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

State of Vermont

v.

Max Misch

APPEAL FROM SUPERIOR COURT, CRIMINAL DIVISION (BENNINGTON)
Docket No. 172-2-19 Bncr

Reply Brief for Appellant State of Vermont

STATE OF VERMONT

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INTRODUCTION

This Court should adopt a reasonable regulation standard to analyze Article 16 claims. Opening Br. 2, 12-26. Under that standard, gun safety legislation like the magazine law challenged here should be upheld so long as the burden on the right to use a firearm in self-defense is reasonable in light of the balance of interests at stake, specifically the State's duty to protect the public from the danger of gun violence. This common-sense standard is supported by the constitutional text, the historical record, this Court's precedent, and case law from throughout New England and around the country. As 17 other states and the District of Columbia have explained, states need flexibility to enact reasonable gun safety legislation like Vermont's magazine law in order to protect their citizens from being killed or injured by gun violence. D.C. Br. 6-18.

Defendant Max Misch offers no workable alternative, and instead argues that any "limitation on the constitutional right to bear arms [under Article 16] is not supported by the constitutional text, its history, or this Court's precedent." Def.'s Br. 22. But this argument ignores the very authorities it cites. "[T]he language of the constitutional provision does not suggest that the right to bear arms is unlimited." *State v. Duranleau*, 128 Vt. 206, 210, 260 A.2d 383, 386 (1969). Nor is there merit to amici's imagined "categorical" right based on overheated rhetoric that regulating magazine size is like "flatly forbidding all Catholics in the State from attending worship" or puts Vermont "on the road to slavery." Kalinowski Br. 3; Cato Br. 25-26.

Defendant's arguments under the Common Benefits Clause fare no better. Defendant has abandoned any argument that the magazine law's grandfather provision is unconstitutional. Instead, he now challenges for the first time on appeal the law's narrow exceptions for law enforcement officers and others. Even if preserved, this argument should be rejected. The law's exceptions are reasonably related to legitimate government objectives. At most, any offending provisions should be severed from the statute.

ARGUMENT

I. Defendant has the burden to show the magazine law is unconstitutional.

"[S]tatutes are presumed to be constitutional" *Badgley v. Walton*, 2010 VT 68, ¶ 20; 188 Vt. 367, 10 A.3d 469. This is because "all sovereignty exists originally in the people," who "created state governments, and conferred upon them the residue of sovereign power, so far as they allow it to be exercised at all." *Town of Bennington v. Park*, 50 Vt. 178, 191 (1877). Accordingly, "the proponent of a constitutional challenge has a very weighty burden to overcome." *Badgley*, 2010 VT 68, ¶ 20; *Park*, 50 Vt. at 191 ("[T]he presumptions are all in favor of the validity of the action called in question; and if we find invalidity at all, it must be upon *clear* and *irrefragable* evidence that the action challenged is in conflict with some express provision of the organic law or its *necessary implications*." (emphasis in original)).

Defendant attempts to shirk this burden by arguing that Vermont's magazine law is "presumptively unconstitutional" and should be reviewed without giving "any deference" to the Legislature. *See* Def.'s Br. 16-21. Defendant is wrong. The

"baseline deference to the Legislature" is required unless a statute plainly violates an express constitutional command. *Cf. State v. Medina*, 2014 VT 69, ¶ 13, 197 Vt. 63, 102 A.3d 661 (discussing the "presumptive unconstitutionality of warrantless searches" under Article 11);[1] *see also In re Montpelier & Barre R. R. Corp.*, 135 Vt. 102, 103-04, 369 A.2d 1379, 1380 (1977) ("Legislative enactments, presumed constitutional, will be given reasonable construction, consistent with constitutional standards, unless the language of the statute itself plainly forecloses it.").

Nothing in the Vermont Constitution expressly prohibits regulating magazine capacity, or even gun laws generally. To the contrary, multiple provisions anticipate legislative regulation of firearms. Vt. Const., ch. II, § 59 ("The inhabitants of this State shall be trained and armed for its defense, under such regulations, restrictions, and exceptions, as . . . the Legislature of this State, shall direct."); Vt. Const., ch. II, § 67 ("The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl . . . under proper regulations, to be made and provided by the General Assembly."). The burden to invalidate 13 V.S.A. § 4021 falls squarely on defendant's shoulders. He has not carried it.

[1] Defendant's other citations are equally inapposite. *See, e.g.*, *Zullo v. State*, 2019 VT 1, 209 Vt. 298, 205 A.3d 466 (analyzing constitutional tort claim); *Ward v. Barnard*, 1 Aik. 121 (1825) (legislature could not ex post facto order defendant's release from debtor's prison); *Bates v. Kimball*, 2 D. Chip. 77, 79, 88 (Vt. 1824) (legislature violated separation-of-powers by passing "an act for the relief of Isaac Kimball" which was "not a law" but a "decree" granting one person a "special privilege").

II. The magazine law does not violate Article 16.

A. The Court should apply a "reasonable regulation" standard.

"[A]s numerous courts in other states have recognized with respect to their state constitutional right to bear arms," Article 16 claims should be governed by a "reasonable regulation" standard under which challenged legislation is upheld if it "is a 'reasonable' limitation on the right to bear arms" in self-defense. *See Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1222-23 (N.H. 2007). "Such a test differs from traditional rational basis because it 'focuses on the balance of the interests at stake, rather than merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare.'" *Id.* (quoting *State v. Cole*, 665 N.W.2d 328, 338 (Wisc. 2003)). The constitutional text, history, case law from both within and outside Vermont, and policy considerations all support adopting this standard. Opening Br. 13-26. Defendant's contrary arguments are unavailing.

First, the constitutional text makes clear that the Article 16 right is limited. Defendant and amici offer no response to the State's arguments that (i) the plain language of Article 16 limits the right to bear arms to self-defense and militia service; (ii) the plain language of Article 16 does not enshrine an unfettered freedom of choice comparable to Articles 3, 13, or 14; (iii) an unlimited right to bear arms under Article 16 is textually incompatible with the constitution's militia provision; and (iv) gun safety laws fall squarely within Article 5's grant of legislative and police powers to the General Assembly. *See* Opening Br. 13-14. Indeed, defendant's

only textual argument is that Article 16 protects an individual right in addition to a collective militia right, which the State has never disputed. *See* Def.'s Br. 21-23; Kalinowski Br. 9. And amici would have this Court ignore the constitutional text altogether. *See* Cato Br. 5 (arguing that the "first step" of constitutional analysis is to look at historical materials).

Second, defendant also largely ignores the State's historical sources, which show that neither Article 16 nor the Pennsylvania provision it copied preclude reasonable gun safety regulation, and that jurisdictions throughout the country, including Vermont, have regulated magazine capacity in various contexts for decades. Opening Br. 15-19; *see also* Everytown Br. 8-15. Defendant provides no countervailing historical analysis.

Amici make several historical arguments, but they are unpersuasive. *See* Kalinowski Br. 10-14; Cato Br. 22-32.

Although Vermont's land dispute with New York is a critical chapter of our State's history, amici misrepresent the nature of that conflict. "It is doubtful if a gun was ever discharged at any person on either side" in the "revolution of the New Hampshire Grants." Matt Bushnell Jones, Vermont in the Making: 1750-1777, at 339-40 (Harvard Univ. Press 1939). "The whole revolution might be fitly named the War of Words, and yet its objective was attained at a minimum of cost and suffering, to which in no small degree may be attributed the kindly feeling throughout the States that finally enabled Vermont to overcome the opposition of New York to its recognition as a member of the Union." *Id.* at 340-41; *see also*

Federalist No. 7 (Hamilton) ("Those who had the opportunity of seeing . . . the controversy between [New York] and the district of Vermont . . . can attest the danger, to which the peace of the Confederacy might have been exposed, had [New York] attempted to assert its rights by force.").

Moreover, armed conflict in the Revolutionary era was a fact of life from Massachusetts to Georgia. The colonists' enemies included not only the British, but also at times the French, the Spanish, tribal nations, and each other. *See, e.g.*, James C. Bradford, *American Colonial Wars*, Oxford Bibliographies (Feb. 6, 2012).[2] And during the Revolutionary War itself, when the Vermont Constitution was ratified at Windsor, conflict raged across the Eastern seaboard, not just at Ticonderoga and Bennington. U.S. Military Academy, Dep't of History, Major Campaigns of the American Revolutionary War.[3] Article 16's language was copied verbatim from Pennsylvania's constitution and is largely identical to the contemporaneous charters of at least seven other States. *See Dist. of Columbia v. Heller*, 554 U.S. 570, 600-03 (2008). Amici's historical anecdotes provide no basis to interpret Article 16 as alone granting the unlimited right defendant seeks.

In any event, the military conflicts amici highlight show early Vermonters bearing arms in defense of *the State*. The Green Mountain Boys were a militia—the forebear of today's Vermont National Guard. There is no question the State may

[2] http://www.oxfordbibliographies.com/view/document/obo-9780199791279/obo-9780199791279-0074.xml.

[3] https://www.westpoint.edu/history/sitepages/american%20revolution.aspx.

regulate the arms that can be used in its own defense. *See* Vt. Const., ch. II, § 59. These examples do nothing to suggest an unlimited self-defense right.[4]

Third, a reasonable regulation standard is supported by this Court's Article 16 precedent. Opening Br. 19-20. Defendant's Article 16 discussion does not even mention *Duranleau* or attempt to reconcile its holding that the Article 16 right is "not . . . unlimited" with his view of a right to bear arms without "limitation." *See* Def.'s Br. 21-27. Defendant argues this Court "rarely upholds statutes or ordinances that encroach upon Article 16," but neglects to mention that this Court has never invalidated an act of the Legislature on Article 16 grounds. *See* Def.'s Br. 24. And while *Rosenthal* voided a city ordinance, defendant fails to explain how a holding that a municipality cannot operate a licensing scheme that gives local officials discretion to disregard state law suggests the Legislature cannot limit the number of bullets a person can fire without reloading. *Compare* Opening Br. 19-20 *with* Def.'s Br. 25. Defendant then cites two inapposite homicide cases that do not even discuss Article 16. *See State v. Carlton*, 48 Vt. 636 (1876) (reversing manslaughter conviction on self-defense grounds); *State v. Wood*, 53 Vt. 560, 561 (1881) (reciting, without analysis, trial court's jury charge on self-defense).

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[4] Amicus's narrative of historical military weapons is similarly unhelpful. *See* Cato Br. 5-21. Those weapons are not comparable to mass-produced modern firearms outfitted with 30-, 50-, or 100-round magazines. And Vermont has for decades regulated magazine size for hunting, large-capacity magazines were banned nationwide from 1994-2004 and in a number of jurisdictions before that, especially dangerous weapons have always been subject to regulation, and more than a quarter of the nation's population currently lives in a jurisdiction that restricts magazine size. *See* Opening Br. 1, 18-19; Everytown Br. 9-14. Regardless, awareness of threats to public safety necessarily evolves. "Legislative inaction" is a "weak reed upon which to lean and a poor beacon to follow." *Lake Bomoseen Ass'n v. Vt. Water Resources Bd.*, 2005 VT 79, ¶ 21, 178 Vt. 375, 886 A.2d 355 (quotation omitted).

A reasonable regulation standard is also supported by this Court's precedent interpreting other state constitutional provisions. Opening Br. 21; Giffords Br. 26-29. The cases amicus cites do not suggest otherwise. *See Taylor v. Town of Cabot*, 2017 VT 92, ¶ 30, 205 Vt. 586, 178 A.3d 313 (plaintiffs could not show likelihood of success based on "legally questionable" argument that Compelled Support Clause "categorically precludes" the use of public funds to pay for repairs to a place of worship); *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 169 Vt. 310, 327, 738 A.2d 539, 552 (1999) ("[T]he constitution delineates only a framework of government with working details left for legislative definition." (quotations and alterations omitted)). And amicus's suggestion that constitutional "interest balancing" tests have the "purpose and effect of limiting individual rights" is emphatically contrary to Vermont's experience. *Compare* Kalinowski Br. 8 *with Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999) (applying flexible "balancing approach" to hold that Common Benefits Clause entitles same-sex couples to benefits of marriage).

Fourth, Defendant does not dispute that most states, including every state in New England, apply a "reasonable regulation" standard when evaluating constitutional challenges to gun safety laws. *See* Opening Br. 24-25; Giffords Br. 29-30. Amicus argues the Court "should not reflexively adopt" this standard and cites purportedly contrary approaches taken in Missouri and Louisiana. Kalinowski Br. 16-17. But this Court encourages the use of "a sibling state approach in state constitutional argument." *State v. Jewett*, 146 Vt. 221, 227, 500 A.2d 233, 237 (1985). And there is nothing "reflexive" about adopting a prevailing constitutional

standard that hews to the text of the Vermont Constitution and is consistent with Vermont history and case law. In any event, amici's examples do not support defendant's position. *See State v. Clay*, 481 S.W.3d 531 (Mo. 2016) (en banc) (applying strict scrutiny, as required by constitutional text, and upholding ban on nonviolent felons possessing firearms); *State ex rel. J.M.*, 144 So.3d 853 (La. 2014) (applying strict scrutiny, as required by constitutional text, and upholding bans on juvenile handgun possession and intentional concealment of a weapon).

Finally, policy considerations also support applying a standard that allows the Legislature flexibility to protect Vermonters against gun violence—both existing threats, including mass shootings; emerging threats like 3-D printable guns; and currently unknown threats that may later arise. Opening Br. 25-26; D.C. Br. 6-18; Giffords Br. 30-32; Brady Br. 21-22. "The public policy issues surrounding these circumstances are complex, and are best taken up by the Legislature," which is "better equipped [than the courts] to assemble the facts and determine the appropriate remedies." *Med. Ctr. Hosp. of Vt. v. Lorrain*, 165 Vt. 12, 16, 675 A.2d 1326, 1329 (1996).

Indeed, many of defendant's arguments simply attempt to relitigate the legislative debate. Defendant highlights statements by the magazine law's opponents but fails to explain their relevance to any constitutional analysis.[5] Def.'s Br. 7-15. *But see Human Rights Comm'n v. Benevolent & Protective Order of Elks of*

[5] The same goes for a concern raised (and later clarified) by an Assistant Attorney General in a committee hearing and a post-enactment statement made by the Governor in a primary debate. *See* Def.'s Br. 10-11; Kalinowski Br. 3, 19.

U.S., 2003 VT 104, ¶ 15 n.4, 176 Vt. 125, 839 A.2d 576 ("While legislative discussion on the matter could be helpful in determining legislative intent, the issue of whether any debate existed is not dispositive or necessarily instructive.").

Defendant also mischaracterizes the legislative record. The language limiting large-capacity magazines was proposed in the House Judiciary Committee on March 13, 2018. S.55: Proposed Amendment from Martin LaLonde (Mar. 13, 2018).[6] That committee publicly debated the amendment on March 14, 15, 16, 20, 21, and 27th before it was approved by the full House. The Senate Judiciary Committee then debated the proposal of amendment on March 28, 29, and 30. S.44 (Act 94), Bill Status.[7] Both chambers approved the language limiting large-capacity magazines after this debate, and the Governor signed the bill into law after an unsuccessful veto campaign. *See* Opening Br. 3-9. Nothing in this record abrogates the deference due the Legislature. *See also below* Section I.C.1.[8]

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[6] https://legislature.vermont.gov/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Erik%20FitzPatrick~Proposed%20Amendment%20from%20Martin%20LaMonde~3-14-2018.pdf.

[7] https://legislature.vermont.gov/bill/status/2018/S.55.

[8] Amicus complains of lobbying by "out-of-state" gun safety groups. Kalinowski Br. 13-14, 16. But his counsel, a Washington D.C. law firm, was hired by the National Rifle Association to invalidate Vermont's magazine law in a separate civil lawsuit (but later withdrew from that case after being fired by the NRA). *See* Colin Meyn, *Sportsmen groups hire favorite NRA law firm for legal challenge*, VTDigger. org (June 7, 2018), https://vtdigger.org/2018/06/07/sportsmen-groups-hire-favorite-nra-law-firm-legal-challenge/; Danny Hakim, *How WayneLaPierre Survived a Revolt at the NRA*, N.Y. Times (Aug. 22, 2019), https://www.nytimes.com/2019/08/22/us/politics/nra-guns-wayne-lapierre.html. The NRA has spent tens of thousands of dollars in recent years lobbying against gun safety bills in the Vermont Legislature. *See* Lobbying Expenditure Search, Vt. Sec'y of State, https://lobbying.vermont.gov/Public/SearchExpenditures (search for "National Rifle Association"). And before focusing on Vermont, counsel unsuccessfully attempted to invalidate large-capacity magazine laws in Connecticut, Maryland, Massachusetts, New Jersey, and New York. *See Worman v. Healey*, 922 F.3d 26 (1st Cir.

B. Defendant has not proposed a workable alternative standard.

The absolutist approaches urged by defendant and his amici are unworkable and dangerous.

At the most extreme, defendant's desired right to bear arms without "limitation" would seemingly permit him to acquire a machine gun, a rocket launcher, or even a nuclear warhead without the State being able to intervene. *See* Def.'s Br. 22. Such an interpretation of Article 16 is indefensible.

Amicus urges this Court to apply "a categorical approach" to Article 16 claims, under which any ban on a "class of arms" in "common use" is "categorically unconstitutional." Kalinowski Br. 3-6. That approach is not supported by any sources described above, and the Court should decline to interpret Article 16 as a one-way ratchet where a weapon's commercial popularity erases the State's traditional police powers.

This "categorical" approach is also not supported by the federal case law upon which amicus relies. In *Heller*, the U.S. Supreme Court first defined the Second Amendment right as "the individual right to possess and carry weapons in case of confrontation" and observed the right extended to weapons in "common use." 554 U.S. at 592, 627. It then determined the right protected possession of handguns, "the quintessential self-defense weapon." *Id.* at 629. Finally, the Court determined that "[u]nder any of the standards of scrutiny [the Court] has applied to enumerated

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2019); *Ass'n of N.J. Rifle and Pistol Clubs v. Attorney General*, 910 F.3d 106 (3d Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc); *N.Y.S. Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015).

constitutional rights," the District of Columbia's complete prohibition of handgun possession in the home was unconstitutional. *Id.* at 628-29.

Amicus purports to apply *Heller* but would end the constitutional inquiry after determining that large-capacity magazines are "in common use," ignoring *Heller*'s third step—selecting and applying an appropriate level of scrutiny. *Heller* did not dwell on this step because the Court concluded "a complete prohibition" on "the most popular weapon chosen by American for self-defense in the home" would fail even strict scrutiny. *Id.* at 629. But that does not mean the third step is irrelevant. Far from it. It is a necessary part of the constitutional analysis. *N.Y.S. Rifle*, 804 F.3d at 257 n.74 ("*Heller* indicated that the typical standards of scrutiny analysis *should* apply to regulations impinging upon Second Amendment rights" (emphasis in original, quotations omitted)); *see also State v. VanBuren*, 2018 VT 95, ¶¶ 47-71, 214 A.3d 791 (applying strict scrutiny to uphold nonconsensual pornography law against First Amendment challenge). The federal courts of appeal have been nearly unanimous in holding that large-capacity magazine bans are subject to, at most, intermediate scrutiny. *See* Opening Br. 28-30.

In any event, amicus's attempt to portray the magazine law as a total "ban" on a distinct "class of arms" is misguided. A magazine is a container that holds ammunition and feeds it into a firearm. The only feature that differentiates compliant and non-compliant magazines under Vermont law is the number of rounds they can hold. Large-capacity magazines are not a "class of arms" distinct

from other magazines; they are just bigger. *Cf. Heller*, 554 U.S. at 629 (discussing unique features that make handgun "quintessential self-defense weapon").

C. Any burden on the right to bear arms in self-defense is justified by the State's interest in reducing the likelihood and harm of mass shootings in Vermont.

Although advocacy groups have been challenging large-capacity magazine restrictions for years, defendant and his amici cite no final state or federal appellate rulings invalidating one and for good reason. Many courts have found that limiting magazine size is substantially or reasonably related to the compelling government interest of reducing the likelihood and harm of mass shootings. Opening Br. 27-30. And any burden on the right to bear arms in self-defense is, at most, minimal.

1. Limiting magazine size advances the State's interest in reducing the likelihood and harm of mass shootings in Vermont.

The State and its amici have described a series of public mass shootings confirming the State's interest, as well as four prevented or completed shootings in Vermont. Opening Br. 3-4; Giffords Br. 2-3, 6-7, 16-17. Defendant and amici do not contest that the State's interest is compelling. Instead, they ask the Court to re-weigh the legislative record and reject the Legislature's judgment about whether magazine restrictions work, based on misleading excerpts of academic literature.

Defendant's arguments run squarely into *Badgley*, which rejected as "the antithesis of deference" invalidating a statute based on an expert "whose findings and conclusions were rejected" by the Legislature. 2010 VT 68, ¶ 42. The legislative record here includes Second and Fourth Circuit cases where Professor Christopher Koper supported magazine restrictions, Professor Gary Kleck opposed them, and

the courts upheld the restrictions after citing Koper. *N.Y.S. Rifle*, No. 14-36-cv, Doc. 64 at 4 (describing where Koper and Kleck materials can be found in the joint appendix); 804 F.3d at 264 (Koper "stated that it is 'particularly' the ban on large-capacity magazines that has the greatest 'potential to prevent and limit shootings in the state over the long-run.'"); *Kolbe*, No. 14-1945, Doc. 27-1 at 3, 7 (same); 849 F.3d at 129 n. 8 (contrasting the "snippets from the studies of . . . Dr. Koper" plaintiffs cited with his actual opinions).[9]

Defendant's arguments are also meritless. As *N.Y.S. Rifle* noted, "[l]arge-capacity magazines are disproportionately used in mass shootings" and "result in more shots fired, persons wounded, and wounds per victim." 804 F.3d at 263-64 (quotations omitted). They "are designed to enhance a shooter's capacity to shoot multiple human targets very rapidly" and "enable shooters to inflict mass casualties while depriving victims and law enforcement officers of opportunities to escape or overwhelm the shooters while they reload." *Kolbe*, 849 F.3d at 125, 127 (quotation omitted).

Amici attempt to contradict these commonsense conclusions by conflating public mass shootings with targeted private shootings and suggesting that most mass shootings do not involve large-capacity magazines. Kalinowski Br. 23. But, as the study amicus cites explains, that is because most shootings killing four or more

[9] The *N.Y.S. Rifle* and *Kolbe* decisions were placed in the legislative record by Representative Martin LaLonde, who proposed the language banning large-capacity magazines. *See* S.55 (Act 94), H. Judiciary Comm, Documents & Handouts, https://legislature.vermont.gov/committee/document/2018/18/Bill/85082. Legislatures may appropriately rely on judicial decisions incorporating factual records from other jurisdictions. *See* D.C. Br. 13 n.14.

people are targeted shootings in private places arising out of domestic violence. *See* Everytown for Gun Safety, *Analysis of Recent Mass Shootings* 2, 3, 6 (2015).[10] Large-capacity magazines generally do not facilitate targeted shootings where the shooter does not intend to fire more than 10 shots.

Rather, as the legislative record reflects, they facilitate public mass shootings where the goal is to kill as many people as possible by "depriving victims and law enforcement officers of opportunities to escape or overwhelm the shooters while they reload." *Kolbe*, 849 F.3d at 127. More recent Everytown research expressly recognizes this, noting that "[a]ssault weapons and high-capacity magazines were disproportionately used in public mass shootings" and that the five deadliest between 2009 and 2018 all involved large-capacity magazines. Everytown, Mass Shootings in America: 2009-2020.[11]

A recently published study of the ten-year federal nationwide magazine capacity restriction, and individual state restrictions, confirms the Legislature's judgment. Between 1990 and 2017, there were 69 mass shootings in which six or more victims were shot to death. Louis Klarevas et al., *The Effect of Large-Capacity Magazine Bans on High-Fatality Mass Shootings, 1990-2017*, 109 Am. J. Pub. Health 174, 1755 (2019).[12] 92% of the shootings with 10 or more fatalities involved large-capacity magazines, as did more than 70% overall where magazine capacity was

[10] https://everytownresearch.org/wp-content/uploads/2015/08/MassShooting-080715-9.pdf.

[11] https://everytownresearch.org/massshootingsreports/mass-shootings-in-america-2009-2019/.

[12] https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2019.305311.

known. *Id*. at 1755, 1760. More people are "killed when LCMs are used" and states that restrict capacity "experience high-fatality mass shootings involving LCMs at a lower rate and a lower fatality count" than states that do not. *Id.* at 1760.

Amici's attempt to contradict the Legislature by relying on Kleck's scholarship is misplaced. *See* Kalinowski Br. 23-26 (citing Gary Kleck, *Large-Capacity Magazines and the Casualty Counts in Mass Shootings: The Plausibility of Linkages*, 17 J. Res. & Pol'y 28 (2016)).

Kleck's work is easily debunked. His *"Plausibility"* article, for example, disputes that pauses during shootings save lives, but contains multiple easily demonstrated errors. For example, Virginia Tech involved two shootings more than two hours apart and an official report establishes that a janitor escaped while the shooter was "loading his gun" during the second shooting. Mass Shootings at Virginia Tech, Addendum to the Report of the Review Panel at 26, 29-30A.[13] But Kleck erroneously asserts that reloading could not have mattered by calculating a misleading average rate of fire that excludes the shots fired during the first shooting, but includes the entire two hours and 23 minutes between shootings. *Id.* at 30A (174 rounds fired in the second location); 17 J. Res. & Pol'y at 43 (4/16/07 entry reporting 174 rounds total fired over 156 minutes).

Likewise, Kleck proposes a flawed metric of a 2- to 4-second reloading time, based on a citation to a YouTube video of an experienced shooter at an empty range. *See* 17 J. Res. & Pol'y at 30, 42-43. "While a trained marksman or professional

[13] https://scholar.lib.vt.edu/prevail/docs/April16ReportRev20091204.pdf.

speed shooter" "in controlled conditions" can reload in 2 to 4 seconds "an inexperienced shooter may need eight to ten seconds." *N.J. Rifle*, 910 F.3d at 113. Indeed, nine people fled to safety during a 13-second pause in the Parkland shooting that began with the shooter "retrieving a magazine from his vest" and ended with him "rais[ing] the rifle" and resuming fire.[14] Recordings also demonstrate that mass shooters regularly fire more than one shot per second when near victims—much faster than Kleck suggests in *Plausibility*—both for incidents the article does and does not discuss.[15]

The best way to evaluate whether "reloading pauses" matter is to examine what has actually happened in past shootings. There have been numerous documented incidents in recent years where an actual or prospective mass shooter's pause to reload or switch weapons allowed victims to escape or the shooter to be subdued.

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[14] Marjory Stoneman Douglas High Sch. Public Safety Comm'n Initial Report 32 ("Parkland Report"), http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf.

[15] Published recordings show speeds faster than one shot per second during the shootings at Virginia Tech and Aurora, and speeds approaching two shots per second at Parkland, three at the Pulse nightclub, and nine in Las Vegas. *2007: Virginia Tech Shooting*, CNN, https://www.cnn.com/videos/us/2011/04/14/vault.todd.va.tech.shooting.cnn (8 shots audible in the first six seconds during Virginia Tech); Mark Memmott, *911 Calls Played and Traps in Holmes' Apartment Described in Colo. Court*, NPR (Jan. 8, 2013), https://www.npr.org/sections/thetwo-way/2013/01/08/168881274/911-calls-played-and-traps-in-holmes-apartment-described-in-colo-court (police counted at least 30 shots during the first 27 second 911 call from the Aurora shooting); *Watch the videos students took during the Florida school shooting*, Wash. Post (Feb. 15, 2018), https://www.washingtonpost.com/video/national/see-the-videos-students-took-during-the-florida-school-shooting/2018/02/15/0d873fe2-1293-11e8-a68c-e9374188170e_video.html?utm_term=.8b1e27aa26e0 (18 shots audible between 18 and 28 seconds); Larry Buchanan et al., *Nine Rounds a Second: How the Las Vegas Gunman Outfitted a Rifle to Fire Faster*, N.Y. Times (Oct. 5, 2017) https://www.nytimes.com/interactive/2017/10/02/us/vegas-guns.html (recordings from Las Vegas and the Pulse nightclub).

See N.J. Rifle, 910 F.3d at 119-20 (describing seven shootings where pauses allowed people to escape or intervene).[16]

Amici also cite *Duncan v. Becerra,* 366 F. Supp.3d 1131 (S.D. Cal. 2019), but that decision is factually flawed. For example, *Duncan* asserts the Parkland shooter "reject[ed] large capacity magazines," *id.* at 1177, but an official Parkland report establishes that "[e]ight 30- and 40- round capacity magazines were recovered from the scene" and provides pictures, Parkland Report at 262-63. *Duncan* similarly asserts that "news pieces" discussing Thousand Oaks "do not report witnesses describing a 'critical pause' when the shooter reloaded," 366 F. Supp. at 1162, even though many report that more than 30 people escaped "[w]hen the gunman paused to reload," *see Borderline Bar Shooting*, *supra* note 16. *Duncan*, which has been appealed, is also contrary to every final appellate ruling in a magazine case to date. *See* Opening Br. 23-24.

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[16] *See also, e.g., The Most Devastating Day: 12 Killed, Several Injured in Virginia Beach Shooting*, ABC8 News (May 31, 2019), https://www.wric.com/news/virginia-news/the-most-devastating-day-12-killed-several-injured-in-virginia-beach-shooting/ (shooter reportedly shot by police while "reloading his weapon"); Dep't of Justice, Press Release, *California Man Indicted for Federal Hate Crimes Related to Poway Synagogue Shooting and Arson of Escondido Mosque* (May 21, 2019), https://www.justice.gov/opa/pr/california-man-indicted-federal-hate-crimes-related-poway-synagogue-shooting-and-arson (shooter using an AR-15 and California-compliant 10-round magazines chased from synagogue "[d]uring a pause when [he] unsuccessfully attempted to reload his firearm"); *Borderline Bar Shooting Leaves a Devasted Community in Mourning*, Associated Press (Nov. 9, 2018), https://www.nbclosangeles.com/news/local/Thousand-Oaks-Borderline-Shooting-Victims-500122561.html (approximately 30 people escaped "[w]hen the gunman paused to reload"); Gina Harkins, *Chattanooga shooting investigation: Marine shielded his daughter from terrorist's rampage*, Marine Times (Sept. 25, 2015) https://www.marinecorpstimes.com/news/your-marine-corps/2015/09/26/chattanooga-shooting-investigation-marine-shielded-his-daughter-from-terrorist-s-rampage/ (marine instructed others "to get down" and "stay down until the break in fire" and escaped with others during the break).

2. The magazine law is enforceable.

Defendant suggests the magazine law is problematic because it will be difficult to enforce. Def.'s Br. 10, 11. The argument fails because "[t]he mere possibility that some subset of people intent on breaking the law will indeed" ignore the restriction "does not make [it] unconstitutional." *N.Y.S. Rifle*, 804 F.3d at 263. It also a curious argument in this case because enforcement here was straightforward. *See* Opening Br. 9-11. Defendant also does not address the primary way the restriction will be enforced—by blocking retail stores from selling large-capacity magazines in Vermont.

3. Any burden on the right to bear arms in self-defense is, at most, minimal.

Finally, the Court should join the nearly unanimous consensus among state and federal courts and conclude that restricting magazine size does not significantly burden the ability to use a firearm for self-defense. *See* Opening Br. 30-31. Vermonters can purchase as many firearms and compliant magazines as they wish. In response to decades of public mass shootings nationwide, defendant and amici do not identify a single instance where anyone fired more than 15 rounds from a handgun, or 10 rounds from a long gun, in self-defense in Vermont.

Amicus's three out-of-state anecdotes do not remedy the omission. *See* Cato Br. 44-46. First, a reportedly successfully use of six shots in self-defense in Georgia does not support a challenge to a 15-round handgun magazine restriction. Second, that the most popular version of the gun a Detroit woman reportedly used to defend herself comes "with a standard magazine of 17 rounds" is irrelevant given that the

cited article states the woman "fired four shots."[17] Finally, noting that a Texas woman suffered cuts and a concussion after running out of ammunition does not support defendant's position, particularly where amicus provides no information about the weapon or ammunition the woman used.[18]

Defendant's failure to identify any incidents supporting their self-defense position is unsurprising. Gun advocates have long contended that the "vast majority" of defensive gun uses consist solely of brandishing a gun. *See, e.g.*, John R. Lott Jr., *Does Allowing Law-Abiding Citizens to Carry Concealed Handguns Save Lives,* 31 Val. U. L. Rev. 355, 355. And when shots are fired, the NRA's studies "of 'armed citizen' stories" found that the average number of shots fired in self-defense was less than 3. *Kolbe*, 849 F.3d at 127.

III. The magazine law does not violate the Common Benefits Clause.

A. Defendant has waived any argument that the magazine law violates the Common Benefits Clause.

Defendant argued below that the magazine law's grandfather provision violates his rights under the Common Benefit Clause because it prevents him from owning large-capacity magazines while allowing others to retain the large-capacity magazines they acquired before the law's effective date. Def.'s Mot. to Dismiss 23-

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[17] *Woman fires at home burglars: 'I let loose on them'*, Detroit News (Jun. 9, 2015) https://www.detroitnews.com/story/news/local/detroit-city/2015/06/09/woman-hospital-gunfight-home-invaders/28727561/.

[18] Brian New, *61-year old woman shoots intruder, then burglars attack her*, CBSDFW (Mar. 28, 2016) https://dfw.cbslocal.com/2016/03/28/61-year-old-woman-shoots-intruder-then-burglars-attack-her/. It was later reported the victim defended herself with an air gun. *Saul Guzman arrested by Terrell Police Department*, Forney Monitor (Mar. 30, 2016), http://forneymonitor.com/2016/03/saul-guzman-arrested-by-terrell-police-department/.

28; *see* 13 V.S.A. § 4021(c)(1). Because defendant does not even mention the grandfather provision on appeal, he has waived any argument that it is unconstitutional. *See C&S Wholesale Grocers, Inc. v. Dep't of Taxes*, 2016 VT 77A, ¶ 28, 203 Vt. 183, 155 A.3d 169 (arguments not raised in opening brief are waived).

Defendant also cannot now challenge the law's exceptions for law enforcement and others because "[a]rguments not raised below will not be addressed for the first time on appeal. " *See Randall v. Hooper*, 2020 VT 32, ¶ 10; 13 V.S.A. § 4021(d). This argument was neither raised by defendant below nor addressed by the trial court. Accordingly, when the parties moved to certify questions to this Court, the State had no reason to believe it was "agree[ing]" to certify a never before considered constitutional challenge to an entirely separate statutory subsection. *See* V.R.A.P. 5(a)(1). The Court should decline to reach defendant's new argument.

B. The magazine law's exceptions do not violate the Common Benefits Clause.

In any event, defendant's new argument is meritless. A challenged statutory classification does not violate the Common Benefits Clause so long as it bears a "reasonable and just" relationship to a legitimate government interest. *Badgley*, 2010 VT 68, ¶¶ 21-27 (citing *Baker,* 170 Vt. at 202-24, 744 A.2d at 869-86).

Defendant characterizes these exceptions listed at 13 V.S.A. § 4021(d) broadly as benefitting "the Government" over "the people of Vermont," but neither explores the exemption categories in any detail nor engages in the balancing test required by

Baker and *Badgley*.[19] Def.'s Br. 35. His argument instead that "the Court cannot engage in any balancing of interests analysis" because the right to possess large-capacity magazines is absolute under Article 16 fails for the reasons discussed above. *See id.* at 30. Many federal courts have correctly rejected combined Second Amendment and Equal Protection challenges where the challenged statute neither unconstitutionally burdens the right to bear arms in self-defense nor is based on a suspect classification. *See* Opening Br. 33.

This is particularly appropriate here because the challenged classifications are justified by a legitimate public safety rationale. For example, a policy "granting police officers unrestricted licenses to carry firearms," while other applicants were issued restricted licenses, enhanced public safety "because it allows [officers] to do their job fighting crime." *See Pineiro v. Gemme*, 937 F. Supp. 2d 161, 176 (D. Mass. 2013). It also permissibly extended "to off-duty and retired officers, because the police training they received greatly increases the chances that they will not inadvertently harm another citizen when carrying or discharging their firearm." *Id.*

Similar reasoning applies to the magazine law's exceptions, which like those of other states, are closely based on the exceptions to the former federal assault

[19] This provision exempts state and federal governments, § 4021(d)(1)(A); state and federal law enforcement officers, on or off duty, for legitimate law enforcement purposes, § 4021(d)(1)(B); certain security of nuclear materials required by federal law, § 4021(d)(1)(C); retired law enforcement officers who received large-capacity magazines from their former employer upon retirement, § 4021(d)(1)(D); and licensed manufacturers or importers for certain purposes, including for testing and development, for repair and return to the owner, for sale to an authorized person, or for sale outside Vermont, § 4021(d)(1)(E), (d)(2).

weapon and large-capacity magazine ban. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110103(a)(3), 108 Stat. 1796.

Indeed, federal appellate courts recently rejected similar challenges to New Jersey's and Maryland's exceptions for active and retired law enforcement officers, explaining that law enforcement officers are not "similarly situated" to others because they "have training and experience not possessed by the general public." *N.J. Rifle*, 910 F.3d at 125; *accord Kolbe*, 849 F.3d at 147 ("[R]etired officers are better equipped to safely handle and store those [large-capacity] magazines and to prevent them from falling into the wrong hands.").[20]

Vermont law enforcement officers likewise receive extensive firearms training. *See, e.g.*, State of Vermont, Criminal Justice Training Council, *Basic Training Curriculum Summary*.[21] And although large-capacity magazines have limited utility as a self-defense tool, law enforcement—unlike the general public—at times must use force offensively. Excluding officers trained to handle particularly dangerous firearms is reasonably related to the State's public safety goals.

Moreover, the statutory exceptions have been actively debated both before and after the law's enactment. *See, e.g.*, 2018, No. 94 (S.55), § 11 (setting automatic sunset for exception for out-of-state residents attending in-state shooting competition); 2019 (S.169), § 1 (adding exceptions for out-of-state law enforcement officer in Vermont for legitimate law enforcement purpose; vetoed by Governor June

[20] While the analysis is distinct, this Court frequently examines federal Equal Protection cases when considering Common Benefit claims. *See, e.g.*, *Badgley*, 2010 VT 68, ¶¶ 12-16.

[21] https://vcjtc.vermont.gov/content/basic-training-curriculum-summary.

10, 2019). The Court should not interfere in this ongoing policy discussion. *See Badgley*, 2010 VT 68, ¶¶ 40-41.

C. Any offending provision should be severed from the rest of the statute.

Even if one of the exceptions violated the Common Benefits Clause, the proper remedy would be to sever it, not facially invalidate the entire magazine law.

"The determinative state law question regarding separability is whether the legislature would have enacted the statute without the invalid portion." *Bagley v. Vt. Dept. of Taxes*, 146 Vt. 120, 125, 500 A.2d 223, 226 (1985). The Court may look to the purpose of the whole statute and determine if it is still well served by the remaining, constitutional portion. *Id.* at 126, 500 A.2d at 226. The presumption is severability. *Veilluex v. Springer*, 131 Vt. 33, 41, 300 A.2d 620, 626 (1973); *cf. City of Burlington v. N.Y. Times Co.*, 148 Vt. 275, 282, 532 A.2d 562, 566 (1987) (only "integrally related" provisions may not be severed).

If any of the exceptions were improper, the remedy would be severance, because they are functionally independent of the statute's purpose—protecting public safety by reducing the likelihood and harm of mass shootings in Vermont—and an exemption based on an improper classification is "easily separable" from an otherwise intact statutory scheme. *See Bagley*, 146 Vt. at 126, 500 A.2d at 226 (severing unconstitutional residency requirement from alternative energy tax credit statute); *Veilleux*, 131 Vt. at 41, 300 A.2d at 625-26 (severing provision from implied consent law that impermissibly punished defendants who pleaded not guilty to related criminal charge).

CONCLUSION

The Court should answer the certified questions in the negative and reject defendant's constitutional challenges.

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CERTIFICATE OF COMPLIANCE

Benjamin D. Battles, Solicitor General and Counsel of Record for the appellant State of Vermont, certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(7), as modified by this Court's May 1, 2020 entry order. According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 6,500 words.

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