IN THE SUPREME COURT OF THE STATE OF VERMONT

STATE OF VERMONT, APPELLANT

V.

MAX MISCH, APPELLEE

SUPREME COURT DOCKET NO. 2019-266

APPEAL FROM THE

SUPERIOR COURT OF VERMONT – CRIMINAL DIVISION
BENNINGTON COUNTY
DOCKET NO. 172-2-19 BNCR

BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE

For the first time in Vermont history, the legislature has outlawed the mere possession of standard-capacity magazines in violation of Article 16 of the Vermont Constitution – Vermont's provision protecting the right to bear arms. That the legislature did so while simultaneously exempting categories of people this prohibition, additionally runs afoul of Article 7 – the Common Benefits Clause. Appellee Max Misch, who is alleged by the Government to have possessed two standard issued 30-round capacity magazines in his home, is charged with committing two counts of this offense.

The Government does not allege that Mr. Misch used these magazines unlawfully or intended to use them for an unlawful purpose. Rather, the Government alleges that the mere possession of the two magazines found inside his residence violated 13 V.S.A. § 4021(a) and constituted two separate misdemeanors, punishable up to two years and $1,000 if the maximum penalty of imprisonment and fines are imposed consecutively.

The parties stipulated to this interlocutory appeal subsequent to the trial court's denial of Mr. Misch's motion to dismiss so that the Court could answer these questions of state constitutional law. The only question before the Court at this point is whether 13 V.S.A. § 4021 violates the rights and protections guaranteed by Article 16's right to bear arms and Article 7's common benefits clause of the Vermont Constitution.

Briefs of Amici Curiae the Cato Institute, Firearms Policy Coalition, Firearms

Policy Foundation, and the Independence Institute and Amicus Curiae Robert Kalinowski Jr. have been filed in this appeal. Appellee adopts and incorporates by reference herein, the arguments as they are fully set forth in their respective briefs.

The legislative history of this act reveals that the General Assembly added the language now found in 13 V.S.A. § 4021 late in the 2017-2018 session. Though aware of the several constitutional problems of the proposed new law and alerted to the fact that it did not have the support of the Attorney General and that law enforcement and State's Attorneys were concerned of its enforceability, the legislation was pushed through over objection that there had not been adequate public hearings on the proposed new language.

Then-Senate Bill 55 ("S.55"), as introduced by Senator Richard Sears, Chair of the Senate Judiciary Committee, initially had nothing to do with firearms regulation. It was entitled: "An act relating to territorial jurisdiction over regulated drug sales."[1] Though amendments were made to the bill relating to firearms, none concerned magazines.[2]

On March 13, 2018, the bill passed out of the Senate and was sent to the House of Representatives without any language concerning the prohibition of certain

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[1] Senate Journal, at 327 (Jan. 31, 2017), available at https://legislature.vermont.gov/Documents/2018/Docs/JOURNAL/sj170131.pdf#page=1 (last visited on 4/23/20).

[2] Senate Journal, at 327-332 (Mar. 1, 20180, available at https://legislature.vermont.gov/Documents/2018/Docs/JOURNAL/sj180301.pdf#page=1; Senate Journal, at 334-348 (Mar. 2, 2018), available at https://legislature.vermont.gov/Documents/2018/Docs/JOURNAL/sj180302.pdf#page=1 (last visited on 4/23/20).

magazines.[3] On March 23, 2018, the House offered new language in section 8 of S.55 restricting magazine sizes. This language evolved into the presently codified 13 V.S.A. § 4021.[4] But the new language raised many concerns about constitutionality and process.

When the magazine-size language was presented to the house floor, Representative Poirier moved to postpone further action on S.55 until April 10, 2018 to allow public hearings to be held.[5] The motion passed, and many members expressed concern that public hearing on this new proposed language had not yet been held.[6]

Representative Herbert explained: "Many of my constituents have been pleading for a public hearing on this proposed monumental shift in Vermont Culture. This refusal by the body to respect and honor their requests is indefensible."[7]

Representative Poirier explained that they needed "to give the people of Vermont what they want[ed] — a public hearing."

Representative Turner stated: "Our legislative process was designed to be a slow methodical process in order to allow all stakeholders equal opportunity to share their view on the issue at hand. It seems that in this case, this body didn't want to

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[3] House Journal, at 586 (Mar. 13, 2018), available at https://legislature.vermont.gov/Documents/2018/Docs/JOURNAL/hj180313.pdf#page=1 (last visited on 04/23/20).
[4] House Journal, at 825-826 (Mar. 23, 2018), available at https://legislature.vermont.gov/Documents/2018/Docs/JOURNAL/hj180323.pdf#page=1 (last visited on 4/23/20).
[5] Id. at 827.
[6] Id.
[7] Id. at 829.

hear anymore from the gun rights advocacy. Adding additional time would have allowed everyone the time they requested."[8]

Representative Wright similarly expressed his concern that there had not been adequate opportunity to give full public hearing to the new proposed language: "A public hearing in one community or one committee is not the same as a full public hearing in the well of the House.…[B]oth sides [need] to weigh in on an issue that emerged as a very different bill than anything the public or the legislature was considering 6 weeks ago. This is too important to not ensure that all sides, across the state, not just in a committee hearing, feel they had the opportunity to be heard."[9]

Finally, Representative Willhoit explained: "[W]hile the Senate held a public hearing early this session, neither S.55 as passed by the Senate nor as further amended by House Judiciary were discussed. Given the significance of our body's work today, the people of Vermont deserve a public hearing."[10]

Before public hearings could be held on April 10, 2018, the House offered and passed additional amendments to Section 8 on March 27, 2018 and then sent it to the Senate.[11]

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[8] Id. at 830.
[9] Id. at 830-831.
[10] Id. at 830.
[11] House Journal, at 866-871, 877-878 (Mar. 27, 2018), available at https://legislature.vermont.gov/Documents/2018/Docs/JOURNAL/hj180327.pdf#page=1 (last visited on 4/23/20); Senate Calendar, at 1464-1466 (Mar. 29, 2018), available at https://legislature.vermont.gov/Documents/2018/Docs/CALENDAR/sc180329.pdf#page=1 (last visited on 4/23/28). Accord Attorney general walks back office's opposition to magazine limit, VtDigger, available at https://vtdigger.org/2018/03/29/attorney-general-walks-back-offices-opposition-magazine-limit/ (last visited on 4/24/20)

On March 28, 2018, recorded statements of the Chair of the Senate Judiciary Committee revealed Senator Sears's frustration with the actions of the House of Representatives: "I can't take responsibility, and I will not take responsibility, for the other body not holding a public hearing [on new Section 8]. That was not my decision. And all those of you who demanded a public hearing, we never, in my twenty-five plus years here held a public hearing…[on] whether or not to have a conference committee. Our choices are limited. We can recommend to the full Senate that we have a conference committee, we can recommend that we agree with the House's changes or we can recommend that we agree with the House's changes with proposals of amendments. Those are this committee's three choices. It's not a choice of whether or not to kill the bill."[12]

The Senate Judiciary Committee then proceeded to take testimony on the new Section 8 proposal. David Scherr from the Office of the Attorney General testified that while the Attorney General supported the bill generally, he told the Senators repeatedly that the Attorney General did not support Section 8 "at all." He expressed "serious concerns about the practical enforceability of this measure. Our office and the AG believe it will be extremely difficult to tell the difference between magazines that were possessed before the passage of this bill, and magazines that come into

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(reporting that the magazine ban "was not included in a Senate version of the bill, but was added in the House Judiciary Committee before being passed after two days of marathon debates on the House floor").

[12] Sen. Judiciary Comm, at 0:28:04 (Mar. 28, 2018) available at https://vermont.access.preservica.com/digitalFile_96ea200d-ecc1-40cc-aa27-d9ff7715e33a/ (last visited on 4/23/20).

possession or sale or transfer afterwards."[13] When Senator Ashe asked why the Attorney General cared if it was enforceable, Mr. Scherr responded: "[W]hen we are introducing new crimes, we want those to be clear, and to make sure that law enforcement can in fact enforce a crime and that there won't be sort of cherry picking or anything like that that could happen from something that is overbroad or vague or hard to enforce."[14]

Senator Benning asked: "Are you aware of a crime that has ever happened in the State of Vermont that would require us to actually ban these devices at this point in time? …I am struggling to understand what this is actually going to accomplish that has been a problem here in Vermont."[15] Mr. Scherr could not come up with an example off the top of his head.[16]

After this hearing, the Attorney General spoke to the press to correct his deputy's representations that he did not support Section 8. "[A]s the elected official I do support [the magazine ban.] What David did was raise issues, which is his job."[17]

When John Campbell, Executive Director of the Department of State's Attorneys and Sheriffs testified on the bill, he also expressed concerns about the enforceability of this proposed new section. He told the Committee that he was concerned that Section 8 would result in constitutional challenges, as had occurred

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[13] Id. at 1:41:00-1:42:30; 1:43:00-1:43:45.
[14] Id. at 1:44:20.
[15] Id. at 1:50:14.
[16] Id.
[17] Attorney general walks back office's opposition to magazine limit, VTDigger, available at https://vtdigger.org/2018/03/29/attorney-general-walks-back-offices-opposition-magazine-limit/ (last visited 04/23/20).

in other states, including an equal protection challenge given the number of exemptions involved.[18]

Mr. Campbell considered the bill to be a ban on the possession of magazines, referencing the proposed law as a "ban" throughout his testimony. "If the bill was passed we would have to prove that the person…possessed this after the ban was in place, and there is a myriad of proof [problems] that we would have to go through….This is a perfect example of a law that would require a significant amount of resources to actually prove and then the question comes down to what are we trying to get at as a person that…is this something that we would pursue?"[19]

When Senator Benning asked him if he could remember a crime having occurred in Vermont involving the use of the magazines at issue, Mr. Campbell admitted that he could not think of such an incident ever occurring. Mr. Campbell then said that if the State had to defend this legislation on constitutional grounds, it would have to show evidence that these magazines have been shown to be an added risk to the general public as opposed to other devices.[20] Senator Benning immediately clarified that the reason he had asked his question was because he wanted to hear if Mr. Campbell could point to such evidence in Vermont.[21] Mr. Campbell had no response to this.

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[18] Sen. Judiciary Comm., at 2:02:00 (Mar. 28, 2018), available at https://vermont.access.preservica.com/digitalFile_96ea200d-ecc1-40cc-aa27-d9ff7715e33a/ (last visited on 04/23/20).
[19] Id. at 1:55:00.
[20] Id. at 2:03:57-2:05:00.
[21] Id. at 2:05:07.

Near the end of the hearing, Scott Chapman, a federally licensed firearms dealer, appeared in his personal capacity to testify against Section 8.[22] Before beginning, he wanted to make a record that he had initially planned to present a letter from Caspian Arms, a firearms dealer in Vermont, but that they had asked him not to because, as he described it, the "activity in the House had intimidated them into capitulating" to support legislation they did not agree with.

Senator Sears paused the testimony and asked Mr. Chapman to confirm what he just said, and the record was made again that Caspian Arms felt that they were intimidated by the House of Representatives and they did not want to present evidence on the subject.[23]

Mr. Chapman went on to explain to the Committee why Section 8 was problematic and focused on the term "high capacity magazine" in the proposed legislation, which he considered a "fallacy":

> Ninety-eight percent of the firearms manufactured in the United States are semi-automatic, and of that 98%, another 98% of that subset are shipped with magazines that hold more than 10 rounds. Almost 100% of double stack handguns hold at least 13 rounds, 12, 13, 22 some of them up to 27. The idea that anything over 10 rounds is high capacity is just not true. There are more 30 round magazines in the U.S. than anything else, some estimates put that at 400 million magazines. So, the idea that these are uncommon, not in common use, that are extremely

[22] Id. at 2:41:19.
[23] Id. at 2:42:55. Accord Written Testimony from Crossfire Arms (Mar. 28, 2020), available at https://legislature.vermont.gov/Documents/2018/WorkGroups/Senate%20Judiciary/Bills/S.55/S.55~Bobby%20Richards~Written%20Testimny%20Submitted%20from%20Crossfire%20Arms.LLC~3-28-2018.pdf (last visited on 04/23/2020).

> more dangerous than a 10-round magazine is simply not true. It does not alter the impact of the round being exited from the barrel.[24]

He gave specific reference to his source for the 400 million magazines figure and clarified that it was based on data from 2004 and counted civilian, not military, use.[25] He told the committee members that the proposed language also raised concerns under the Vermont Constitution and offered to share a memorandum of the specific legal arguments involved.[26]

When Senator Benning asked if he had testified in the House on this subject, Mr. Chapman said he had not. Senator Benning then asked if he was invited to testify on the subject in the House. And Mr. Chapman said he was not.[27]

On March 30, 2018, the Senate proposed amendments to Section 8.[28] Senator Rodgers moved to strike Section 8 entirely. But this proposal was rejected 18 to 12.[29]

Senator Brock, in his vote supporting striking Section 8, explained:

> I remain concerned that today in concurring with the underlying bill we have infringed on the rights of thousands of law-abiding Vermonters, while failing to prevent to deter future acts of violence. Our efforts would

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[24] Id. at 2:44:30-2:45-47.

[25] Id. at 2:28:00-2:48:55.
[26] Id. at 2:46:00.
[27] Id. at 2:50:31.
[28] Senate Journal, at 659-661 (Mar. 30, 2018), available at https://legislature.vermont.gov/Documents/2018/Docs/JOURNAL/sj180330.pdf#page=1 (last visited on 4/23/20).
[29] Senate Journal, at 663 (Mar. 30, 2018), available at https://legislature.vermont.gov/Documents/2018/Docs/JOURNAL/sj180330.pdf#page=1 (last visited on 4/23/20).

> have been much better directed at identifying threats, enhancing security of our schools, improving our mental health system and enforcing laws already on the books.[30]

The Senate ultimately accepted the House's proposed amendments by a vote of 17-13. However, Senator Sears, the original sponsor of the bill, voted against it.[31] He explained his reasons for not supporting it:

> It is unfortunate that I am forced to vote no on a bill that I reported and sponsored. When I have looked at firearms restrictions I have been guided by one principle; will the proposed legislation keep firearms out of the hands of individuals who should not possess them. However when law enforcement officers, our attorney general and our states attorneys tell us that something is unenforceable we should listen. Yes most Vermonters are law abiding and will follow the law so I ask who is this legislation designed to impact law abiding citizen's or the criminal element and deranged individual's who by will not abide by this law. For that reason I cannot support the sections that deal with magazines. In addition this section may very well be unconstitutional under the Vermont constitution.[32]

This appeal follows.

STANDARD OF REVIEW

The interpretation of the meaning and core values of the Vermont Constitution and the determination of whether legislation survives state constitutional scrutiny raise questions of law that the Court considers de novo. State v. Badger, 141 Vt. 430, 449 (1982).

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[30] Id.
[31] Id. at 664
[32] Id.

ARGUMENT

I. The "right to bear arms for the defence of self and the State," including the right to possess standard capacity magazines, is guaranteed by Article 16 and Article 7 and is fundamental to ensuring that the core values of the Vermont Constitution are upheld.

A. The Court's standard of judicial review of enactments that violate the Vermont Constitution is nondeferential to the Legislature and when those laws are contrary to the express and fundamental principles of the Vermont Constitution, they are presumptively unconstitutional.

The Vermont Constitution is the fundamental law of this State. No branch of government is above the Constitution, including the Legislature. Since Bates v. Kimball, the Court has recognized that while the Legislature's powers are expansive, its powers are not unlimited and are specifically set by the Constitution. 2 D. Chip. 77, 81, 1824 WL 1336, at *5 (Vt. Feb. 1824). Explicitly circumscribed in chapter II, § 6, the Constitution establishes that "[the Legislature] shall have all other powers necessary for…a free and sovereign State; but they shall have no power to add to, alter, abolish, or infringe any part of this Constitution." Id. (emphasis added).

In reviewing the constitutionality of legislative acts, the Court has determined it duty-bound to adhere to "this fundamental law-this fiat of the sovereign people." Bates, 2 D. Chip. 77, 81, 1824 WL 1336, at *5 (Vt. Feb. 1824) (emphasis in the original). The Court has further clarified that this review does not

> by any means suppose a superiority of the Judicial to the Legislative power. It will only be supposing that the power of the people is superior to both; and that where the will of the Legislature, declared in its statutes, stands in opposition to that of the people declared in the constitution, the Judges ought to be governed by the latter rather than the former.

Id.

The Court's doctrine of judicial review of Vermont constitutional matters, finding its source ultimately in the people, does not involve engaging in its own determination of the purpose, necessity, or usefulness of the enacted law in question. Nor does the Court engage in a reweighing of competing interests between the people and the Government. Instead, it has held that the rights set out in chapter I of the Vermont Constitution already reflect the balance of those competing interests reached by the constitutional drafters, and ultimately the people themselves:

> [I]t is a fundamental principle, engrafted into the constitution, that all power is originally inherent in the people; and that all officers of government, whether legislative or executive, are their trustees and servants—therefore, such power, and such only, as is delegated to them, can they exercise.

Ward v. Barnard, 1 Aik. 121, 127, 1825 WL 1089, *7 (Vt. 1825). Accord State v. Savva, 159 Vt. 75, 85-86, 616 A.2d 774, 780 (1991) (holding that Article 11's warrant reflects "the balance reached by the constitutional drafters, a balance in which the individual's interest in privacy outweighs the burdens imposed on law enforcement"); Zullo v. State, 2019 VT 1, ¶ 36, 205 A.3d 466, 484. ("Article 11 unequivocally sets forth a single specific right of the people to be free from unwarranted searches and seizures of their persons, possessions, and property, [and] that provision is manifestly self-executing.").

The Court has long held that it does not give any deference to legislative acts that contravene this fundamental law. Bates, 2 D. Chip. 77, 81, 1824 WL 1336, at *5 (Vt. Feb. 1824). It recently affirmed this basic tenet of judicial review in State v. Medina, 2014 VT 69, ¶ 13, 197 Vt. 63, 73, 102 A.3d 661, 668. When a statute runs

counter to the express requirements of the Vermont Constitution, the usual deference to the Legislature—that its laws are presumptively constitutional, is switched. The Court presumes such laws are unconstitutional and the Government has the heavy burden of proving the constitutionality of the enactment. Id. "Where there has been the exercise of a power not delegated, or that is opposed to the constitution, the supreme law, the peace of the state, and security to the rights of the citizens, forbid that aid." Ward, 1 Aik. At 126-127, 1825 WL 1089 * 6.

Explicitly rejecting the federal approach of reviewing the constitutionality of acts of the legislature, the Court has reasoned that this approach "may be described as broadly deferential to the legislative prerogative to define and advance governmental ends, while vigorously ensuring that the means chosen bear a just and reasonable relation to the governmental objective." Baker v. State, 170 Vt. 194, 203, 744 A.2d 864, 871 (1999) (emphasis in the original) (citing State v. Ludlow Supermarkets, Inc., 141 Vt. 261, 448 A.2d 791 (1982)). Accord State v. Delisle, 162 Vt. 293, 310, 648 A.2d 632, 643 (1994) (declining to follow the federal standard for lost evidence due process violation claims under Article 10, as it was deemed too deferential to the Government and insufficiently sensitive to measuring the prejudice suffered by the defendant); State v. Savva, 159 Vt. 75, 85–86, 616 A.2d 774, 780 (1991) ("[A]s a matter of constitutional policy, a warrant requirement is not a starting point for deriving exceptions that balance citizens' interest in privacy against law enforcement's interest in expeditious searches. Rather, it is the balance reached by the constitutional drafters[.]").

The Court's holdings are confirmed by Article 4 itself, which establishes in plain terms that the people have the right to access the Court to secure a certain remedy for all injuries or wrongs:

> Every person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which one may receive in person, property or character; every person ought to obtain right and justice, freely and without being obliged to purchase it; completely and without any denial; promptly and without delay; comformably to the laws.

Vt. const., ch. I, art. 4 (emphasis added).

Article 4 constitutionalizes the Court's duty to rise above legislative policy decisions and enactments of the majority of the General Assembly that result in injuries to the people suffered at the hands of the Government. As the Court has recognized, "due process rights flow from Article 4" itself and establish both a procedural and substantive right to access "the judicial branch to enforce the law." Nelson v. Town of St. Johnsbury Selectboard, 2015 VT 5, ¶¶ 44, 50, 198 Vt. 277, 297, 298-99, 115 A.3d 423, 436, 437 (citing Holton v. Dep't of Emp't & Training, 2005 VT 42, ¶ 27, 178 Vt. 147, 878 A.2d 1051) (recognizing Article 4 was self-executing; "a plaintiff can bring an action for a violation of the provision without implementing legislation" because the rights established therein are clear"). Accord Records of the Council of Censors of the State of Vermont, 81 (Gillies and Sanford, eds., 1991) (establishing that several unconstitutional acts of the General Assembly, which were subject to censure by the Council of Censures, likely gave rise to the recommendation to amend the constitution to include Article 4 in 1786); William C. Hill, The Vermont State Constitution, A Reference Guide, 37 (Greenword Press 1992) (noting that

neither the Vermont Constitution of 1777 nor the Pennsylvania Declaration of Rights, on which the 1777 Constitution was based, contained Article 4).

Without deference to the Legislature, the Court determines the meaning of Article 16 and Article 7 by identifying their core values. The Court has set out a multi-faceted, non-exhaustive list of considerations to tease these out. State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985). Relevant factors include the text of the constitutional provision, its history, the political doctrine underlying the provision, the Court's precedent interpreting the same, and comparisons with other state and federal constitutions. Id. at 227, 500 A.2d at 238.

Ultimately, the Court considers the rights embedded in the Vermont Constitution as "rest[ing]—at their core—on the fundamental principle of limited government." State v. Bauder, 2007 VT 16, ¶ 13, 181 Vt. 392, 397, 924 A.2d 38, 43. Consistent with this overarching approach to constitutional interpretation, the Court applies a least intrusive means requirement to government invasion of personal liberties when it navigates the outer limits of constitutional protections. State v. Birchard, 2010 VT 57, ¶ 13, 5 A.3d 879, 884-885; State v. Sprague, 2003 VT 20, ¶ 17, 175 Vt. 123, 824 A.2d 539.

The Court has previously determined that the 1777 Vermont Constitution eclipsed the Pennsylvania Constitution as "the most radical constitution of the Revolution." It recognized that Article 7 "and other provisions have led one historian to observe that Vermont's first charter was the most democratic constitution produced by any of the American states. Baker, 170 Vt. 194, 210, 744 A.2d 864, 876

(internal quotations omitted). This recognition informs the Court's interpretation of individual constitutional provisions. Id.

The Court further considers individual constitutional provisions within the context of the whole document. See e.g., State v. Slamon, 73 Vt. 212, 50 A. 1097, 1099 (1901) (reviewing Articles 4, 10 and 11 together and interpreting them as complimentary and giving the rights enforcement effect). It recognizes that where constitutional provisions are express and without limitation, they are self-executing and directive. They do not "need further legislative action to become operative." Shields v. Gerhart, 163 Vt. 219, 227-28, 658 A.2d 924, 930 (1995) (stating that Article 13 unequivocally sets forth a single specific right rather than general principle); Town Highway, 2012 VT 17, ¶ 32, 191 Vt. 231, 45 A.3d 54 (same holding for Article 7); Zullo v. State, 2019 VT 1, ¶ 35, 209 Vt. 298, 322, 205 A.3d 466, 483 (same holding for Article 11).

Though it has the burden to prove the statute at issue here is consistent with the Vermont Constitution and the duty to address this controlling law, the Government's case for upholding title 13 VSA § 4021 rests almost entirely on federal law. Even if it attempted to meet state constitutional jurisprudence requirements and give full weight to this independent fundamental source of law, it cannot show that the magazine ban survives state constitutional scrutiny.

B. The rights and protections of Article 16 establish that the people of Vermont may possess and bear the magazines at issue in this statute.

In 1777, the framers of the Vermont Constitution selected the words contained in Article 16 and, over 242 years later, it remains in its original form, unaltered.

Surviving a single attempt of constitutional revision by the Council of Censors in 1785 to eliminate the right to bear arms for the defense of self, thereby limiting it to a right only when acting in defense of the State, the language of Article 16 has been a part of Vermont since its foundation. Records of the Council of Censors of the State of Vermont, 7, 45, 88, 140 (Gillies and Sanford, eds., 1991). The ideas embedded therein; however, are ancient.

Fundamental to a free and democratic state, Article 16 establishes:

> That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.

Vt. const. ch. I, art. 16 (1777).

The Attorney General argues in its briefing that Article 16 "creates a limited right to bear arms in self-defense," Appellee's Brf. 13, but limitation on the constitutional right to bear arms is not supported by the constitutional text, its history, or this Court's precedent.

Quoting Chief Justice Marshall, the Court held: "[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words." Baker, 170 Vt. 194, 207, 744 A.2d 864, 874 (quoting Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202, 4 L.Ed. 529 (1819)). When the language of Article 16 is considered, several affirmative rights relating to the use and possession of arms are enumerated. Its plain text establishes the framers' intent that there be both an individual and collective right to bear arms in self-defense and in defense of the State of Vermont:

> That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to governed by the civil power.

Vt. const. ch. I, art. 16.

The plain text is without caveat, definite, and directive, stating the rights in the affirmative. The only explicit reference to the Government's role in this area is to keep the military in strict subordination to civil power.

Informed further by the failed attempt to eliminate the individual right to bear arms in self-defense by constitutional amendment in 1785, it is readily apparent that among the core values embedded in Article 16—the individual's right to bear arms for the specific purpose of self-defense must be preserved; the language is hardly accidental or redundant. Accord District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.").

Though Article 16, on its face, does not limit the "arms" that may be in possession and used, the Attorney General insists that these arms do not extend to "any type." Appellee's Br. 14. But this argument necessarily reads limitations into the meaning of arms that are not supported by the plain constitutional text. The Court does not read in limitations to self-executing rights set out in chapter I of the Vermont Constitution without basis. When the Court construes the words of a constitutional provision, it considers its historical context. State v. Jewett, 146 Vt. 221, 225, 500 A.2d 233, 236 (1985)

Applying this historical lens, the brief of Amici Curiae the Cato Institute, et al.

provides extensive discussion of how firearms with the capacity to discharge more than ten rounds have been used by civilians for self-defense for centuries. Both Amici Curiae briefs in support of Appellee lay out the historical context and political landscape that resulted in common possession of repeat arms, from the time of Vermont's first constitution through the present date, establishing that any permissible limits on the meaning of arms in Article 16 cannot extend to the magazines at issue here.

Tracking the handful of cases in this area, the Court has established that it rarely upholds statutes or ordinances that encroach upon Article 16. In 1881, the Court in State v. Wood, before addressing the issue of the case, went to great lengths to explain that the right to self-defense was incontrovertible. The Court has historically presumed that the right to bear arms in self-defense is a fundamental right. In that case, the Court held: "thus believing you have a right, and if you have the means you have the right to shoot [an assailant] in anticipation." State v. Wood, 53 Vt. 560, 561 (1881).

In another case, the Court set aside a manslaughter verdict in 1876, determining that:

> The respondent having the right to use reasonable force in expelling [the petitioners], he had the right to go prepared to defend himself against any assault that they might make upon him while in the exercise of that right; and if he only intended to use the pistol in such an emergency in defending his own life, or against the infliction of great bodily harm, the carrying it for such a purpose would be lawful.

State v. Carlton, 48 Vt. 636, 645 (1876).

In State v. Rosenthal, an often-cited case, the Court voided a local law that required a permit to carry a pistol. It had determined that the ordinance violated Article 16. 75 Vt. 295, 55 A. 610 (1903). The Court affirmed that Article 16 permits a person to "carry a dangerous or deadly weapon, openly or concealed unless he does it with the intent or avowed purpose of injuring another…." Id. at 298. The court's reasoning was similar to that in State v. Carlton: "[N]either the intent nor purpose of carrying them enters into the essential elements of the offense[,]" rendering the laws fundamentally flawed. Id. at 295, 55 A. at 611.

This Court's precedent interpreting Article 16, and its key holdings that implicitly recognize that paramount in this constitutional provision is the right to bear arms for lawful self-defense, tracks with the United States Supreme Court's analysis and understanding of the Second Amendment. "[W]hatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Heller, 128 S.Ct at 2821.

> Self-defense is best conceived of as a primarily personal purpose, but one that also has a significant civic importance. One of the main criminological claims advanced and supported by pro-rights gun policy scholarship is that the presence of an armed, peaceable citizenry deters several types of violent crime—particularly so-called "hot" or "home invasion" burglaries. Thus, while the benefit of acts of armed self-defense redounds most directly to the individual defender, the keeping of guns for defense can also contribute to the civic purpose of crime reduction.

Michael P. O'Shea, The Right to Defensive Arms After District of Columbia v. Heller, 111 W. Va. L. Rev. 349, 351 (2009).

The core values embedded in Article 16 reflect dominant political and legal theory during the time of revolutionary America and its references to the defense of self and the State must be understood in the broader context as well. "[T]he right to arms is essentially a question of the balance of power between a people and the state that governs them, that question is far more important today than when it was first formalized in seventeenth-century England." Robert J. Cottrol & Raymond T. Diamond, The Fifth Auxiliary Right; to Keep and Bear Arms: The Origins of an Anglo-American Right. by Joyce Lee Malcolm. Cambridge, Ma: Harvard University Press, 1994. Pp. Xii, 232. $35.00., 104 Yale L.J. 995, 1025-26 (1995) (reviewing and discussing Joyce Lee Malcolm's influential book). In the words of William Blackstone:

> [I]n vain would these rights [personal security, personal liberty, and private property] be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.
>
> . . . .
>
> The fifth and last auxiliary right of the subject . . . is that of having arms for their defence, suitable to their condition and degree, and such as are allowed by law. Which is also declared by the same statute . . . and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.

1 William Blackstone, Commentaries *136, *139.

Read in conjunction with the whole of the Vermont Constitution, Article 16

provides both individual and collective substantive assurance that the people will have the ability to ensure that this document of ideals continues to reflect those of its founders for hundreds of years more.

C. Article 7, Vermont's Common Benefits Clause, prohibits the enactment of laws that benefit one group over another, particularly when the group advantaged is the Government over the people.

Mr. Misch has the affirmative right to bear arms for lawful purposes under Article 16, as set out above. But under 13 V.S.A. § 4021, he and every other Vermonter falling outside the carved-out exemptions to the magazine ban, are necessarily denied their right to the common benefit and protection of law guaranteed by Chapter I, Article 7 of the Vermont Constitution.

Article 7 establishes in full, the following rights:

> That 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 a single person, family or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such a manner as shall be, by that community, judged most conducive to the public weal.

Id.

This Court has previously determined that Article 7 is markedly different from the Equal Protection Clause of the United States Constitution in its language, historical origins, purpose and development. Baker, 170 Vt. 194, 744 A.2d 864. Vermont's Common Benefits Clause is the "first and primary safeguard" of the right to equal treatment under the law in Vermont. Id. at 202, 744 A.2d at 870.

Significantly, for purposes of reviewing the constitutionality of the exemptions

in this magazine ban, this Court has identified the core values of Article 7 as preventing the preferential treatment of the Government over the people:

> The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferments and advantages. 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.

Id. at 211, 744 A.2d at 876–77.

The Court's identification of the values of equality at the center of Article 7, and, in particular, the check on disparate power and advantage between the Government and the people, is further confirmed in the final clause of the provision. In that section, the Vermont Constitution directly grants the people the right to "reform or alter government" using any means "judged most conducive to the public weal." Reading this section along with the rights provided in Article 7—the right to bear arms in the defense of the State, it confirms what this Court has previously determined: the overriding principle throughout the Vermont Constitution is one of limited government. Bauder, 2007 VT 16, ¶ 13, 181 Vt. at 397, 924 A.2d at 43. An enactment that serves to strengthen the Government's power at direct expense to the people's rights as those are explicitly set out in chapter I of the Vermont Constitution, must be viewed with particular suspicion given the historical backdrop of Article 7. Under this Court's doctrine of judicial review; however, it must also be considered presumptively unconstitutional. Medina, 2014 VT 69, ¶ 13, 197 Vt. at 73, 102 A.3d at 668.

Here, the Legislature's enactment goes directly against Article 7 by expressly exempting categories of government officials from being subject to this crime. The effect grants certain members of the Government preferential treatment and advantages in possessing and using these useful magazines for their own personal safety, while the same has been denied to the people, and only because they lack elevated government status. This is a direct affront to the core values of the Vermont Constitution, which is presumptively inclusive of all benefits conferred to only a select few and cannot be tolerated.

In conducting a Common Benefits Clause analysis, the Court eschews "[t]he rigid categories utilized by the federal courts under the Fourteenth Amendment." Baker, 170 Vt. at 206, 744 A.2d at 873. Instead, "statutory exclusions from publicly-conferred benefits and protections must be premised on an appropriate and overriding public interest." Id., 170 Vt. at 206, 744 A.2d at 873. In these types of cases, the Court applies a three-pronged analysis that "ultimately ascertain[s] whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose." Factors considered in this determination include: "(1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive." Id.

However, where the source of unequal legislative treatment directly implicates

a separate constitutional right—the right to bear arms, the Court cannot engage in any balancing of interests analysis without impermissibly infringing upon the constitutional provision impacted by the disparate legislative enactment. Considering the "benefit withheld" (here a constitutional right) against the "governmental purpose" involved would necessarily require a recalibration of the balancing already done by the Framers of the Vermont Constitution. Such recalibration must be done by deliberate and democratic process of constitutional amendment, not by judicial or legislative rule. In Baker, the Court acknowledged that any Article 7 analysis must ultimately not substitute for "[t]he inescapable fact ... that adjudication of ... claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.…It is, indeed, a recognition of the imprecision of "reasoned judgment" that compels both judicial restraint and respect for tradition in constitutional interpretation. Id. 170 Vt. at 215, 744 A.2d at 879 (internal citations and quotations omitted).

In Veilleux v. Springer, 131 Vt. 33, 40–41, 300 A.2d 620, 625 (1973), the Court held that a DUI statutory scheme that imposed a six month suspension upon only those who plead not guilty to a violation of the vehicle laws was unconstitutional under federal due process and equal protection and Vermont's Common Benefits Clause. The pre-Baker Court defaulted to applying federal standards of review of the statute when it assessed the Article 7 violation. But even under the federal standard, the Court determined that the law could not "be justified by the compelling state

interest of providing a statutory scheme for the detection of the alcoholic content in the body fluids of a vehicle operator because of all those who withdraw their consent to take the chemical test provided for such detection, only those who exercise their fundamental right to maintain their innocence to a criminal charge suffer the six month license suspension." Id. (emphasis added). Though that precise federal standard is inapplicable in this state constitutional context, it illustrates that there can be no government interest in establishing even a well-intentioned statutory scheme that effectively punishes those who merely exercise their right to bear arms under Article 16.

As both briefs for Amici Curiae make clear, the Government and supporting amici curiae's arguments fail to point to evidence of a problem in Vermont that is in need of fixing or, even assuming a problem exists, that the statute prohibiting mere possession and not the actual unlawful use or intent, fixes it. Numerous crimes already exist to punish violent assaultive acts resulting in serious bodily injury or death. See e.g., 13 V.S.A. §§ 2301, 2304; 13 V.S.A. §1024. The Government fails to show how 13 V.S.A. § 4021 achieves its goal of thwarting unlawful shootings or how infringing upon the fundamental right to bear arms for lawful purposes is the least intrusive means for achieving this objective.

D. The effect of this statute is to ban the use of standard capacity magazines and to criminalize violators for exercising a constitutional right while it confers preferential treatment to the Government and law enforcement by giving them access to these magazines for their own use.

The Court looks to the overall effect of the statute in question when it considers the several relevant factors in the state constitutional analysis—whether

the legislation is an outright ban on possessing standard-capacity magazines. Bates, 2 D. Chip. 77, 85, 1824 WL 1336, at *8. "It is axiomatic that the principal objective of statutory construction is to discern the legislative intent. …[I]t is also a truism of statutory interpretation that where a statute is unambiguous we rely on the plain and ordinary meaning of the words chosen. Baker, 170 Vt. at 198–99, 744 A.2d at 868.

The statute at issue, codified in 13 V.S.A. § 4021, sets out in relevant part:

> (a) A person shall not manufacture, possess, transfer, offer for sale, purchase, or receive or import into this State a large capacity ammunition feeding device. As used in this subsection, "import" shall not include the transportation back into this State of a large capacity ammunition feeding device by the same person who transported the device out of State if the person possessed the device on or before the effective date of this section.
>
> (b) A person who violates this section shall be imprisoned for not more than one year or fined not more than $500.00, or both.
>
> (c)(1) The prohibition on possession of large capacity ammunition feeding devices established by subsection (a) of this section shall not apply to a large capacity ammunition feeding device lawfully possessed on or before the effective date of this section.
>
> (2) The prohibition on possession, transfer, sale, and purchase of large capacity ammunition feeding devices established by subsection (a) of this section shall not apply to a large capacity ammunition feeding device lawfully possessed by a licensed dealer as defined in subdivision 4019(a)(4) of this title prior to April 11, 2018 and transferred by the dealer on or before October 1, 2018.
>
> (d)(1) This section shall not apply to any large capacity ammunition feeding device:
>
> (A) manufactured for, transferred to, or possessed by

the United States or a department or agency of the United States, or by any state or by a department, agency, or political subdivision of a state;

(B) transferred to or possessed by a federal law enforcement officer or a law enforcement officer certified as a law enforcement officer by the Vermont Criminal Justice Training Council pursuant to 20 V.S.A. § 2358, for legitimate law enforcement purposes, whether the officer is on or off duty;

(C) transferred to a licensee under Title I of the Atomic Energy Act of 1954 for purposes of establishing and maintaining an on-site physical protection system and security organization required by federal law, or possessed by an employee or contractor of such a licensee on-site for these purposes, or off-site for purposes of licensee-authorized training or transportation of nuclear materials;

(D) possessed by an individual who is retired from service with a law enforcement agency after having been transferred to the individual by the agency upon his or her retirement, provided that the individual is not otherwise prohibited from receiving ammunition;

(E) manufactured, imported, transferred, or possessed by a manufacturer or importer licensed under 18 U.S.C. chapter 44:

> (i) for the purposes of testing or experimentation authorized by the U.S. Attorney General, or for product development;
>
> (ii) for repair and return to the person from whom it was received; or
>
> (iii) for transfer in foreign or domestic commerce for delivery and possession outside the State of Vermont; or

(F) Repealed by 2017, Adj. Sess., No. 94, § 11, eff. July 1, 2019.

> (e)(1) As used in this section, "large capacity ammunition feeding device" means a magazine, belt, drum, feed strip, or similar device that has a capacity of, or that can be readily restored or converted to accept:
>
> > (A) more than 10 rounds of ammunition for a long gun; or
> >
> > (B) more than 15 rounds of ammunition for a hand gun.
>
> (2) The term "large capacity ammunition feeding device" shall not include:
>
> > (A) an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition;
> >
> > (B) a large capacity ammunition feeding device that is manufactured or sold solely for use by a lever action or bolt action long gun or by an antique firearm as defined in subdivisions 4017(d)(2)(A) and (B) of this title; or
> >
> > (C) a large capacity ammunition feeding device that is manufactured or sold solely for use with a firearm that is determined to be a curio or relic by the Bureau of Alcohol, Tobacco, Firearms and Explosives. As used in this subdivision, "curio or relic" means a firearm that is of special interest to collectors by reason of some quality other than its association with firearms intended for sporting use or as offensive or defensive weapons.

13 V.S.A. § 4021 (eff. April 11, 2018, and July 1, 2019).

The plain language of 13 V.S.A. § 4021(a) shows that this is not a narrow statute. The words selected are absolute and sweeping: "A person shall not manufacture, possess, transfer, offer for sale, purchase, or receive or import into this State a large capacity ammunition feeding device." Id. The effect is to establish a complete ban on the possession and use of standard-issued magazines. Compare State

v. Duranleau, 128 Vt. 209-10, 260 A.2d at 386 (1969) (upholding statute that prohibited carrying a rifle or shotgun while it was loaded in a motor vehicle on a public highway) with State v. Rosenthal, 75 Vt. 295 (1903) (striking down local ordinance banning the possession of weapons in Rutland unless permission obtained from mayor or chief of police as repugnant to Article 16). Accord Heller, 554 U.S. at 636 (striking down handgun possession ban, holding, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home").

Meanwhile, those specifically exempted from this magazine ban constitute the Government—federal and state law enforcement, federal and state departments and agencies, licensees under Title I of the Atomic Energy Act of 1954, as well as federally licensed firearm manufacturers or importers. 13 V.S.A. § 4021(d)(1). The effect of this disparity is to permit people in Government and law enforcement (and the handful of others exempted by the statute) the benefit of using such a magazine for self-defense. The Legislature permits this specially exempted group in Vermont to join the millions of others around the country who presently possess these magazines. Without the ability to purchase or possess these magazines, the people of Vermont are placed at significant disadvantage of defending themselves and others to their ultimate detriment. See Brief of Amici Curiae the Cato Institute, et al. at 20-21, 43-47 (providing various estimates establishing that there are presently about 100 million magazines over 10 rounds owned by Americans and setting forth the significant and

numerous advantages of these magazines when used for self-defense purposes).

E. Because 13 V.S.A. § 4021 impermissibly infringes both Articles 16 and 7, the statute is necessarily void.

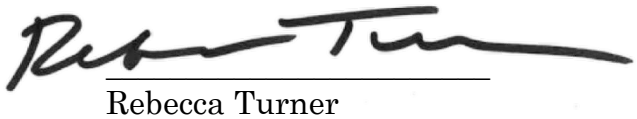
It is not hard to imagine what the founders of Vermont, the Green Mountain Boys, would have thought of the Legislature's enactment of an arms ban that has the effect of rendering Vermonters more vulnerable than those living in neighboring states. Reading the preamble to the 1777 Vermont Constitution provides ready reminder how individual liberties and the bearing of arms in self-defense and in defense of a free and independent State are inextricably intertwined.

The Court's remedy for this unconstitutional statute is to strike down the law as it "must be deemed void, as repugnant" to the Vermont Constitution under Article 16 and Article 7. Bates, 2 D. Chip. 77, 89, 1824 WL 1336, at *11 (Vt. Feb. 1824). To deprive this remedy would deny individuals "a means by which to vindicate their constitutional rights [and] would negate the will of the people in ratifying the constitution." Shields, 163 Vt. at 223, 658 A.2d at 928 (1995).

CONCLUSION

For the reasons stated herein, the Court should hold 13 V.S.A. § 4021 void.

DATED at Montpelier, Vermont this 24th day of April, 2020.



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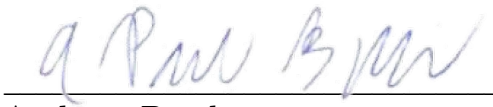
CERTIFICATE OF COMPLIANCE

I certify that the above brief submitted under Rule 32(a)(7)(B) was typed using Microsoft Word for Office 365 and the word count is 8,439.

Dated at Montpelier, Vermont this 24th day of April, 2020.



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