STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 224-4-18 Wncv

VERMONT FEDERATION OF SPORTSMEN'S CLUBS;
VERMONT STATE RIFLE & PISTOL ASSOCIATION, INC.;
POWDERHORN OUTDOOR SPORTS CENTER, INC.;
WILLOW LLC, dba LOCUST CREEK OUTFITTERS; JOHN FOGARTY;
SAMUEL FRANK; and
LEAH STEWART,
Plaintiffs

v.

MATTHEW BIRMINGHAM, Director of the Vermont State Police;
T.J. DONOVAN, Attorney General;
SARAH GEORGE, State's Attorney for Chittenden County; and
DAVID CAHILL, State's Attorney for Windsor County; WILLIAM PORTER, State's Attorney for Orange County,
Defendants,

AMICUS BRIEF OF GIFFORDS LAW CENTER, THE VERMONT MEDICAL SOCIETY AND GUN SENSE VERMONT IN SUPPORT OF STATE'S MOTION TO DISMISS

Of Counsel:
J. Adam Skaggs, Esq.
Giffords Law Center to Prevent Gun Violence
223 West 38th St. #90
New York, NY 10018
(917) 680-3473

Hannah Shearer, Esq.
Giffords Law Center to Prevent Gun Violence
268 Bush St. #555
San Francisco, CA 94104
(415) 433-2062

Tristram J. Coffin, Esq.
Jennifer McDonald, Esq.
Downs Rachlin Martin, PLLC
P.O. Box 190
Burlington, VT 05402-190
(802) 863-2375

Bridget Asay, Esq.
Michael Donofrio, Esq.
Stris & Maher LLP
28 Elm Street, 2d Floor
Montpelier, VT 05602
(802) 858-4465

Counsel for Amici Curiae

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*

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

Amicus curiae Vermont Medical Society is a nonprofit member service organization with over 2400 members, representing about 60% of practicing physicians and physicians' assistants in Vermont. It is dedicated to improving the environment in which Vermont physicians practice medicine and to protecting the health of Vermont citizens. Consistent with its longstanding policy position, the Vermont Medical Society supports legislation like S.55 that restricts the sale and private ownership of large-capacity magazines. Vermont pediatrician Dr. Rebecca

Bell testified in support of S.55 on behalf of both the Vermont Medical Society and the Vermont Chapter of the American Academy of Pediatrics, explaining why firearms injuries and deaths are a public health crisis.

Amicus curiae GunSense Vermont, Inc. is a grassroots Vermont organization formed in 2013 following the shooting at the Sandy Hook elementary school in Connecticut. GunSense Vermont represents a growing coalition of concerned Vermonters who support common-sense laws designed to save lives and reduce gun violence. Its members include gun owners, non-gun owners, members of all three major political parties in Vermont, and others who recognize that gun violence poses a serious threat to public safety. GunSense Vermont supported S. 55, including its restriction on large-capacity magazines.

INTRODUCTION AND SUMMARY OF ARGUMENT

Large capacity magazines ("LCMs") holding more than 10 rounds of ammunition—in some cases up to 100 rounds—allow shooters to inflict mass casualties by continuously firing without pausing to reload. The numbers are staggering and speak for themselves: In 2011, a gunman at Congresswoman Gabrielle Giffords' constituent meeting in Tucson, Arizona fired 33 rounds in 15 seconds, hitting 19 victims and killing six; in 2012, the Sandy Hook gunman fired 154 rounds in minutes, killing 26 children and teachers; in 2015, the San Bernardino shooters shot 36, killing 14; in 2016, the Orlando gunman shot over 100 people, killing 49; and in 2017, the Las Vegas gunman killed 58 and injured almost

500, firing nearly continuously into a crowd for approximately ten minutes.[1] LCMs are the common denominator.

In February 2018, it became painfully clear that Vermont is not immune from the threat of gun violence. Days after the school shooting in Parkland, Florida, the Vermont State Police arrested Jack Sawyer, a young man with detailed plans to use an AR-15 rifle, a 9mm handgun, and a 12-gauge shotgun to "beat the highest casualty count of all the other school shootings" at Fair Haven High School.[2] He specifically planned to purchase ammunition that "he believed would cause greater casualties and injuries." *Id.* Sawyer's plot is not an isolated incident. In July 2005, Vermont State Police narrowly thwarted a planned mass shooting in Brattleboro. One year later, in August 2006, Christopher Williams opened fire at Essex Elementary School as part of his rampage throughout Essex, Vermont, killing four people and wounding two others.

Horrifying mass shootings like these are often enabled by the extraordinary lethality of LCMs. These magazines enable untrained shooters to take down dozens of people and eliminate the possibility of interruption while shooters reload. Other incidents in which LCMs holding more than 10 rounds were not used—and

---

[1] *See e.g.*, Alex Horton, *Las Vegas Shooter Modified a Dozen Rifles to Shoot Like Automatic Weapons,* Washington Post, Oct. 3, 2017, https://www.washingtonpost.com/news/checkpoint/wp/2017/10/02/video-from-las-vegas-suggests-automatic-gunfire-heres-what-makes-machine-guns-different/?noredirect=on&utm_term=.ba9dea195791

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

rampages were cut short while shooters reloaded—stand in stark contrast to the examples above. *See infra* at 9 n.14.

On April 11, 2018, the Vermont Legislature banned the manufacture, possession, transfer, sale, purchase, or receipt in Vermont of LCMs. Vermont's ban on LCMs is similar to bans in other jurisdictions that have been upheld by the Second, Fourth, Seventh, and D.C. Circuits, and by other state and federal courts. *See infra* § I.B; State's Mem. 33-34, 45.

This Court should dismiss Plaintiffs' challenge to Vermont's LCM ban. As the State has shown, Plaintiffs do not have standing to press this claim. State's Mem. 11-29. Even if the Court does find standing, Plaintiffs' claims fail as a matter of law. First, as explained below, S.55's LCM restrictions are constitutional under any standard of review, because LCMs pose an unjustifiable risk to public health and safety—as evidenced by the fact that LCM bans have been upheld by numerous federal and state courts. Second, the Court should reject Plaintiffs' unprecedented and extreme interpretation of Article 16 of the Vermont Constitution. Consistent with precedent construing Article 16 and other provisions of the state constitution, the Court should defer to the Legislature's measured judgment that LCMs pose an unacceptable risk to public health and safety.

ARGUMENT

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

When Governor Scott signed S.55, Vermont joined state and local governments across the country that have saved lives by banning LCMs.[3] LCMs are repeatedly used in mass shootings and attacks on law enforcement officers because they allow shooters to keep firing without stopping—killing and wounding many more victims with a single weapon. LCMs are offensive accessories intended for military-style assaults, not defensive weapons necessary or suitable for individual self-defense.

As explained below, *see infra* Part II, the Vermont Constitution permits reasonable regulations of firearms and does not require courts to apply heightened scrutiny. But the overriding interest in public safety is so compelling that the standard of review does not matter. As multiple federal courts have concluded, restrictions on LCMs are permissible under the Second Amendment even applying a form of heightened scrutiny. The awful toll of casualties and injuries from both large-scale mass shootings and everyday gun violence confirms that under any S.55's ban on LCMs readily survives scrutiny under any standard of review.

---

[3] *See* Cal. Penal Code §§ 16740, 32310 (West 2015); Colo. Rev. Stat. §§ 18-12-301(2), 18-12-302 (2013); Conn. Gen. Stat. Ann. §§ 53- 202w(a)(1), 53-202w(b) (West 2013); D.C. Code § 7-2506.01(b) (2012); Haw. Rev. Stat. Ann. §§ 134-1, 134-4, 134-8(c) (West 2013); Md. Code Ann., Crim. Law §§ 4-306(b)(1) (West 2013); Mass. Gen. Laws ch. 140, §§ 121, 131M (2014); N.J. Stat. Ann. §§ 2C:39-1(y), 2C:39-3(j), 2C:39-9(h) (West 2014); N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.10 (McKinney 2018); Cook Cnty., Ill., Code of Ordinances §§ 54-211 – 54-213; N.Y.C. Admin. Code §§ 10-301, 10-306; S.F. Police Code § 619; Sunnyvale, Cal., Municipal Code § 9.44.050. California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New York, and the District of Columbia define a LCM as a magazine capable of holding over 10 rounds, while Colorado defines a LCM as a magazine capable of holding over 15 rounds.

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

Vermont's LCM ban is amply justified by this sad and simple fact: LCMs allow shooters to inflict mass casualties by continuing to fire more bullets without stopping or pausing to reload. Indeed, shooters who use assault weapons or LCMs shoot 155% more people and kill 47% more people, on average, than shooters who do not.[4] Medical research and physician experiences confirm the unsurprising fact that shootings involving LCMs are deadlier because victims suffer more bullet wounds.[5] The results are tragic:

- *November 2017*: A gunman massacred 26 worshippers and injured 20 others during a church service in Sutherland Springs, Texas. Law enforcement "collected hundreds of shell casings from the church, including 15 magazines with 30 rounds each."[6]

- *October 2017*: A gunman opened fire from the 32nd floor of a hotel in Las Vegas, slaughtering 58 people attending a concert and injuring hundreds. The shooter was armed with at least 20 firearms and a dozen LCMs each holding up to 100 rounds.[7]

---

[4] Everytown Research, Analysis of Recent Mass Shootings, at 4 (Aug. 2015), https://everytownresearch.org/documents/2015/09/analysis-mass-shootings.pdf; *see also* Mayors Against Illegal Guns, Analysis of Recent Mass Shootings (2013), http://libcloud.s3.amazonaws.com /9/56/4/1242/1/analysis-of-recent-mass-shootings.pdf.

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

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

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

- *June 2016*: A gunman entered an Orlando, Florida nightclub and shot over 100 people, killing 49. His victims "suffered more than 200 gunshot wounds."[8]

- *December 2015*: Assailants shot 36 people in less than four minutes in an attack in San Bernardino, California.[9] The shooters were armed with "at least four high-capacity magazines and more than a thousand rounds of ammunition."[10]

- *December 2012*: A gunman killed 26 people at Sandy Hook Elementary School in Newtown, Connecticut. Twenty of the dead were young children. The gunman was armed with a Bushmaster XM-15 assault rifle, two handguns, multiple 30-round magazines, and hundreds of rounds of ammunition.[11]

- *July 2012*: A gunman opened fire in a movie theater in Aurora, Colorado. Armed with several firearms, including an assault weapon equipped with a 100-round drum magazine, the gunman shot 58 people killing twelve.[12]

- *January 2011*: A gunman opened fire at Representative Gabrielle Giffords' constituent meeting in a supermarket parking lot in Tucson, Arizona. The gunman emptied his 30-round magazine, killing 6 and wounding 14, including Rep. Giffords. Bystanders tackled him and ended the carnage when he paused to reload.[13]

---

[8] David Harris, *Final Autopsies of Pulse Victims Released*, Orlando Sentinel, Aug. 8, 2016, http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/os-pulse-shooting-more-autopsies-20160808-story.html.

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

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

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

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

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

This is not just a matter of common sense. A recent analysis of high-fatality mass shootings in which at least six people were killed between 1966 and 2015 shows that such massacres have markedly increased in frequency and lethality, reaching "unprecedented levels in the past ten years." Louis Klarevas, Rampage Nation: Securing America from Mass Shootings 215, 78-79 (2016). This study found that the use of magazines holding more than ten rounds is "the factor most associated with high death tolls in gun massacres." *Id.* at 257; *see also id.* 215-25 (calculating impact of LCM use on fatalities).

LCM bans are an evidence-based way to combat this epidemic of gun rampages. The Klarevas study found that between 1994 and 2004, when federal law restricted the sale and possession of LCMs, there were twelve high-fatality mass shootings resulting in a total of 89 deaths, but no such incidents during the first four and a half years. *Id.* at 240-43. However, when the federal ban expired in 2004, fatality rates connected to large-scale shootings spiked once more. *Id.* at 243.

Other experts reach the same conclusion when examining a broader range of shootings. Using data from Stanford University's Mass Shooting Database, which defines a mass shooting as an event with three or more casualties, Dr. Michael Siegel found that LCM bans correlate with a 63% lower rate of mass shootings.[14] Siegel, a community health science professor at Boston University, looked at "many possible socio-demographic factors," but concluded that whether "a state has a large

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

capacity ammunition magazine ban is the single best predictor of the mass shooting rate in that state." *Id.*

LCMs have also enabled increasing numbers of gun crimes and murders of law enforcement officers. A 2017 study co-authored by the lead researcher of the assessment of the 1994 federal assault weapons ban found that LCMs are disproportionately used in murders of police and mass murders and are "particularly prominent in public mass shootings and those resulting in the highest casualty counts." Christopher S. Koper et al., *Criminal Use of Assault Weapons and High-Capacity Semi-Automatic Firearms: an Updated Examination of Local and National Sources*, 95 J. of Urban Health (Issue 3) 313, 319 (2018). Like the Klarevas study, this study highlights that since the federal ban expired in 2004, in different jurisdictions "high-capacity semiautomatics have grown from 33 to 112% as a share of crime guns." *Id.* at 313.

The research confirms what common sense and real-life experience tell us: When a person intent on killing can keep shooting without pause, more people will be injured and killed. Moreover, as numerous examples illustrate, when the shooter

must pause to reload, lives are saved.[15] Put simply, restricting the sale and possession of LCMs saves lives, and a state's choice to do so falls well within its power to protect public health and safety, regardless of the standard of review.

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

Vermont joins eight other states and the District of Columbia plus a number of municipalities that have banned or restricted large-capacity magazines. These measures have been upheld by federal appellate courts across the country, including the Second Circuit. *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017); *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537 (10th Cir. 2016);[16] *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), *cert. denied sub. nom. Shew v. Malloy*, 136 S. Ct. 2486 (2017); *Friedman*, 784 F.3d at 406;

---

[15] *E.g.*, John Wilkens, *Construction Workers Felt They 'Had To Do Something,'* San Diego Union-Tribune, Oct. 11, 2010, http://www.sandiegouniontribune.com/sdut-hailed-asheroes-construction-workers-who-stopped-2010oct11-htmlstory.html (after gunman wounded two students, "workers chased after him as he stopped to reload, knocked him" down "and held him until police arrived"); *Deer Creek Middle School Shooting: At Least Two Shot in Incident in Littleton, Colorado*, Huffington Post, Apr. 25, 2010, http://www.huffingtonpost.com/2010/02/23 /deer-creek-middleschool_n_473943.html (math teacher "tackled the suspect as he was trying to reload his weapon"); Shaila Dewan, *Hatred Said to Motivate Tenn. Shooter*, N.Y. Times, Jul. 28, 2008, http://www.nytimes.com/2008/07/28/us/28shooting.html ("It was when the man paused to reload that several congregants ran to stop him."); After Action Report Washington Navy Yard September 16, 2013 (July 2014) (during 2013 Washington Navy Yard massacre, cornered victim crawled to safety while shooter reloaded), https://www.policefoundation.org/wp-content/uploads/2015/05/Washington-Navy-Yard-After-Action-Report.pdf; Staff, *1 Dead, Others Hurt in Shooting at Seattle Pacific University Before Student Tackles Gunman*, Seattle Times, June 6, 2014 ("When Meis saw the shooter reloading, he saw an opportunity to stop the attack."), https://www.seattletimes.com/seattle-news/1-dead-others-hurt-in-shooting-at-seattle-pacific-university-before-student-tackles-gunman/.

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

Fyock v.Sunnyvale, 779 F.3d 991 (9th Cir. 2015);[17] *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244 (D.C. Cir. 2011). Although courts have taken different paths to the same result, these decisions consistently recognize the serious threat posed by LCMs. *See, e.g., Kolbe*, 849 F.3d at 139 (assault weapons and LCMs "allow a shooter to cause mass devastation in a very short amount of time"); *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 263 ("record evidence suggests that large-capacity magazines may present even greater dangers to crime and violence than assault weapons alone"); *Friedman*, 784 F.3d at 411 (ban on assault weapons and LCMs "may reduce the carnage if a mass shooting occurs").

The Second Circuit rejected challenges to bans on the sale of LCMs holding more than 10 rounds that were adopted in New York and Connecticut after the Sandy Hook massacre. *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 249-50. The court "assume[d] for the sake of argument that these 'commonly used' weapons and magazines are also 'typically possessed by law-abiding citizens for lawful purposes'" and therefore assumed they were "protected by the Second Amendment." *Id.* at 257 (quoting *Heller II*, 670 F.3d at 1260-61 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008)). Even applying a heightened, intermediate-scrutiny standard

---

[17] In *Fyock*, the Ninth Circuit affirmed a district court's denial of a preliminary injunction against a California municipality's LCM ban. On July 17, 2018, a Ninth Circuit panel, in an unpublished 2-1 decision, held that another district court did not abuse its discretion in granting a preliminary injunction regarding California's state-wide LCM ban. *Duncan v. Becerra*, No. 17-56081, 2018 WL 3433828 (9th Cir. July 17, 2018). The majority made clear that its decision did not "determine the ultimate merits." *Id.* at *1. Further, as Judge Wallace's dissent explains, the ruling is "temporary" and the district court "has properly proceeded with deliberate speed towards a trial, which will allow it to decide this case with a full and complete record and a new review." *Id.* at *6 (Wallace, J., dissenting).

of review, the court held that the LCM ban was constitutional. *Id.* at 260-61. New York and Connecticut's laws did not burden the "core" area of protection, defined in *Heller* as lawful self-defense, because citizens can purchase any number of permitted magazines and retain the ability to use firearms for self-defense. *Id.* at 260. The Court found that the laws were substantially related to the States' important interest in ensuring public safety and controlling crime and therefore passed constitutional muster. *Id.* at 263-64.

In upholding a city ordinance prohibiting the possession of assault weapons or LCMs, the Seventh Circuit looked to whether the banned weapons were "common at the time of ratification" or had "'some reasonable relationship to the preservation or efficiency of a well-regulated militia'" and whether citizens "retain adequate means of self-defense." *Friedman*, 784 F.3d at 410 (quoting *Heller*, 554 U.S. at 622); *U.S. v. Miller*, 307 U.S. 174, 178 (1939)). The Court upheld the ban because (1) neither assault weapons nor LCMs even existed in 1791; (2) "states, which are in charge of militias, should be allowed to decide when civilians can possess military-grade firearms, so as to have them available when the militia is called to duty;" and (3) the ordinance did not prevent law-abiding citizens from effectively providing for self-defense. *Id.* at 410-11; *see also Heller*, 554 U.S. at 627 (recognizing that citizens are not entitled to possess every type of weapon that might be useful in modern warfare). Indeed, while recognizing that such weapons can in theory be used in self-defense, the Seventh Circuit concluded that the danger they pose outweighs any such use: "[A]ssault weapons with large-capacity magazines can fire more shots,

faster, and thus can be more dangerous in aggregate. Why else are they the weapons of choice in mass shootings?" *Id.* at 411.

In short, LCM restrictions have repeatedly survived scrutiny under various modes of review, as courts have recognized that a right to bear arms for self-defense does not preclude restrictions on dangerous, military-style weapons and accessories that facilitate mass shootings. Likewise here, S.55 passes constitutional muster under any standard of review.

C. The Vermont Legislature acted on the basis of substantial and compelling evidence to address an unprecedented risk to public safety.

"[A]s tragedies in Florida, Las Vegas, Newtown and elsewhere—as well as the averted plot to shoot up Fair Haven High School—have demonstrated, no state is immune to the risk of extreme violence." Gov. Phil Scott, Official Statement on S.55, S.221 & H.422 (Mar. 30, 2018).[18] The facts before the Vermont Legislature overwhelmingly supported Governor Scott's observation.

On February 16, 2018, a young man named Jack Sawyer was charged with multiple felonies in connection with his detailed plan for a mass shooting at Fair Haven Union High School. Sawyer's "Journal of an Active Shooter" detailed his extensive plans for a catastrophic shooting at Fair Haven Union High School. Sawyer admitted that he was influenced by the 1999 Columbine massacre and planned to "beat the highest casualty count of all the other school shootings," in part by using ammunition that "would cause greater casualties and injuries."[19]

---

[18] *See* http://governor.vermont.gov/press-release/official-statement-s55-s221-h422.
[19] *See* Charging Document, *supra* n. 2.

This was not an isolated incident in Vermont's recent past. In August 2005, state police arrested Christopher Greene in Brattleboro, Vermont, thwarting a potentially devastating attack. Police found handwritten notes in Greene's car outlining an apparent planned attack on Greene's former school in Connecticut, including diagrams depicting the school from both the side and back doors alongside the note "Heads: 3. Shoulders: 3. 2 Teachers. 2 to the legs."[20] His detailed notes outlined an apparent plot to escape to Brattleboro, cause a traffic-back up, and shoot drivers in the head on Interstate 91.[21] Along with the notes, police found a receipt for the purchase of the Ruger Mini-14 .223 assault rifle and a loaded magazine for the rifle.[22] And just days before this filing, armed police officers were deployed to two state buildings after a man threatened state employees in an email, declaring "I'm taking everyone of them to my grave with me."[23]

Not all shootings are averted. In August 2015, Jody Herring shot and killed three of her family members and then murdered social worker Lara Sobel outside a

---

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

[21] John Holl, *New Jersey Man is Accused of Plotting Attack in Vermont*, N.Y. Times, July 15, 2005, https://www.nytimes.com/2005/07/15/nyregion/new-jersey-man-is-accused-of-plotting-attack-in-vermont.html ("There were also writings about how to disable a SWAT vehicle, details how to collapse a bridge abutment, causing traffic to back up, escape routes, and places to take good, clear shots.").

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

[23] Alan Keays, *Armed Officers Deployed Outside Two State Buildings After Threats*, VTDigger, July 19, 2018, https://vtdigger.org/2018/07/18/armed-officers-deployed-outside-two-state-buildings-threats/.

state office building in Barre.[24] And in August 2006, the Town of Essex experienced a deadly shooting rampage involving three different crime scenes, including Essex Elementary School.[25]

Following Sawyer's averted mass shooting in Fair Haven, Vermont citizens mobilized and demonstrated in support of gun safety regulations.[26] These demonstrations reflected longstanding and broad support, not a momentary reaction. Indeed, in a July 2018 poll that asked whether Vermonters "favor or oppose" Vermont's 2018 gun safety legislation (including limiting "the size of ammunition magazines"), 45% responded that they "completely favor," 22% "generally favor," while only 13% "generally oppose" and 12% "completely oppose."[27] These results are consistent with a 2013 poll by the Castleton Polling Institute, which found that 66% of respondents favor (with 35% "strongly" in favor) banning LCMs.[28]

---

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

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

[26] *See, e.g.*, J. Walters, *Thousands Attend March for Our Lives Rally in Montpelier*, Seven Days, Mar. 24, 2018, https://www.sevendaysvt.com/OffMessage/archives/2018/03/24/walters-thousands-attend-march-for-our-lives-rally-in-montpelier; *see also* P. Hirschfeld, *Students Demand Action From Montpelier On Gun Control Bills*, VPR, (Mar. 21, 2018), *available at* http://digital.vpr.net/post/students-demand-action-montpelier-gun-control-bills#stream/0.

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

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

In addition, the Fair Haven plot "jolted" Governor Scott, a former opponent of stronger firearm laws with an A rating from the NRA. As the Governor candidly reflected, "This was one of those situations where I feel like I was given a second chance to help avoid a catastrophic event. And I was determined not to let it slip through my fingers."[29] Acknowledging how close Vermont had come to suffering the latest school massacre, Governor Scott unveiled an action plan urging the Legislature to pass multiple gun safety measures, including magazine-capacity restrictions.[30]

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

---

[29] P. Heintz, *In Range: The Week That Changed Vermont's Gun Politics*, Seven Days, Feb. 28, 2018, https://www.sevendaysvt.com/vermont/in-range-the-week-that-changed-vermonts-gun-politics/Content?oid=13165766; *see also* Meagan Flynn, *How Vermont's NRA A-Rated Governor was "Shocked" into Backing New Gun Laws*, Washington Post, Apr. 12, 2018, https://www.washingtonpost.com/news/morning-mix/wp/2018/04/12/how-vermonts-nra-a-rated-governor-was-shocked-into-backing-new-gun-laws/?noredirect=on&utm_term=.a5ea3ae44c4a.

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

groups on all sides of the issues provided testimony and information.[31] In the end, the Executive and Legislative branches, representing cross-partisan support, concluded that S.55's gun safety measures, including the LCM provision were needed to reduce the urgent risk of high-fatality shootings in Vermont. *See* State's Mem. 3-7.[32]

This Court should not set aside the considered judgment of the political branches that an LCM ban is necessary to protect public safety. Plaintiffs point to Vermont's tradition of gun ownership and permissive gun laws as supporting their constitutional claim. Am. Compl. ¶¶ 8-9. But in fact, Plaintiffs' allegations cut the other way. Even in this rural state, with its devotion to hunting and respect for

---

[31] *See, e.g.,* Letter from Addison Cent. Sch. Dist. Bd. to Gov. P. Scott, Speaker M. Johnson, and Pro Tem T. Ashe (Feb. 19, 2018) ("Whereas, Vermont school districts are forced to spend larger and larger portions of their limited budgets on security-related facilities upgrades, security personnel, trainings, and drills to potentially defend our students, staff, and community members against military-style attacks on our students, staff, and school buildings"); Letter from Essex Westford Sch. Dist. Bd. To Gov. P. Scott, Speaker M. Johnson, and Pro Tem T. Ashe (March 8, 2018) ("Whereas, Vermont school children spend increasingly more time participating in lock-down and active shooter drills [now more common than fire drills], detracting from time spent on critical classroom learning and invoking significant anxiety and fear among students and teachers"); Written Testimony of Rebecca Bell, M.D. (on behalf of the Vermont Chapter of the American Academy of Pediatrics & the Vermont Medical Society) (March 14, 2018) ("Firearm injury and death is a public health crisis...I have witnessed first-hand the damage that knives and fists and other blunt objects can inflict. But adding a gun to the picture drastically changes the outcome. An argument between teenagers that would likely have ended in broken bones instead can end fatally if a gun is present."); Written Testimony of Madison Knoop (March 14, 2018) ("After [the Sandy Hook Massacre] I was terrified to go to school. I even refused to go for a little. And, I'm still terrified."); Compilations of Constituent Emails regarding S.55 (Entered on March 23, 2018), *available at https://legislature.vermont.gov/committee/document/2018/18/Bill/4184284*

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

tradition, leaders from across the political spectrum recognized that LCMs pose an unjustifiable risk of harm that requires regulation. The history cited by Plaintiffs merely confirms that the Legislature did not take this step lightly. It acted with the intent of averting, in the Governor's words, a "catastrophic event," responding to a need clearly articulated by Vermonters and amplified by recent history. In sum, the Legislature's decision to ban LCMs is sound under any standard of review, and, as explained below, fully consistent with the Vermont Constitution.

II. The Vermont Legislature's reasonable restriction on the possession and sale of LCMs does not violate Article 16 of the Vermont Constitution.

Plaintiffs assert a right under the Vermont Constitution to possess and sell LCMs. The Vermont Constitution, however, does not recognize a broad and unlimited right to possess and transfer weapons or accessories of every kind and purpose. Rather, Article 16 acknowledges that Vermonters have a "right to bear arms *for the defence of themselves* and the State." Vt. Const. ch. 1, art. 16 (emphasis added). To the extent Article 16 protects an individual right to bear arms, that right is limited and defined as part of a right of self-defense. LCMs are offensive weapons for mass killing that do not warrant any protection under Article 16. And even if the Court affords some constitutional protection to the possession and sale of LCMs, the Court's review must be tempered by deference to the Legislature's determination that LCMs pose a threat to public health and safety.

A. Because LCMs are designed for military-style rapid fire assaults and are not necessary for self-defense, they are not protected under Article 16.

As the U.S. Supreme Court recognized in *Heller*, a constitutional right to bear arms does not encompass an unlimited right to own every type of lethal and powerful weapon. *Heller* expressly observed that "weapons that are most useful in military service—M-16 rifles and the like—may be banned" without violating the Second Amendment. *Heller*, 554 U.S. at 627.

Following *Heller*, the *en banc* Fourth Circuit rejected a Second Amendment challenge to Maryland's Firearm Safety Act of 2013, which banned certain assault weapons and LCMs. *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017). The Fourth Circuit held that the banned firearms and LCMs, like M-16 rifles, are "weapons that are most useful in military service" and are thus not protected by the Second Amendment. *Id.* at 135, 137. Noting that the M-16 is designed to be a "devastating and lethal weapon of war," the *Kolbe* court readily concluded that assault rifles and LCMs share the same "capability for lethality" as weapons intended to kill the enemy on the battlefield and that a large ammunition supply "enable[s] a shooter to hit multiple human targets very rapidly." *Id.* at 137 (quotation omitted). Based on its determination that these devices "are particularly designed and most suitable for military and law enforcement applications," the Fourth Circuit held that LCMs "are not constitutionally protected." *Id.* (quotation omitted); *see also Worman v. Healey*, 293 F. Supp. 3d 251, 264 (D. Mass. 2018) ("Assault weapons and LCMs . . . are not within the scope of the personal right to 'bear Arms' under the Second Amendment.").

This Court should follow *Kolbe's* persuasive analysis and likewise hold that LCMs are not protected under Article 16. In addition to the facts demonstrating that LCMs give shooters military firepower, there is compelling evidence that LCMs are unnecessary for and unsuited to everyday self-defense. As an experienced law enforcement officer explained, the "typical self-defense scenario in a home does not require more ammunition than is available in a standard 6-shot revolver or 6-10 round semiautomatic pistol."[33] In fact, excessive firepower can be a hazard to others in the household and nearby because "in most self-defense scenarios, the tendency is for defenders to keep firing until all bullets have been expended."[34] The Fourth Circuit recognized in *Kolbe* that the lethality of LCMs makes them dangerous and poorly adapted for use in self-defense. *See* 849 F.3d at 127. When civilians with inadequate training fire weapons with large-capacity magazines, "they tend to fire more rounds than necessary and thus endanger more bystanders." *Id.*

The rural nature of Vermont does not change the analysis. Vermont has the second lowest rate of violent crime and the lowest homicide rate in the country.[35] *Amici* are not aware of any incident in which a law-abiding Vermonter acting in self-defense to fend off a home invasion or assault had to fire more rounds than are

---

[33] *See* Brian J. Siebel, Brady Ctr. to Prevent Gun Violence, Assault Weapons: Mass Produced Mayhem, 16 (2008), http://www.bradycampaign.org/sites/default/files/mass-produced-mayhem.pdf (quoting *Police Fear a Future of Armored Enemies*, USA Today, Mar. 3, 1997, at 02A).

[34] *Id.*

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

contained in the magazines permitted under S.55. Plaintiffs do not allege any examples of LCMs being needed for self-defense in Vermont and likewise have alleged no facts suggesting that Vermonters cannot adequately defend themselves using 10-round magazines. *Cf. Kolbe*, 849 F.3d at 127 (noting lack of evidence that Maryland residents had used military-style rifles or needed to fire more than ten rounds for self-protection).

Moreover, because LCMs are a relatively recent invention, Plaintiffs cannot credibly allege that these devices are part of Vermont's established traditions of hunting or self-defense. Before the 1980s, the only handgun most American gun owners possessed was a revolver, which typically held six rounds.[36] Only in the 1980s did the gun industry begin aggressively producing and promoting pistols that could be equipped with larger magazines.[37] In the 1980s and 1990s, as Americans recognized the danger posed by widespread access to LCMs, some jurisdictions began adopting restrictions on their possession. In addition, Congress banned LCMs beginning in 1994 until the law was allowed to lapse in 2004. Plaintiffs' appeal to Ethan Allen's generation has no force here. Am. Compl. ¶ 6. Allen and his cohorts could not have envisioned the transformation of their single-shot muzzle loaders into high-capacity, easily concealed weapons—much less believed that armed

---

[36] Violence Policy Center, *Backgrounder on Glock 19 Pistol and Ammunition Magazines Used in Attack on Representative Gabrielle Giffords and Others* 1 (Jan. 2011), http://www.vpc.org/fact_sht/AZbackgrounder.pdf. This means that, before the 1980s, average Americans relied on six-round revolvers for self-defense. Plaintiffs point to no evidence that revolvers were believed inadequate then.

[37] *Id.*

criminals would use military-style firearms for senseless killings at schools, theaters, and places of worship.

As the State has shown in its memorandum, early American legislatures recognized the need for common-sense restrictions on dangerous weapons. State's Mem. 37-39. Even if Plaintiffs are correct that military-style rifles and LCMs have become more common since the federal ban expired in 2004, *see* Am. Compl. ¶ 32, that newfound popularity cannot displace the Legislature's settled authority to regulate dangerous weapons to protect public safety. Moreover, the popularity of LCMs with some gun owners does not mean that LCMs are necessarily or even commonly used for lawful purposes such as home defense or hunting. Indeed, Plaintiffs themselves allege that the plaintiff organizations and their members are principally concerned with "competitive target shooting," "shooting competitions," and "recreational shooting" — not the constitutionally protected self-defense right. Am. Compl. ¶¶ 12, 13, 33, 34, 35, 43, 49. Article 16 does not protect a right to award LCMs as "prizes," to hold "shooting matches," or to profit from selling dangerous weapons. *Id.* ¶¶ 33, 34, 43. It recognizes a right to self-defense. And there is simply no evidence that LCMs are typically employed for, well suited to, or necessary for that purpose. Regardless of how many LCMs may have been sold, self-defense by responsible Americans does not reasonably depend on continuously firing scores or hundreds of bullets.

B. Consistent with text, history, and precedent, the Court should construe Article 16 in a manner that affords deference to

reasonable legislative judgments informing public safety regulations.

As explained above and in the State's memorandum, the Vermont Legislature and the Governor made a considered and deliberate judgment that restrictions on LCMs were needed to protect public safety. Plaintiffs may disagree with that judgment but may not use this lawsuit to draw the Court into a re-trial of the political debate over S.55. "Subject to constitutional limitations," the Legislature "is authorized to pass measures for the general welfare of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted." *Ex parte Guerra*, 94 Vt. 1, 110 A. 224, 227 (1920); *see also State v. Curley-Egan*, 2006 VT 95, ¶ 11, 180 Vt. 305, 910 A.2d 200.

Plaintiffs posit an absolutist view that Article 16 protects a right to bear arms and S.55 must be struck down as infringing that right. Am. Compl. ¶¶ 49-53. That rigid approach has no grounding in Vermont constitutional precedent. First, the Vermont Supreme Court has consistently rejected absolutist interpretations of constitutional protections, including Article 16, instead adopting more measured interpretations that balance individual rights with reasonable regulations. Second, the Court has consistently recognized that deference to legislative judgments is appropriate even when assessing constitutional claims.

1. Article 16 does not preclude reasonable regulation of firearms and accessories to protect public safety.

The Vermont Supreme Court has already rejected an absolutist reading of Article 16. As the Court explained in *State v. Duranleau,* "the language of the constitutional provision does not suggest that the right to bear arms is unlimited

and undefinable." 128 Vt. 206, 210, 260 A.2d 383, 386 (1969). The *Duranleau* court upheld a statute that requires that rifles and shotguns carried in vehicles be unloaded. *Id.* Although the statute "admittedly somewhat conditions the unrestrained carrying and operation of firearms," its purpose was assumed to be "reasonable" and the prohibition did not cause "such an infringement on the constitutional right to bear arms as to make the statute invalid." 128 Vt. at 210, 260 A.2d at 386.

Duranleau's interpretation of Article 16 fits comfortably with the Vermont Supreme Court's approach to other constitutional provisions. The Court has frequently recognized that constitutional rights, even when phrased in uncompromising language, are subject to reasonable regulations. Indeed, well over 150 years ago, the Court placed a historical gloss on Article 11's proclamation that "the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure." In *Lincoln v. Smith*, 27 Vt. 328, 346 (1855), the Court looked to the U.S. Constitution and historical context in construing Article 11 "to secure only against *unreasonable* searches and seizures." (Emphasis added.) *Lincoln* upheld a statute authorizing the seizure of alcohol, even while acknowledging that the statutory language was imperfect. *Id.* More recently, the Court reaffirmed *Lincoln*, holding that "Article Eleven does not mandate an absolute prohibition against searches and seizures undertaken without a proper warrant." *State v. Record*, 150 Vt. 84, 85, 548 A.2d 422, 423 (1988) (word 'unreasonable' is "as implicit

in Article Eleven as it is express in the Fourth Amendment"); *see also State v. Kirchoff*, 156 Vt. 1, 4, 587 A.2d 988, 991 (1991) (same).

The Court has taken a similarly measured approach to its interpretation of Article 7's Common Benefits Clause. The Common Benefits Clause "is intended to ensure that the benefits and protections conferred by the state are for the common benefit of the community and are not for the advantage of persons 'who are a part only of that community.'" *Baker v. State*, 170 Vt. 194, 212, 744 A.2d 864, 878 (1999) (quoting Vt. Const. ch. 1, art. 7). The Court has never held, however, that the Common Benefits Clause prohibits all legislative classifications. Instead, the Court looks to the purpose and the nature of the classification in assessing whether the challenged law bears "a reasonable and just relation to the governmental purpose." *Id.* at 214, 744 A.2d at 879; *see also Badgley v. Walton*, 2010 VT 68, ¶ 23, 188 Vt. 367, 378, 10 A.3d 469, 477 (2010). The interpretation adopted in *Baker* eschews "rigid categories" in favor of a "balancing approach," and includes a significant degree of deference to the "legislative prerogative to define and advance governmental ends." *Baker*, 170 Vt. at 203, 206, 744 A.2d at 871, 873; *Badgley*, 2010 VT 68, ¶ 21 ("We accord deference to legislation having any reasonable relation to a legitimate public purpose." (quotation omitted)).

As yet another example, the Court squarely refused to construe the constitutional right to a jury trial in absolute terms. Article 12 provides that "when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred." Vt. Const. ch. I,

art. 12. But in 1990, facing severe budget shortfalls, the court administrator placed a temporary moratorium on civil jury trials. *See Vermont Supreme Court Admin. Directive No. 17 v. Vermont Supreme Court*, 154 Vt. 392, 394, 579 A.2d 1036, 1037 (1990). Litigants challenged the moratorium as violating Article 12, arguing that "a jury trial delayed is equal to a jury trial denied for purposes of the Vermont Constitution." *Id.* at 399, 579 A.2d at 1040. The Court rejected that position, holding that its "precedents do not support the absolutist view of the jury trial right that the petitioners espouse." *Id.* Looking to history and precedent, the Court reasoned that "actions that may delay or condition the jury trial right do not by themselves infringe on that right" and declined to adopt a "*per se*" rule. *Id.* at 400, 579 A.2d at 1041.

This Court should likewise refuse to construe Article 16 as a rigid or *per se* rule that precludes reasonable regulation to protect public safety. Gun violence is a real and substantial threat to public safety. Plaintiffs do a disservice to Vermont's proud history when they cite it as grounds for invalidating a limited measure aimed at devices that facilitate mass shootings. Vermonters treasure their independent spirit and egalitarian traditions. *See Baker*, 170 Vt. at 211, 744 A.2d at 876-77 ("The Vermont Constitution would ensure that the law uniformly afforded every Vermonter its benefit, protection, and security so that social and political preeminence would reflect differences of capacity, disposition, and virtue, rather than governmental favor and privilege."). The state charter is the "primary safeguard of the rights and liberties of all Vermonters." *Id.* at 202, 744 A.2d at 870.

But it does not prevent the legislature from enacting even modest regulations of these rights. Today, Ethan Allen's musket has been supplanted by locked public buildings, metal detectors and bag searches, school children learning to hide from active shooters—and that all too familiar feeling of dread upon reading the latest news of a mass shooting in America. Article 16 does not deprive the Legislature of reasonable tools to address these urgent dangers through laws that leave law-abiding citizens ample avenues to exercise self-defense rights.

Personal freedom does not require unlimited access to military-style weaponry. Indeed, for most of this nation's history, no one has questioned that federal, state, and local governments may place reasonable restrictions on the sale, possession, and use of firearms. As the State correctly notes, state courts for over a century consistently interpreted their analogous constitutional provisions to permit reasonable regulations of firearms. State's Mem. 43-44 & n. 34 (citing Adam Winkler, *The Reasonable Right to Bear Arms*, 17 Stan. L. & Pol'y Rev. 597, 598 (2006)). The U.S. Supreme Court in *Heller* took pains not to undermine a laundry list of "longstanding" and "presumptively lawful" firearms regulations. *Heller*, 554 U.S. at 626-27 & n.-26. And federal courts applying *Heller*—including the Second Circuit—have upheld restrictions on LCMs and assault rifles and myriad other reasonable firearm regulations. No Vermont precedent supports a more stringent and inflexible interpretation of Article 16. The Vermont Constitution does not constrain the Legislature's authority to take reasonable steps to regulate the possession, sale, and use of dangerous weapons, ammunition, and accessories. *Cf.*

Turner v. Shumlin, 2017 VT 2, ¶ 24, 163 A.3d 1173, 1183 (Vt. 2017) (recognizing that the Constitution delineates "the framework of government," while leaving the "working details" for "legislative definition").

2. The Court should reject Plaintiffs' invitation to revisit the policy determinations made by the political branches.

Plaintiffs claim that the Legislature's determination was incorrect and that, in fact, banning the possession and sale of LCMs will not deter "criminals" from obtaining these devices. They are wrong, studies, evidence and common sense support the Legislature's determination that banning LCMs will deter their use. Regardless, this Court should not revisit the Legislature's weighing of the evidence on this point. The Vermont Supreme Court has consistently declined to turn constitutional challenges into opportunities to scrutinize legislative policy judgments. The Court cautioned in *Badgley* that its function "is not to substitute [the Court's] view of the appropriate balance for that of the Legislature." 2010 VT 68, ¶ 24. The Common Benefits Clause inquiry does not require courts to "judge whether the policy decision made by the Legislature was wise," but rather to assess whether the "decision to exclude a portion of the community from the common protection of the law was reasonable and just in light of its purpose." *Id.* And even where the Court has found constitutional violations, its rulings respect the legislative role and often defer to legislative consideration of a proper remedy. *See, e.g., Baker*, 170 Vt. at 225, 744 A.2d at 886 (holding that exclusion from benefits and protections of marriage violated the rights of same-sex couples, but noting that Court did "not purport to infringe upon the prerogatives of the Legislature to craft

an appropriate means of addressing [its] constitutional mandate"); *Brigham v. State*, 166 Vt. 246, 268, 692 A.2d 384, 398 (1997) ("Although the Legislature should act under the Vermont Constitution to make educational opportunity available on substantially equal terms, the specific means of discharging this broadly defined duty is properly left to its discretion.").

Plaintiffs may argue that this Court should apply heightened scrutiny because some federal courts have applied "intermediate" scrutiny in Second Amendment challenges.[38] But the Vermont Supreme Court has in other contexts rejected the "rigid, multi-tiered analysis" of federal constitutional law as a useful tool for interpreting the state constitution.170 Vt. at 212, 744 A.2d at 878; *see also Vermont Supreme Court Admin. Directive No. 17*, 154 Vt. at 406, 579 A.2d at 1043 ("relying on our own settled interpretations of the nature of the right to trial by jury under the Vermont Constitution, which "do not necessarily apply to the Seventh Amendment"). So too here. It makes little sense to adopt for purposes of Article 16 an interpretative framework that Vermont has unequivocally rejected for purposes of Article 11.

---

[38] As explained above, Plaintiffs' claim would fail under intermediate scrutiny as well, even were the Court to conclude that standard was appropriate under Article 16. *See supra* I.A-I.C. Nearly all federal courts to employ intermediate scrutiny in LCM challenges have concluded that LCM restrictions are reasonably tailored to important safety interests and thus constitutional. *See Kolbe*, 849 F.3d at 138; *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261-64 (2d Cir. 2015); *Heller II*, 670 F.3d at 1252-53; *Colo. Outfitters Ass'n*, 24 F. Supp. 3d at 1071-74; *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1196-97 (E.D. Cal. 2018); *but see Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1139 (S.D. Cal. 2017), aff'd, No. 17-56081, 2018 WL 3433828 (9th Cir. July 17, 2018).

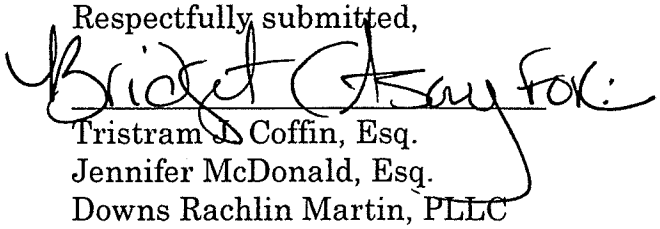
Consistent with Vermont precedent, the Court should defer to the Legislature's policy judgment that S.-55's ban on LCMs protects public health and safety. Given the nature and paucity of Plaintiffs' allegations, no further factual development is warranted. The Legislature drew on abundant evidence that LCMs increase fatalities and injuries in mass shootings and other crimes. Further, Plaintiffs cannot plausibly allege that LCMs—devices that were banned nationwide just 15 years ago—play any meaningful role in self-defense. They do not identify a single incident where a Vermonter needed or used that kind of firepower to defend herself. Their own allegations focus on recreational shooting and shooting competitions—conduct that has no constitutional protection. Plaintiffs' complaint falls far short of a credible showing that S. 55 violates Article 16. The Legislature was well within constitutional bounds when it drew the informed conclusion that prohibiting LCMs will help alleviate the danger of mass shootings and everyday gun violence.

CONCLUSION

Plaintiffs' amended complaint should be dismissed.

Burlington, Vermont July 24, 2018

Respectfully submitted,



Tristram J. Coffin, Esq.
Jennifer McDonald, Esq.
Downs Rachlin Martin, PLLC
P.O. Box 190
Burlington, VT 05402

Bridget Asay, Esq.

Michael Donofrio, Esq.
Stris & Maher LLP
28 Elm Street, 2d Floor
(802) 858-4465

J. Adam Skaggs, Esq.
Giffords Law Center to
Prevent Gun Violence
223 West 38th St. # 90
New York, NY 10018
(917) 680-3473
Hannah Shearer, Esq.
Giffords Law Center to
Prevent Gun Violence
268 Bush St. # 555
San Francisco, CA 94104
(415) 433-2062

Counsel for Amicus Curiae
Giffords Law Center
To Prevent Gun Violence, the
Vermont Medical Society and
GunSense Vermont, Inc.