCM bans were constitutional. *Id.* at 257, 260-61. The court observed that New York's and Connecticut's laws did not burden the "core" area of constitutional protection, defined in *Heller* as lawful self-defense, because citizens can still purchase any number of permitted magazines and retain the ability to use firearms for self-defense. *Id.* at 260. Moreover, the laws were substantially related to the states' important interests in ensuring public safety and controlling crime. *Id.* at 263-64.

In upholding a city ordinance prohibiting the possession of assault weapons and LCMs, the Seventh Circuit did not apply intermediate scrutiny, but instead

[39] In *Fyock*, the Ninth Circuit affirmed a district court's denial of a preliminary injunction against a California municipality's LCM ban. On July 17, 2018, a Ninth Circuit panel, in an unpublished 2-1 decision, held that another district court did not abuse its discretion in granting a preliminary injunction regarding California's state-wide LCM ban. *Duncan v. Becerra*, 742 F. App'x 218, 220 (9th Cir. 2018). The district court subsequently ruled in plaintiffs' favor on summary judgment, and the case has now returned to the Ninth Circuit. *See Duncan v. Becerra*, No. 17-CV-1017-BEN-JLB, 2019 WL 1510340, at *3 (S.D. Cal. Apr. 4, 2019)..

looked to whether the banned weapons were "common at the time of ratification" or had "'some reasonable relationship to the preservation or efficiency of a well-regulated militia'" and whether citizens "retain adequate means of self-defense." *Friedman*, 784 F.3d at 410 (*quoting District of Columbia v. Heller*, 554 U.S. 570, 622 (2008)). The Court upheld the ban because (1) neither assault weapons nor LCMs even existed in 1791; (2) "states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms, so as to have them available when the militia is called to duty;" and (3) the ordinance did not prevent law-abiding citizens from effectively providing for self-defense. *Id.* at 410-11. According to the court, the danger LCMs pose outweighs any potential self-defense use: "[A]ssault weapons with large-capacity magazines can fire more shots, faster, and thus can be more dangerous in aggregate. Why else are they the weapons of choice in mass shootings?" *Id.* at 411. Just recently, the Seventh Circuit reaffirmed *Friedman* in another challenge to an assault weapon and LCM ban. *See Wilson v. Cook Cty.*, No. 18-2686, 2019 WL 4063568, at *1 (7th Cir. Aug. 29, 2019).

In short, LCM restrictions have repeatedly survived heightened scrutiny under various modes of review. Courts recognize that a right to bear arms for self-defense does not preclude restrictions on dangerous, military-style weapons and accessories that facilitate mass shootings. Likewise here, Act 94 passes constitutional muster under any standard of review.

C. The Vermont Legislature relied on substantial and compelling evidence to address an unprecedented risk to public safety.

As Governor Phil Scott observed, "tragedies in Florida, Las Vegas, Newtown and elsewhere—as well as the averted plot to shoot up Fair Haven High School—have demonstrated [that] no state is immune to the risk of extreme violence." Gov. Phil Scott, Official Statement on Act 94 (S.55, S.221 & H.422) (Mar. 30, 2018).[40] The facts before the Vermont Legislature overwhelmingly supported Governor Scott's observation. The prior month, a young man named Jack Sawyer was arrested and charged in connection with his detailed plan for a mass shooting at Fair Haven Union High School. Sawyer's "Journal of an Active Shooter" described his extensive plans for a catastrophic shooting at his former school. Sawyer admitted that he was influenced by the 1999 Columbine massacre and planned to "beat the highest casualty count of all the other school shootings," in part by using ammunition that "would cause greater casualties and injuries."[41]

Sawyer's planned shooting was not an isolated incident in Vermont's recent past. In August 2005, state police arrested Christopher Greene in Brattleboro, Vermont, thwarting a potentially devastating attack. Police found handwritten notes in Greene's car outlining a planned attack on Greene's former school in Connecticut, including diagrams depicting the school from both the side and back

[40] See http://governor.vermont.gov/press-release/official-statement-s55-s221-h422.

[41] See Charging Document, *supra* n. 2. This Court subsequently held that Sawyer's preparations were not sufficient to constitute "attempt" to cause bodily injury with a deadly weapon or attempted murder. *State v. Sawyer*, 2018 VT 43, ¶ 1, 187 A.3d 377.

doors alongside the note "Heads: 3. Shoulders: 3. 2 Teachers. 2 to the legs."[42] His detailed notes outlined an apparent plot to escape to Brattleboro, cause a traffic-back up, and shoot drivers in the head on Interstate 91.[43] Along with the notes, police found a receipt for the purchase of the Ruger Mini-14 .223 assault rifle and a loaded magazine for the rifle.[44]

Unfortunately, not all shootings are averted. In August 2015, Jody Herring shot and killed three of her family members and then murdered social worker Lara Sobel outside a state office building in Barre.[45] And in August 2006, the Town of Essex experienced a deadly shooting rampage involving three different crime scenes, including Essex Elementary School.[46]

Following the averted mass shooting in Fair Haven, Vermont citizens mobilized in support of gun safety regulations.[47] These demonstrations reflected

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[42] Memorandum and Exs. in Support of Government's Mot. for Detention, *U.S. v. Greene*, Docket No. 2:06-CR-22 (D. Vt. filed April 10, 2006), http://lawcenter.giffords.org/wp-content/uploads/2018/07/US-v.-Greene-ECF-14.pdf; http://lawcenter.giffords.org/us-v-greene-ecf-14-1/; http://lawcenter.giffords.org/us-v-greene-ecf-14-2/.

[43] John Holl, *New Jersey Man is Accused of Plotting Attack in Vermont*, N.Y. Times, (July 15, 2005), https://www.nytimes.com/2005/07/15/nyregion/new-jersey-man-is-accused-of-plotting-attack-in-vermont.html

[44] Sentencing Mem. of the U.S. and Mot. for Upward Departure 1-2, *U.S. v. Greene*, Docket No. 2:06-CR-22 (D. Vt. filed Mar. 12, 2008), http://lawcenter.giffords.org/wp-content/uploads/2018/07/US-v.-Greene-ECF-54.pdf.

[45] Abbey Gingras, *Herring Pleads Guilty to Four Murder Charges*, Burlington Free Press, (July 6, 2017), https://www.burlingtonfreepress.com/story/news/2017/07/06/herring-hearing-homicide-barre-vt/453332001/.

[46] Wilson Ring, *Christopher Williams Pleads Innocent in Shooting Spree*, Rutland Herald, (Aug. 26, 2006), http://www.rutlandherald.com/articles/christopher-williams-pleads-innocent-in-shooting-spree/.

[47] *See, e.g.*, J. Walters, *Thousands Attend March for Our Lives Rally in Montpelier*, Seven Days, (Mar. 24, 2018), https://www.sevendaysvt.com/OffMessage/archives/2018/03/24/walters-thousands-attend-march-for-our-lives-rally-in-montpelier.

longstanding and broad support, not a momentary reaction. Indeed, a July 2018 poll asked Vermonters if they "favor or oppose" Vermont's 2018 gun safety legislation (including limiting "the size of ammunition magazines"). Forty-five percent responded that they "completely favor," 22% "generally favor," while only 13% "generally oppose" and 12% "completely oppose."[48] These results are consistent with a 2013 poll by the Castleton Polling Institute, which found that 66% of respondents favor (with 35% "strongly" in favor) banning LCMs.[49]

The Fair Haven plot also "jolted" Governor Scott, who candidly reflected, "This was one of those situations where I feel like I was given a second chance to help avoid a catastrophic event. And I was determined not to let it slip through my fingers."[50] Acknowledging how close Vermont had come to suffering the latest school massacre, Governor Scott unveiled an action plan urging the Legislature to pass multiple gun safety measures, including magazine-capacity restrictions.[51]

The Legislature responded by convening numerous committee hearings and a public hearing between late February and early March. Citizens and interest

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[48] VPR — Vermont PBS Poll (July 2018), http://projects.vpr.org/vpr-vermont-pbs-poll-july-2018.

[49] Castleton Poll Measures Vermonters' Support for Gun Control Measures, Complete Poll Results (Feb. 21, 2013), http://www.castleton.edu/academics/undergraduate-programs/political-science/poll-results/castleton-poll-measures-vermonters-support-for-gun-control-measures/.

[50] P. Heintz, *In Range: The Week That Changed Vermont's Gun Politics*, Seven Days, (Feb. 28, 2018), https://www.sevendaysvt.com/vermont/in-range-the-week-that-changed-vermonts-gun-politics/Content?oid=13165766.

[51] Peter Hirschfeld, *In Less Than a Week, Scott and Lawmakers Put Gun Control Bills on Fast Track*, VPR, (Feb. 22, 2018), http://digital.vpr.net/post/less-week-scott-and-lawmakers-put-gun-control-bills-fast-track#stream/0.

groups on all sides of the issues provided testimony and information.[52] In the end, the Executive and Legislative branches, reflecting cross-partisan support, concluded that Act 94's gun safety measures, including the LCM provision, were needed to reduce the urgent risk of high-fatality shootings in Vermont.[53]

Opponents of Act 94 invoke Vermont's tradition of hunting and responsible gun ownership to advance a categorical rule against all firearm regulations. Yet throughout its history Vermont's legislature has responded to safety concerns raised by firearms and their accessories with common-sense laws like Act 94, including by regulating magazine capacity. In the 1920s and 1930s, many states and the federal government responded to growing gun violence by regulating machine guns and semiautomatic firearms[54] and by restricting weapons based on ammunition

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[52] *See, e.g.*, Letter from Addison Cent. Sch. Dist. Bd. to Gov. P. Scott, Speaker M. Johnson, and Pro Tem T. Ashe (Feb. 19, 2018) ("Whereas, Vermont school districts are forced to spend larger and larger portions of their limited budgets on security-related facilities upgrades, security personnel, trainings, and drills to potentially defend our students, staff, and community members against military-style attacks on our students, staff, and school buildings");Written Testimony of Rebecca Bell, M.D. (on behalf of the Vermont Chapter of the American Academy of Pediatrics & the Vermont Medical Society) (March 14, 2018) ("Firearm injury and death is a public health crisis…I have witnessed first-hand the damage that knives and fists and other blunt objects can inflict. But adding a gun to the picture drastically changes the outcome. An argument between teenagers that would likely have ended in broken bones instead can end fatally if a gun is present."); Written Testimony of Madison Knoop (March 14, 2018) ("After [the Sandy Hook Massacre] I was terrified to go to school. I even refused to go for a little. And, I'm still terrified."); Compilations of Constituent Emails regarding S.55 (Entered on March 23, 2018), *available at* https://legislature.vermont.gov/committee/document/2018/18/Bill/85082#documents-section

[53] *See* Paul Heintz, Taylor Dobbs, and John Walters, *In Historic Shift, Vermont's GOP Governor and Democratic Leaders Embrace Gun-Control Measures*, Seven Days (Feb. 22, 2018), https://www.sevendaysvt.com/OffMessage/archives/2018/02/22/in-dramatic-shift-vermonts-democratic-leaders-unite-behind-background-checks.

[54] See generally Adam Winkler, Gunfight: The Battle over the Right to Bear Arms in America 187-93, 203-10 (2011); Robert Spitzer, Gun Law History in the United States and Second Amendment Rights, 80 Law & Cont. Probs. 55, 67-69 (2017).

capacity.[55] In 1923, Vermont joined these states by banning hunters from using "a machine gun of any kind or description, *or an automatic rifle of military type with a magazine capacity of over six cartridges*." 1923 Vt. Acts and Resolves 130 (emphasis added). The bill's initial language did not contain this final clause, which was added on the Senate's recommendation. *See* JOURNAL OF THE SENATE OF THE STATE OF VERMONT, 202-03 (1923). By adding this clause, the Legislature ensured that the law would specifically regulate the magazine capacity of military-style automatic rifles. This law remains in effect in a slightly amended form at 10 V.S.A. § 4704.

Other Vermont laws illustrate the Legislature's history of responding to new firearm dangers and constituent concerns over emerging public safety risks. On March 23, 1912, the Bennington Evening Banner ran a Vermonter's impassioned demand that the Legislature take up a ban on gun silencers, which the author called "an article which even the nations of the earth should combine against."[56] Later that year, the Legislature enacted a ban on gun silencers. 1912 Vt. Acts and Resolves No. 237 (this law remains in effect in amended form at 13 V.S.A. § 4010).

Similarly, the Vermont Legislature has regulated the sale and possession of firearms by minors since as 1896 *See* 1896 Vt. Acts & Resolves No. 111; *see also* 1904 Vt. Acts & Resolves No. 152, § 1. And this is another area in which the Legislature has responded to public demand for further restrictions. On March 16, 1911, the Bennington Evening Banner argued for renewed legislation after the

[55] See Spitzer, *supra*, at 68.

[56] The Bennington evening banner (Bennington, Vt.), 23 March 1912. Chronicling America: Historic American Newspapers. Lib. of Congress, *available at* https://chroniclingamerica.loc.gov/lccn/sn95066012/1912-03-23/ed-1/seq-4/.

shooting death of a fourteen-year old boy in Barre, Vermont, "the sixth fatality of the kind in this state during the past few months."[57] Responding to this outcry over what the public recognized as a growing risk, in 1912, the Vermont Legislature adopted more comprehensive restrictions on juveniles' unsupervised possession of firearms. 1912 Vt. Acts & Resolves No. 229. These restrictions remain in effect in a slightly amended form at 13 V.S.A. §§ 4007-4008.

Act 94's LCM ban is grounded in this tradition—another example of Vermont's political branches exercising their considered judgment to protect public health and safety. The Governor and legislators from across the political spectrum came together, assessed the evidence, and concluded that LCMs posed an unacceptable risk to the people of Vermont. These leaders did not reach this decision lightly. Rather, fulfilling their roles as the "trustees and servants" of the people's power, Vt. Const. ch. I, art. VI, they acted together to avert, in the Governor's words, a "catastrophic event." They responded to a danger that Vermonters clearly articulated, and that recent events both outside and within Vermont amplified. The Legislature's decision to ban LCMs is sound under any standard of Second Amendment review, and, as explained below, is fully consistent with the Vermont Constitution.

[57] The Bennington evening banner (Bennington, Vt.), 16 March 1911. Chronicling America: Historic American Newspapers. Lib. of Congress, *available at* http://chroniclingamerica.loc.gov/lccn/sn95066012/1911-03-16/ed-1/seq-2/.

II. The Vermont Constitution permits reasonable restrictions on dangerous weapons to protect public safety.

Defendant's constitutional challenges are meritless. The Vermont Constitution does not codify an unlimited right to possess and transfer weapons or accessories of every kind and purpose. Rather, Article 16 acknowledges that Vermonters have a "right to bear arms for the defence of themselves and the State." Vt. Const. ch. I, art. 16 (emphasis added). To the extent Article 16 protects an individual right to bear arms, that right is limited and defined as part of a right of self-defense. LCMs are offensive weapons for mass killing that do not warrant any protection under Article 16. Even if the Court affords some constitutional protection to the possession and sale of LCMs, the Court's review must reflect deference to the Legislature's determination that LCMs threaten public safety.

A. The rights protected by Article 16 do not extend to military-style weapons that are not reasonably needed or useful for self-defense.

In addressing Defendant's constitutional challenge, the Court must first address whether Article 16 protects an individual's right to purchase or possess military-style weaponry that is unnecessary for self-defense. Persuasive federal precedents suggest that the right to bear arms does not include such military-grade firearms and accessories. The U.S. Supreme Court recognized in *Heller* that the Second Amendment does not encompass an unlimited right to own every type of weapon. *Heller* expressly observed that "weapons that are most useful in military service—M-16 rifles and the like—may be banned" without violating the Second Amendment. *Heller*, 554 U.S. at 627.

Following *Heller*, the *en banc* Fourth Circuit rejected a Second Amendment challenge to Maryland's Firearm Safety Act of 2013, which banned certain assault weapons and LCMs. In *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017), the Fourth Circuit concluded that LCMs share the same "capability for lethality" as weapons intended for the battlefield, and that a large ammunition supply "enable[s] a shooter to hit multiple human targets very rapidly." *Id.* at 137 (quotation omitted). Based on its determination that these devices "are particularly designed and most suitable for military and law enforcement applications," as well as a lack of evidence that state residents needed to fire more than ten rounds for self-protection, the Fourth Circuit held that LCMs "are not constitutionally protected." *Id.* (quotation omitted).

As *Kolbe* confirms, responsible, law-abiding citizens do not require LCMs for self-defense. To the contrary, LCMs are unnecessary for and unsuited to everyday self-defense. As an experienced law enforcement officer explained, the "typical self-defense scenario in a home does not require more ammunition than is available in a standard 6-shot revolver or 6-10 round semiautomatic pistol."[58] The average number of shots fired in self-defense is two. *See supra* page 12. Excessive firepower can endanger others nearby, because "in most self-defense scenarios, the tendency is for defenders to keep firing until all bullets have been expended."[59] *Id.* When

[58] *See* Brian J. Siebel, Brady Ctr. to Prevent Gun Violence, *Assault Weapons: Mass Produced Mayhem*, 16 (2008), *available at* http://www.american-manifesto.com/wordpress/wp-content/uploads/2008/10/mass-produced-mayhem.pdf (quoting Police Fear a Future of Armored Enemies, USA Today, Mar. 3, 1997, at 02A).

[59] *Id.*

civilians with inadequate training fire weapons with large-capacity magazines, they tend to fire more rounds than necessary and "pose a heightened risk of hitting innocent bystanders." *Id.*

Nothing in Vermont's history or current circumstances suggests any valid need to use LCMs for self-defense. Vermont has the second lowest rate of violent crime and the lowest homicide rate in the country.[60] Amici are not aware of any law-abiding Vermonter who, while acting in self-defense during a home invasion or assault, had to fire more rounds than are contained in the magazines permitted under 13 V.S.A. § 4021. LCMs are a relatively recent innovation and accordingly played no role in Vermont's longstanding traditions of hunting or self-defense. Before the 1980s, the only handgun most American gun owners possessed was a revolver, which typically held six rounds.[61] Only in the 1980s did the gun industry begin aggressively producing and promoting pistols that could be equipped with larger magazines, mimicking new U.S. military weapons.[62] In the 1980s and 1990s, as Americans recognized the danger posed by widespread access to LCMs, more jurisdictions restricted their possession (*see supra* n.3), including the federal

[60] Federal Bureau of Investigations, Crime in the United States 2016, Table 3, https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/cius-2016; Center for Disease Control and Prevention, Homicide Mortality by State, https://www.cdc.gov/nchs/pressroom/sosmap/homicide_mortality/homicide.htm

[61] Violence Policy Center, Backgrounder on Pistol and Ammunition Magazines Used in Attack on Representative Gabrielle Giffords and Others 1 (Jan. 2011), http://www.vpc.org/fact_sht/AZbackgrounder.pdf.

[62] *Id.*; Alain Stephens, *The Gun Industry is Betting on Bigger High-Capacity Magazines*, Trace (Jun. 12, 2019), https://www.thetrace.org/2019/06/gun-industry-high-capacity-magazine-size/.

government, which banned LCMs beginning in 1994 until the law was allowed to lapse in 2004. *See supra* page 10.

Even if military-style rifles and LCMs have become more popular since the federal ban expired in 2004, that newfound popularity does not mean that LCMs are reasonably necessary for Vermonters to protect themselves and their homes. Weapons equipped with LCMs are sometimes used for recreational competitions and target shooting, but Article 16 does not protect recreation; it protects self-defense. There is no evidence that LCMs are well suited to or necessary for self-defense. Evidence to the contrary abounds.

B. Consistent with text, history, and precedent, the Court should construe Article 16 in a manner that respects the Legislature's traditional authority to regulate public safety.

As explained above, Act 94 reflects a considered and deliberate legislative judgment that restrictions on LCMs are necessary to protect public safety. Defendant may not use this challenge to draw the Court into a re-trial of the debate resolved by the political branches. "Subject to constitutional limitations," the Legislature "is authorized to pass measures for the general welfare of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted." *Ex parte Guerra*, 94 Vt. 1, 110 A. 224, 227 (1920); *see also State v. Curley-Egan*, 2006 VT 95, ¶ 11, 180 Vt. 305, 910 A.2d 200.

The Court's settled interpretation of Article 16 recognizes that the rights it protects are not unlimited and must co-exist with reasonable public safety regulations. In *State v. Duranleau*, the Court upheld a statute requiring that rifles and shotguns carried in vehicles be unloaded. 128 Vt. 206, 210, 260 A.2d 383, 386

(1969). Although the statute "admittedly somewhat conditions the unrestrained carrying and operation of firearms," its purpose was assumed to be "reasonable" and the prohibition did not cause "such an infringement on the constitutional right to bear arms as to make the statute invalid." *Id.* The Court explained that "the language of" Article 16 "does not suggest that the right to bear arms is unlimited and undefinable." *Id.*

Duranleau's interpretation of Article 16 fits comfortably with the Court's approach to other constitutional provisions. The Court has frequently recognized that constitutional rights, even when phrased in more absolute language than Article 16, are subject to reasonable regulations. Indeed, well over 150 years ago, the Court placed a historical gloss on Article 11's proclamation that "the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure." In *Lincoln v. Smith*, 27 Vt. 328, 346 (1855), the Court looked to the U.S. Constitution and historical context in construing Article 11 "to secure only against *unreasonable* searches and seizures." (Emphasis added.) More recently, the Court reaffirmed *Lincoln*, holding that "Article Eleven does not mandate an absolute prohibition against searches and seizures undertaken without a proper warrant." *State v. Record*, 150 Vt. 84, 85, 548 A.2d 422, 423 (1988) (word 'unreasonable' is "as implicit in Article Eleven as it is express in the Fourth Amendment"); *see also State v. Kirchoff*, 156 Vt. 1, 4, 587 A.2d 988, 991 (1991) (same).

The Court has taken a similarly measured approach to its interpretation of Article 7's Common Benefits Clause. The Clause provides "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." Vt. Const. ch. I, art. 7. The Court has never held, however, that the Clause prohibits *all* legislative classifications. Instead, the Court looks to the purpose and the nature of the classification in assessing whether the challenged law bears "a reasonable and just relation to the governmental purpose." *Baker v. State*, 170 Vt. 194, 214, 744 A.2d 864, 879 (1999); *see also Badgley v. Walton*, 2010 VT 68, ¶ 23, 188 Vt. 367, 378, 10 A.3d 469, 477. The interpretation adopted in *Baker* eschews "rigid categories" in favor of a "balancing approach," and includes a significant degree of deference to the "legislative prerogative to define and advance governmental ends." *Baker*, 170 Vt. at 203, 206, 744 A.2d at 871, 873; *Badgley*, 2010 VT 68, ¶ 21 ("We accord deference to legislation having any reasonable relation to a legitimate public purpose." (quotation omitted)).

As yet another example, the Court squarely refused to construe the constitutional right to a jury trial in absolute terms. Article 12 provides that "when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred." Vt. Const. ch. I, art. 12. But in 1990, facing severe budget shortfalls, the court administrator placed a temporary moratorium on civil jury trials. *See Vermont Supreme Court Admin.*

Directive No. 17 v. Vermont Supreme Court, 154 Vt. 392, 394, 579 A.2d 1036, 1037 (1990). When litigants challenged the moratorium as violating Article 12, the Court rejected that position, holding that its "precedents do not support the absolutist view of the jury trial right that the petitioners espouse." *Id.* at 399, 579 A.2d at 1040. Looking to history and precedent, the Court reasoned that "actions that may delay or condition the jury trial right do not by themselves infringe on that right" and declined to adopt a "*per se*" rule. *Id.* at 401, 579 A.2d at 1041.[63]

In short, no relevant or analogous precedent supports interpreting Article 16 as a rigid *per se* rule precluding reasonable regulation to protect public safety. This Court has consistently recognized the government's latitude to implement reasonable regulations in the face of more absolute constitutional provisions than Article 16, which expressly qualifies the right in terms of Vermonters' "defence of themselves and the State." Without question, Vermonters treasure the individual freedoms and egalitarian traditions protected in their state constitution. *See Baker*, 170 Vt. at 211, 744 A.2d at 876-77 ("The Vermont Constitution would ensure that the law uniformly afforded every Vermonter its benefit, protection, and security so that social and political preeminence would reflect differences of capacity, disposition, and virtue, rather than governmental favor and privilege."). The state

[63] The Court has also recognized the need to balance protection of individual rights with other interests in its decisions that permit damages remedies in some circumstances but place substantial limits on the availability of money damages. *See Zullo v. State*, 2019 VT 1, ¶ 52, 205 A.3d 466, 490 (holding that restrictions on damages for Article 11 violations are necessary to avoid "potential flood of litigation for every alleged constitutional violation and the potential chilling effect on citizens serving on local boards" and noting that law enforcement should not be inhibited from "taking some effective and constitutionally permissible actions in pursuit of public safety").

charter is the "primary safeguard of the rights and liberties of all Vermonters." *Id.* at 202, 744 A.2d at 870. But Article 16—adopted when the most common firearm was a single-shot musket— cannot reasonably be construed to prevent measured, evidence-based regulations aimed at military-style devices that facilitate mass shootings.

Indeed, for most of this nation's history, nearly every state has applied a "reasonable regulation" test when reviewing constitutional challenges to gun laws. This test gives states leeway to adopt reasonable, public safety-driven firearm regulations with their inherent police powers. *See* Adam Winkler, *The Reasonable Right to Bear Arms*, 17 Stan. L. & Pol'y Rev. 593, 595, 598 (2006) (as of 2006, 42 states applied a reasonableness test). Since *Heller*, a number of state courts—across every region of the country—have re-affirmed the reasonable regulation test in cases involving a state's right to bear arms. *See, e.g.*, *State v. Jorgenson*, 312 P. 3d 960, 963-64 (Wash. 2013); *Hertz v. Bennett*, 751 S.E.2d 90, 96 (Ga. 2013); *State v. Christian*, 307 P.3d 429, 437-38 (Or. 2013); *People v. Schwartz*, No. 291313, 2010 WL 4137453, at *4 (Mich. Ct. App. Oct. 21, 2010); *State v. Flowers*, 808 N.W.2d 743, 2011 WL 6156961, at *1, *3-4 (Wis. Ct. App. Dec. 13, 2011); *State v. Fernandez*, 808 S.E.2d 362, 366 (N.C. Ct. App. 2017). As discussed above, no Vermont precedent supports imposing a more stringent and inflexible interpretation of the Article 16 right to bear arms, and nothing in *Heller* directs use of such a standard either.[64]

[64] *Heller* did not announce a standard for deciding Second Amendment challenges other than to say that the rational basis test should not be used. 554 U.S. at 628 n.27. The "reasonable regulation" test differs from the rational basis test. *See, e.g. State v. Cole*, 665 N.W.2d 328, 338 (Wis. 2003) ("we find the correct test to be whether or not the restriction. .

Other state courts have correctly recognized that "the state and federal rights to bear arms have different contours and mandate separate interpretation," including because guns are a matter of "[p]articular state interest and concern." *Jorgenson*, 312 P. 3d at 963, 963. This reasoning lends additional support to a reading of Article 16 that assures Vermont's Legislature the reasonable latitude to regulate.

C. The Court should construe Article 16 in a manner that affords deference to reasonable legislative judgments

This Court's precedent confirms that the judicial branch should defer to the Legislature's informed judgments about the need to regulate dangerous weapons, ammunition, and accessories. This Court has consistently acknowledged that the Legislature plays a critical policymaking role even in areas subject to constitutional limitations. As the Court recently observed, the Constitution delineates "the framework of government," while leaving the "working details" for "legislative definition." *Turner v. Shumlin*, 2017 VT 2, ¶ 24, 163 A.3d 1173, 1183. The Court's landmark decision in *Zullo*, which authorized actions against the State for certain constitutional torts, also expressly acknowledged that the Legislature may "limit" and "confine" such remedies, so long as the remedy afforded is meaningful. *Zullo v. State*, 2019 VT 1, ¶ 28, 205 A.3d 466. In *Baker v. State*, the Court likewise allowed the Legislature "to craft an appropriate means of addressing [its] constitutional mandate" under the Common Benefits Clause. 170 Vt. at 225, 744 A.2d at 886. And

.is a reasonable exercise of the State's inherent police powers. Such a test should not be mistaken for the rational basis test."); *see also Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1223 (N.H. 2007).

the same was true in *Brigham v. State*, where the Court held that inequality in education financing violated the state constitution but recognized the Legislature's "prerogative[] to define a system consistent with constitutional requirements." 166 Vt. 246, 249, 692 A.2d 384, 386 (1997). *Brigham* directed that the "specific means of discharging this broadly defined duty" to make educational opportunity available on substantially equal terms "is properly left to [the Legislature's] discretion." *Id.* at 268, 692 A.2d at 398.

The Court has also declined to turn constitutional challenges into opportunities to scrutinize legislative policy judgments. The Court cautioned in *Badgley* that its function "is not to substitute [the Court's] view of the appropriate balance for that of the Legislature." 2010 VT 68, ¶ 24. The judiciary's role is not to "judge whether the policy decision made by the Legislature was wise," but rather to assess whether the "decision to exclude a portion of the community from the common protection of the law was reasonable and just in light of its purpose." *Id.*

The Court should approach its review of Act 94 with a similar degree of deference to legislative policy judgments. Expert evidence, the experience of prior mass shootings, and common sense support the Legislature's determination that banning LCMs will deter their use and thereby promote public health and safety. *See supra* page 11 & note 52. This Court should not re-weigh the Legislature's analysis of that evidence and assessment of public safety needs. Nor should the Court import into Article 16 the "rigid, multi-tiered analysis" of federal

constitutional law that it has elsewhere rejected as tool for interpreting the state constitution. *Baker*, 170 Vt. at 212, 744 A.2d at 878.

The Legislature acted to address the dual dangers posed by mass shootings: the threat from shooters armed with military-style weapons; and the secondary harm imposed on communities, schools, and families.[65] Today's children have only known a world where active shooter drills, pat-downs, locked public buildings, imaging devices, metal detectors, and bag searches are routine. Community gathering places—schools, churches, festivals, shopping centers, clubs— appear regularly on the news as sites of mass shootings. Public events require security cordons, surveillance, and a phalanx of police officers. The risk of mass shootings changes the nature of our public spaces and makes everyone less free.

The Legislature acted well within its authority to address these threats and protect Vermonters by adopting a reasonable restriction on LCMs. That restriction does not interfere with responsible self-defense by law-abiding citizens—the right that Article 16 guarantees. The Legislature drew on abundant evidence that LCMs increase fatalities and injuries in mass shootings and other crimes. Consistent with Vermont precedent, the Court should defer to the Legislature's policy judgment that Act 94's ban on LCMs reasonably and properly protects public health and safety.

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[65] *See, e.g.*, Nicole Gaudiano, *Parkland and Santa Fe Schools Disclose Devastating After-Effects of Shootings*, Politico (Oct. 10, 2019), https://www.politico.com/news/2019/10/10/parkland-santa-fe-school-shootings-effects-students-043687 (following the mass shooting at Marjory Stoneman Douglas High School, administrators reported a substantial increase in student "anxiety, depression, cutting/self-injurious behavior, school avoidance, suicidal ideation, illegal substance usage, etc."; across the district "the toll of the shootings spread" to other schools as well).

CONCLUSION

This Court should affirm the decision below.

October 14, 2019

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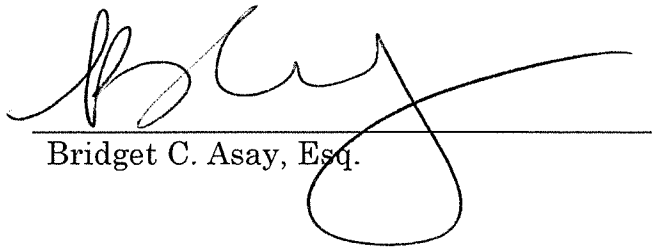
CERTIFICATE OF COMPLIANCE

I, Bridget C. Asay, Esq. certify that this brief complies with the word-count limit provided by V.R.A.P. 32(a)(7)(A). According to the word count of the Microsoft Word software used to prepare this brief, the text of this brief contains 8959 words.



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