STATE OF VERMONT

SUPERIOR COURT
WINDHAM UNIT

CIVIL DIVISION
DOCKET NO. 315-8-18 Wmcv

GUN OWNERS OF VERMONT, INC.

Plaintiff,

v.

MATTHEW BIRMINGHAM, in his Official Capacity as Director of the Vermont State Police,

T. J. DONOVAN, in his Official Capacity as Attorney General of the State of Vermont,

TRACY KELLY SHRIVER, in her Official Capacity as State's Attorney for Windham County,

Defendants.

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

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*, 561 U.S. 742 (2010), *United States v. Castleman*, 134 S. Ct. 1405 (2014), *Voisine v. United States*, 136 S. Ct. 2272 (2016), *Vt. Federation of Sportsmen's Clubs et al. v. Birmingham et al.*, No. 224-04-18-Wncv (pending), and numerous other cases.

Amicus curiae Gun Sense Vermont, Inc. is a grassroots Vermont organization formed in 2013 following the shooting at the Sandy Hook elementary school in Connecticut. Gun Sense 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. Gun Sense Vermont supported S. 55, including the provisions challenged by Plaintiff in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

"If I take myself out, I want to do it in a bigger and better way than just the stereotypical suicide."[1]

"I'm aiming to kill as many as I can."[2]

"The biggest thing I'm trying to figure out is how can I get as far into the shooting before cops bust me first and shoot me dead . . . . If [a cop] kills me first, all of this will be pointless since I won't make the impact and chaos I plan to create."[3]

"I'd rather exist by what I will leave behind. I will be immortal from my actions. The mass chaos I'll create will leave everyone hopeless and distraught and fearful of their every next step, not knowing what might happen next, who might do it, when. They'll ponder why I did it, what led me to it, what went wrong."[4]

These are some of the entries Jack Sawyer wrote in his journal, self-titled "The Journal of an Active Shooter." In February 2018, Sawyer was arrested by Vermont State Police after police discovered his detailed plans to use an AR-15 rifle, a 9mm handgun, and 12-gauge shotgun to kill students and teachers at Fair Haven High School, his former high school.

On April 11, 2018, the Vermont Legislature passed a series of new laws on firearms, including the three statutes at issue in this lawsuit:

- 13 V.S.A. § 4019, which requires persons transferring a firearm to appear together before a licensed dealer and use the licensed dealer to facilitate the transfer;

---

[1] Brad Evans, " 'I'm aiming to kill as many as I can': Journal of former student allegedly plotting school shooting" *MyNBC5*, https://www.mynbc5.com/article/im-aiming-to-kill-as-many-as-i-can-journal-of-former-student-allegedly-plotting-school-shooting/18676265 (Feb. 23 2018).
[2] *Id.*
[3] *Id.*
[4] *Id.*

- 13 V.S.A. § 4020, which prohibits the sale of a firearm to a person under the age of 21 unless the person is a law enforcement officer, an active or veteran member of the armed forces, or has completed an approved hunter safety course; and
- 13 V.S.A. § 4022, which prohibits the possession of bump-fire stocks.

As the State persuasively argues in its motion to dismiss, these are precisely the sort of measured, common-sense laws that the Vermont Legislature routinely enacts to promote public health, welfare, and safety. Background checks for firearm transfers prevent dangerous and mentally unstable individuals from purchasing firearms. Basic conditional limits on the sale of firearms to persons under 21 years old ensure that young adults who wish to purchase firearms have completed some form of safety training. And prohibitions on "bump-fire stocks" and "bump stocks" remove from the open market a firearm accessory that transforms a semi-automatic firearm into a machine gun—making it the ideal accessory for someone who wishes to commit mass murder.

This Court should grant the State's motion to dismiss. As the State has shown, Plaintiff does not have standing to bring these claims. State's Mem. 14-25. Even if this Court does find that Plaintiff has standing, Plaintiff's claims fail as a matter of law. None of the statutes challenged in this case violate the Vermont Constitution. First, any reasonable interpretation of Article 16 permits background checks that ensure felons and other dangerous persons do not purchase firearms. Indeed, federal and state courts have routinely found that background checks and licensing programs are constitutional. Second, bump stocks are firearm accessories and are not "arms" within the meaning of Article 16. Even if this Court were to find that bump stocks are "arms," they are not protected by Article 16 because their sole purpose is to convert firearms into unlawful machine guns. Finally, persons under the age of 21 in Vermont were historically

considered minors. To the extent such persons have any right to bear arms under Article 16, their right is more limited than that of a full adult.

ARGUMENT

I. The Vermont Constitution Does Not Bar the Legislature From Requiring Background Checks for Private Firearm Sales.

As the State has persuasively shown in its motion to dismiss, the Vermont Legislature may adopt reasonable firearm regulations without contravening Article 16. This Court has long recognized a strong presumption in favor of the constitutionality of state laws and has consistently recognized the deference appropriately afforded to legislative judgments, even in matters of constitutional significance. *See, e.g., Elliott v. State Fish & Game Comm'n*, 117 Vt. 61, 68, 84 A.2d 588, 593 (1951) ("[E]very presumption is to be made in favor of the constitutionality of an act of the Legislature and it will not be declared unconstitutional without clear and irrefragable proof that it infringes the paramount law."); *Badgley v. Walton*, 2010 VT 68, ¶ 38, 188 Vt. 367, 384, 10 A.3d 469, 481 (2010) (holding that court "must accord deference to the policy choices made by the Legislature"). This Court should follow the lead of federal and state courts nationwide and hold that mandatory background checks are constitutional.

Indeed, accepting Plaintiff's sweeping view of Article 16 would make Vermont an outlier and dramatically limit the Legislature's ability to protect public safety. The purpose of background checks is simple and uncontroversial: to keep guns out of the hands of people who pose a particularly high risk of harm. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment applies to "law-abiding, responsible citizens," 544 U.S. 570, 635 (2008), and specifically noted that certain classes of dangerous people could be prohibited from possessing weapons. *Id.* at 626. "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . . . We identify these presumptively lawful regulatory measures only as examples; our list does not

purport to be exclusive." *Id.* Background checks are an essential tool used to carry out these "longstanding" and "presumptively lawful" prohibitions.

Federal courts have universally rejected facial challenges under the Second Amendment to laws disqualifying these dangerous classes of people from possessing firearms. *See United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011) ("All of the circuits to face the issue post *Heller* have rejected blanket challenges to felon in possession laws.") (citing *United States v. Joos*, 638 F.3d 581, 586 (8th Cir. 2011); *United States v. Barton*, 633 F.3d 168, 170-75 (3d Cir. 2011); *United States v. Williams,* 616 F.3d 685, 691-94 (7th Cir. 2010); *United States v. Rozier*, 598 F.3d 768, 70-1 (11th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111, 1114-15 (9th Cir. 2010); *United States v. Khami*, 362 Fed. App'x 501, 507 (6th Cir. 2010); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Stuckey*, 317 Fed. App'x 48, 50 (2d Cir. 2009); *United States v. Anderson*, 559 F.3d 348, 352 n.6 (5th Cir. 2009)). State courts have similarly held that these longstanding prohibitions do not violate their state constitutions. *Hertz v. Bennet*, 751 S.E.2d 90, 95 (Ga. 2013) (ban on felons possessing firearms did not violate either the Second Amendment or the Georgia Constitution); *Peoples Rights Org., Inc. v. Montgomery*, 756 N.E.2d 127, 173 (Ohio App. 2001) (background checks did not violate Ohio Constitution because they were designed to "ensur[e] that prohibited classes of persons do not purchase handguns").

Background check requirements like 13 V.S.A. § 4019 are the critical mechanism for ensuring that those acquiring firearms through private sales are eligible to possess firearms and are not mentally ill, felons, or persons that otherwise pose a danger to the public. As the Seventh Circuit explained when evaluating a state licensing program: "[i]f the state may set substantive requirements for ownership, which *Heller* says it may, then it may use a licensing system to

enforce them." *Berron v. Illinois Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 843 (2017).

Courts have upheld similar state and commonwealth licensing laws that extend background checks to private sales, concluding that such laws are essential to enforce longstanding restrictions on gun ownership by dangerous people. In *Rocky Mountain Gun Owners v. Hickenlooper*, the Colorado Court of Appeals held that a Colorado law that "expanded mandatory background checks to recipients of firearms in some private transfers" did not violate the Colorado Constitution. 371 P.3d 768, 770, (Colo. App. 2016). Under the law, a transferor of a firearm was required "to first obtain a background check of the transferee by a licensed gun dealer." *Id.* at 776. The court found the law did "not implicate a fundamental right" because "Colorado and federal law bar certain individuals from possessing firearms based on a history of violence, criminal prosecution, or mental condition" and "[t]here is no fundamental right to possess a firearm if an individual falls within one of the barred categories." *Id.* Because Colorado's law "simply carves out a reasonable regulation that provides a mechanism" for determining whether the transferee fell within one of those barred categories, it did not violate the Colorado Constitution. *Id.*

In *Murphy v. Guerrero*, the District Court for the Northern Mariana Islands similarly held that the Commonwealth's background check system did not violate the Second Amendment. No. 1:14-CV-00026, 2016 WL 5508998, at *8 (D. N. Mar. I. Sept. 28, 2016). Like the provision at issue here, the Commonwealth's background check law closed a loophole in the federal background check system by requiring the transferee in a private gun sale "to obtain a license—complete with a background check—before he may possess a gun or one may be sold to him."

Id. at *8. The court held that the Commonwealth's background check system "squarely fits its legitimate end of keeping firearms out of the hands of those most likely to abuse them." *Id.*

Courts have also approved of gun licensing laws that include background checks as a component. In *Heller v. District of Columbia*, the D.C. Circuit held that a provision of the District of Columbia code that required a firearm purchaser to be fingerprinted so that the district could run a background check from the fingerprint did not violate the Second Amendment. 801 F.3d 264, 275. The court reasoned that the District of Columbia "could conclude that fingerprinting and photographing each person registering a gun promotes public safety by facilitating identified of a gun's owner, both at the time of registration and upon any subsequent police check of the gun's registration." *Id.* The court also noted that the District's evidence that "suggest[ed] background checks using fingerprints are more reliable than background checks conducted without fingerprints, which are more susceptible to fraud." *Id.* at 276.

Similarly, in *Virgin Islands v. James*, the Superior Court of the Virgin Islands ruled that the Virgin Island's gun licensing laws did not violate the Second Amendment. 54 V.I. 45, 47-48 (Sup. Ct. V.I. 2010). The court explained:

> In the Virgin Islands, 23 V.I.C. 454 states how a private citizen may acquire a license to carry a firearm and 23 V.I.C. 456 states the qualifications that an applicant must meet, which includes passing a background check. Neither of these provisions can be reasonably construed to constitute bans on the use of firearms that would be unconstitutional under *Heller* or *McDonald*.
> *Id.* (emphasis added).

Well over a dozen states now require background checks for all firearm transfers and no court has invalidated a background check requirement.[5] That is hardly surprising. The available data confirms that universal background checks are an important tool for protecting public safety and reducing gun violence. Because of loopholes in federal and state laws, nearly a quarter of

[5] Giffords Law Center, Universal Background Checks, https://lawcenter.giffords.org/universal-background-checks/

US gun owners obtained their last firearm without a background check. Internet sales have made it easy for private sellers to advertise and connect with buyers.[6] Unregulated private sales and transfers make it all too easy for people to evade legal restrictions and quickly obtain guns that they are not permitted to own. In 2012, for example, a Wisconsin man subject to a restraining order—and barred by federal law from having guns—purchased a gun in a McDonald's parking lot and used it to kill his wife and two of her co-workers.[7] Where required, federal background checks have prevented gun sales to millions of people who are legally prohibited from possessing firearms.[8] And the data shows that states with expanded background check requirements for private sales have fewer gun deaths and fewer mass shootings.[9]

In sum, 13 V.S.A. § 4019 fits comfortably within the array of presumptively lawful regulations on gun ownership designed to ensure that certain classes of dangerous people do not purchase guns through private sales. Therefore, the statute does not violate Article 16, but instead implements an essential tool well within the State's power to protect public health and safety.

II. Vermont's Ban on Bump Stocks Does Not Violate the Vermont Constitution.

Bump stocks, or bump-fire stocks, accelerate a weapon's rate of fire, turning a semi-automatic weapon into the equivalent of a machine gun.[10] The shooter who carried out the deadliest mass shooting in U.S. history, the massacre at a country music concert in Las Vegas last year, used bump-stocks to convert semi-automatic weapons into rapid-fire killing machines

---

[6] M. Miller, L. Hepburn, & D. Azrael . "Firearm Acquisition Without Background Checks". Annals of Internal Medicine 166(4) (2017): 233-239.
[7] Michael Cooper, Michael S. Schmidt and Michael Luo, Loopholes in Gun Laws Allow Buyers to Skirt Checks, N.Y. Times (April 10, 2013).
[8] Jennifer Karberg et al., "Background Checks for Firearm Transfers, 2013-14—Statistical Tables," US Department of Justice: Bureau of Justice Statistics, (June 2016), https://www.bjs.gov/content/pub/pdf/bcft1314st.pdf.
[9] Giffords Law Center, Universal Background Checks, https://lawcenter.giffords.org/universal-background-checks/
[10] See, e.g., Taylor Swaak, What Are Gun Bump Stocks? Trump Calls For Ban On Device, Newsweek (Feb. 22, 2018), https://www.newsweek.com/what-are-gun-bump-stocks-816585.

that ended 58 lives. Bump stocks serve no arguable purpose for self-defense and merit no constitutional protection.[11]

A. Bump stocks are accessories, not "arms."

By its terms, Article 16 applies only to "arms." In *Heller*, the U.S. Supreme Court interpreted the word "arms" as it was used in both the 1770s and today. 554 U.S. at 581. The Court first looked to the 1773 edition of Samuel Johnson's dictionary, which defined "arms" as "[w]eapons of offence, or armour of defence." *Id.* (quoting 1 Dictionary of the English Language 106 (4th ed.) reprinted 1978). According to the Court, the term arms "was applied, then as now, to weapons" *Id.*

A bump stock is not a weapon of offense or armor. Nor is it an integral or necessary component of a firearm like lawful types of ammunition. *See Jackson v. San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("[W]ithout bullets, the right to bear arms would be meaningless."). Rather, it is a firearm accessory with the sole purpose of converting a semi-automatic firearm into an unlawful machine gun. As a non-essential firearm accessory, it enjoys no constitutional protection under the Second Amendment or Article 16.

Post-*Heller*, courts have embraced the distinction between protected "arms" under the Second Amendment and unprotected firearm accessories. In *United States v. Cox*, the Tenth Circuit held that silencers are not protected under the Second Amendment. 902 F.3d 1170, 1186 (10th Cir. 2018). Quoting *Heller*, the court explained that a silencer is "not a weapon in itself (nor is it 'armour of defence'). Accordingly, it can't be a 'bearable arm' protected by the Second Amendment." *Id.*; *see also New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 264 n.127 (2d Cir. 2015) (noting argument that large-capacity magazines should be considered

[11] Martin Kaste, "*The Politics of Bump Stocks, 1 Year After the Las Vegas Shooting,*" NPR.org (Sept. 26, 2018), https://www.npr.org/2018/09/26/650454299/the-politics-of-bump-stocks-one-year-after-las-vegas-shooting.

firearm accessories not protected by Second Amendment, but deciding case on other grounds). This Court should similarly find that a bump stock is not a "bearable arm" within the meaning of Article 16.

Indeed, the Vermont Legislature itself has recognized the distinction between arms and accessories. In 1912, it declared that "[a] person who manufactures, sells, or uses, or possesses with intent to sell or use, an appliance known as or used for a gun silencer shall be fined twenty-five dollars for each offense." 1912 Vt. Acts & Resolves 310 (emphasis added). For over a hundred years, Vermont has placed limits on non-essential accessories for firearms. The ban on bump stocks is no different.

Further, the industry and general public view bump stocks as accessories. Tellingly, bump stock manufacturers frequently refer to their products as "accessories" in patent applications and in court filings. Three of the issued patents using the term "bump stock" explain in their background sections that "[t]he present invention relates generally to firearms, and more particularly toward a manually reciprocated bump-stock accessory for semi-automatic firearms." U.S. Patent No. 9,546,836 (January 17, 2017); U.S. Patent No. 8,607,687 (December 17, 2013); U.S. Patent No. 8,356,542 (January 22, 2013) (emphasis added).

In court filings, bump stock manufacturers, retailers, and patent holders frequently confirm that bump stocks are accessories. *See, e.g.*, Brief of Appellant William Akins, *Akins v. United States*, No. 08-15640-F, 2008 WL 5458835 (11th Cir. Nov. 19, 2008) (inventor of a bump stock referred to himself as "an accessory manufacturer" and claimed "the government has no interest in regulating devices that are firearm accessories (and therefore not firearms at all)"); Amended Complaint of Slide Fire Solutions, *Slide Fire Sols. v. Bump Fire Sys.*, No 3:14-cv-3358-M, 2015 WL 8660835 ("Plaintiff Slide Fire is a Texas limited partnership in the business

of marketing and selling firearms and accessories to firearms including sliding rifle stocks, sometimes referred to as bump fire stocks.") (emphasis added); Complaint of Fostech Outdoors, *Fostech Outdoors v. Slide Fire Sols.*, No. 1:12-cv-0289, 2012 WL 827222 (S.D. Ind. March 5, 2012) ("[Plaintiff] is in the business of selling certain accessories to firearms. Such accessories include 'bump fire stocks' . . . .").

The federal government regularly refers to bump stocks as "accessories." Currently, the federal government is considering rulemaking that would potentially ban bump stocks. In the Notice of Proposed Rulemaking, the Bureau of Alcohol, Tobacco, & Firearms ("ATF") acknowledged comments it received that "objected to any regulation of bump-stock-type devices because . . . it will decrease innovation in the firearms accessories market and result in the loss of manufacturing and associated jobs." 83 Fed. Reg. 13,442, 13,447 (Mar. 29, 2018). ATF has also noted that "[s]ince 2008, ATF has issued a total of 10 private letters in which it classified various bump stock devices to be unregulated parts or accessories." 82 Fed. Reg. 60,929, 60,930 (Dec. 26, 2017).

In addition, national news sources often describe bump stocks as "accessories." A Washington Post article on bump stocks explained that "[a] little-known gun accessory that makes semiautomatic weapons fire more like a battlefield machine gun is suddenly getting a lot of attention on Capitol Hill."[12] When discussing the initial steps President Trump had taken to ban bump stocks after the then-recent shooting in Parkland, Florida, the Wall Street Journal noted that "[w]hile that accessory wasn't used in last week's Florida shooting, it was used in the

[12] Amber Phillips, Darla Cameron, et al., "*A bump stock ban may have enough support to pass the House*," Wash. Post (Oct. 11, 2017) https://www.washingtonpost.com/graphics/2017/politics/bump-stock-ban-whip-count/?%3Ftid%3D=sm_pg&utm_term=.6cce8235f805

Las Vegas gun massacre . . . ."[13] Finally, in an article titled "What You Need to Know About Bump Stock Gun Accessories," Fortune described a bump stock as an "accessory [that] replaces the standard stock on a rifle with a piece of plastic or metal molded to the lower end of the gun."[14]

Because bump stocks are not "arms" within the meaning of Article 16, Plaintiff's challenge to 13 V.S.A. § 4022 fails.

B. Bump stocks are also unprotected because they convert arms into machine guns that are not protected by Article 16.

Even if this Court were to find that bump stocks are "arms" within the meaning of Article 16, Plaintiff's challenge to 13 V.S.A. § 4022 fails because the sole purpose of bump stocks is to convert semi-automatic weapons into unlawful machine guns, which are not protected by Article 16.

Courts have unanimously held that there is no individual right to own or possess a machine gun under either the Second Amendment or state constitutions. In *Heller*, the Supreme Court distinguished between firearms that are "typically possessed by law-abiding citizens for lawful purposes," like handguns, and "dangerous and unusual" weapons like machine guns, recognizing that there is no individual right to possess the latter. *See* 554 U.S. at 624-25, 627. As the Fifth Circuit explained in *Hollis v. Lynch*, machine guns cannot be considered firearms that are in "common use" among the public because they cannot be lawfully possessed in the majority of states:

> Twelve states and the District of Columbia entirely ban machineguns even if the weapon is legal under the [federal] Gun Control Act. An additional 22 states, like Texas in the present case, ban machineguns unless the weapon is legal under

[13] Peter Nicholas and Julie Bykowicz, "*Trump Takes Step to Ban 'Bump Stocks,'*" Wall St. J. (Feb. 20, 2018) https://www.wsj.com/articles/trump-takes-step-to-ban-bump-stocks-1519168128

[14] Grace Donnelly, "*What You Need to Know About Bump Stock Gun Accessories*," Fortune (Feb. 21, 2018) http://fortune.com/2018/02/21/bump-stocks-ban-las-vegas-shooting/

> federal law. Thus, 34 states and the District of Columbia prohibit possessing machineguns. Only 16 states have no such prohibition, but even some of these states have some sort of restriction affecting or limiting machinegun possession.

827 F.3d 436, 450 (5th Cir 2016).

For this reason, the Fifth Circuit held that "[m]achineguns are dangerous and unusual and therefore not in common use. They do not receive Second Amendment protection . . . ." *Id.* at 451.

The Third Circuit reached the same conclusion in *United States v. One Palmetto State Armory PA-15 Machine Gun*, 822 F.3d 136, 142 (3d Cir. 2016), observing that *Heller* "discusses machine guns on several occasions, and each time suggests that these weapons may be banned without burdening Second Amendment rights." *Id.* at 141. The court also found that machine guns "are not in common use for lawful purposes," but rather are "'weapons used principally by persons engaged in unlawful activities'" *Id.* (quoting *Haynes v. United States*, 390 U.S. 85, 87 (1968)). At least five other federal circuits have similarly concluded that machine guns are not protected under the Second Amendment. *Id.* at 143 (citing *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 408 (7th Cir. 2015); *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 124, 1263 (D.C. Cir. 2011); *Hamblen v. United States*, 591 F.3d 471, 474 (6th Cir. 2009); *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008)).

State courts have also found no right to possess machine guns under their constitutions. In *State v. LaChapelle*, the Supreme Court of Nebraska upheld a Nebraska law criminalizing possession of a machine gun, short rifle, or short shotgun on the grounds that under the Nebraska Constitution, "a legislature may properly forbid use or possession of a certain type of weapon, especially a weapon which is used almost exclusively for a criminal purpose." 451 N.W.2d 689,

691 (Neb. 1990). Similarly, in *Rinzler v. Carson*, the Supreme Court of Florida held that a statute making it a crime to possess a short-barreled rifle, short-barreled shotgun or machine gun did not violate the Florida Constitution because these weapons were dangerous and were the sort of weapons "which, in times of peace, find its use by a criminal." 262 So. 2d 661, 666 (Fla. 1972).

Likewise, in *Morrison v. State*, the Court of Criminal Appeals of Texas affirmed a conviction for unlawful possession of a machine gun, holding that "the statute making it unlawful to possess a machine gun is not violative of the constitutional right of every citizen to keep and bear arms in the lawful defense of himself or the state, the Legislature having the power by law to enact such law with a view to prevent crime." 339 S.W.2d 529, 532 (Tex. Crim. App. 1960) (citing Art. 1, Sec. 23, Texas Constitution). Finally, the Supreme Court of Michigan held that a law criminalizing the possession of a machine gun did not violate the Michigan Constitution because, as the court explained:

> Some arms, although they have a valid use for the protection of the state by organized and instructed soldiery in times of war or riot, are too dangerous to be kept in a settled community by individuals, and, in times of peace, find their use by bands of criminals and have legitimate employment only by guards and police.

People v. Brown 235 N.W. 245, 246 (Mich. 1931)

Therefore, to the extent this Court is inclined to view bump stocks as "arms" at all, it should conclude that 13 V.S.A. § 4022 is constitutional under Article 16, because bump stocks convert firearms into machine guns, which courts have universally concluded are not protected under federal or state constitutions.

III. Vermont's Modest Conditions on Possession of Firearms By Persons Under 21 Do Not Violate the Vermont Constitution.

Contrary to Plaintiff's claims, the Vermont Constitution does not require that persons under the age of 21 have untrammeled access to firearms. The age of 21 was historically the age of majority and, consistent with historical practice and common sense, the Legislature may place reasonable restrictions—such as safety training—on the purchase of guns by those under 21. The modest restriction at issue here furthers important public safety considerations and appropriately recognizes that young people, who are continuing to mature and develop, pose special risks with respect to firearms access and gun violence. Age-based restrictions on access to other dangerous products, including alcohol, tobacco, and even motor vehicles, are well-established in American law. Neither Article 16 nor the Common Benefits Clause mandates that 18-20 year olds have the same rights to access and purchase firearms as adults over 21.

A. In Vermont, persons under 21 were historically considered minors.

As the State correctly notes in its motion to dismiss, individuals under the age of 21 have historically been considered minors. "According to the English common law, the age of 21 is the period of majority for both sexes." *Rafus v. Daley*, 103 Vt. 426, 154 A. 695, 696–97 (1931). In Vermont, however, nineteenth century courts held that the age of majority for men was 21, but that the age of majority for women was 18. *See id.* (citing *Young v. Davis*, Brayt. 124 (1817)). These courts relied on the version of Article 1 of the Vermont Constitution then in effect, which "declare[d] involuntary servitude illegal, and not allowable after males arrive at the age of twenty-one, and females at the age of eighteen years," viewing this distinction as "fixing the age of majority of females at eighteen years." *Sparhawk v. Buell's Adm'r*, 9 Vt. 41, 78 (1837). In 1924, the Vermont Constitution was amended to provide that both men and women could not be held in involuntary servitude after reaching the age of 21 and to allow all citizens "of the full age

of twenty-one years" to vote. Article 37 of the Amendments to the Vermont Constitution. In 1947, the Vermont Legislature defined a minor as both men and women under the age of 21. Vt. Statutes Revision of 1947, ch. 1 § 21. It was not until 1971 that Vermont amended this law to lower the age of majority for all persons from 21 to 18. 1971 Vt. Acts & Resolves No. 90 § 1.

This history demonstrates that the Vermont Legislature has the power to set the age of majority at 21 and in turn has greater power to limit and condition access to firearms for persons under the age of 21. *See Beaudry v. Beaudry*, 132 Vt. 53, 56–57, 312 A.2d 922, 925 (1973) ("The term 'minor' . . . embraces any person who has not yet arrived at the age of majority prescribed by law, for minority is a status created by law and is subject to statutory limitation and exception."). In *National Rifle Association of America v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, the Fifth Circuit explained the historical perspective on limits on the sale of firearms to persons under 21:

> Arms-control legislation intensified through the 1800s, and by the end of the 19th century, nineteen States and the District of Columbia had enacted laws expressly restricting the ability of persons under 21 to purchase or use particular firearms, or restricting the ability of "minors" to purchase or use particular firearms while the state age of majority was set at age 21. . . .
>
> Meanwhile, 19th century courts and commentators, maintained that age-based restrictions on the purchase of firearms—including restrictions on the ability of persons under 21 to purchase firearms—comported with the Second Amendment guarantee. To illustrate, Thomas Cooley . . . agreed that the State may prohibit the sale of arms to minors pursuant to the State's police power. Cooley recognized the validity of imposing age qualifications on arm sales, despite his acknowledgment that the federal and State constitutions provide the right of that the right of the people to bear arms shall not be infringed.

700 F.3d 185, 202 (5th Cir. 2012) (internal citations and quotation marks omitted)

Because persons under the age of 21 in Vermont were considered minors, both at common law and far into the twentieth century, this Court should find that the modest conditions placed on a 18, 19, or 20-year old's ability to purchase a firearm in 13 V.S.A. § 4020 do not violate Article

16. The Vermont Legislature's choice to lower the age of majority for other purposes to 18 does not render its age-based conditional limits on firearms unconstitutional. *See Nat'l Rifle Ass'n of Am.*, 700 F.3d at 204 n. 17 (the modern choice to set the age of majority at 18 does not compel states to also "select 18 as the minimum age to purchase alcohol, lottery tickets, or handguns").

Despite Plaintiff's suggestions to the contrary, a review of the historical record shows both that Vermonters have always been concerned about minors using firearms in an unsafe manner and that the Vermont Legislature had the power to respond to these concerns by limiting firearm purchases by minors. On July 28, 1868, the Orleans Independent Standard reported on a thirteen-year old boy in Holland, Vermont who was shot by his friend while they were out hoeing potatoes. "So frequent are such accidents," the article observed, "it almost requires a law forbidding the use of firearms by children. If parents cannot keep such things from them, public safety will soon demand some extreme penalty for their use, especially by careless boys."[15]

In 1896, the Vermont Legislature banned the sale or possession of firearms to a child under the age of 12. 1896 Vt. Acts & Resolves No. 111. In 1904, the legislature added further restrictions on the ability of minors to purchase weapons, with a law providing that: "No person other than a parent or guardian shall sell or furnish to a minor under the age of fifteen years any firearms or other dangerous weapon; provided that instructors and teachers may furnish military weapons to pupils for instruction and drill." 1904 Vt. Acts & Resolves 152 § 1.

Despite these laws, there emerged growing public outcry calling for further limits on the sale and possession of firearms by minors. On Mach 16, 1911, the Bennington Evening Banner argued for renewed legislation after the shooting death of a fourteen-year old boy in Barre, Vermont:

---

[15] Orleans independent standard. (Irasburgh, Vt.), 28 July 1868. Chronicling America: Historic American Newspapers. Lib. of Congress. <http://chroniclingamerica.loc.gov/lccn/sn84022548/1868-07-28/ed-1/seq-2/>

> The shooting . . . is, we believe, the sixth fatality of the kind in this state during the past few months, due to the criminal recklessness with which firearms and ammunitions are supplied to mere children. At the last session of the legislature Mr. Meyers of Pownal introduced a bill forbidding anybody to sell or furnish a gun or ammunition to a child under sixteen years of age but the committee to which the bill was referred reported against it and the bill was killed.
>
> The Banner believes that the bill should have become a law. There are it is true, a few boys under sixteen years of age, who are competent to handle firearms but there are ten times as many who are not and we do not believe that any good purpose is served by allowing boys of that age to own, handle or use dangerous weapons. It is almost never the boy with the gun that is killed but some innocent friend of his who does not realize the danger. Then too there are many more maimed and injured.
>
> What compensating benefit is there in return for the long toll of dead and injured children due to the mistaken indulgence of fond parents and the selfish greed of dealers who care not to whom they sell so long as they get a profit?[16]

Responding to this outcry, in 1912, the Vermont Legislature amended its 1904 law to ban the possession of pistols and revolvers by minors under the age of 16 unless they had consent from a parent or guardian and to ban the sale and furnishing of all firearms to minors under the age of 16 unless done by a parent or guardian. This law remains in effect in a slightly amended form at 13 V.S.A. §§ 4007-4008.

B. Modern social science and data supports conditions on gun ownership for persons under the age of 21.

Early legislatures appear to have regulated the age of firearm possession among very young minors in an effort to reduce the incidence of tragic unintentional shootings and firearm misuse. Modern social science evidence both supports the effectiveness of these earlier efforts and also provides compelling justification for the modern legislature's decision to regulate firearm purchases by an even broader set of minors under 21.

---

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

In 2014, more than 21,000 Americans under the age of 21 were shot by guns, and 3,265 of them died from their wounds.[17] Of those deaths, 1,925 were classified as homicides, 1,145 as suicides, and 122 as the result of unintentional shootings.[18] Homicide is the leading cause of death for African American males age 15-24, and firearms are used in more than 90% of homicides in that group.[19] Suicide is the second leading cause of death for males age 10-24, and guns are used in more than half of the suicides in this group.[20]

Over the last twenty years, advancements in neurology and neuroimaging have provided greater insight on the brain's development throughout adolescence and into adulthood. As one article explained:

> [A] growing body of longitudinal neuroimaging research has demonstrated that adolescence is a period of continued brain growth and change, challenging longstanding assumptions that the brain was largely finished maturing by puberty. The frontal lobes, home to key components of the neural circuitry underlying "executive function" such as planning, working memory, and impulse control, are among the last areas of the brain to mature; they may not be fully developed until halfway through the third decade of life.[21]

Another expert on brain development has explained that:

> [T]he changes that happen between 18 and 25 are a continuation of the process that starts around puberty, and 18 year olds are about halfway through that process. Their prefrontal cortex is not yet fully developed. That the part of the brain that helps you inhibit impulses and to plan and organize your behavior to reach a goal.[22]

---

[17] Nat'l Ctr. for Injury Prevention & Control, U.S. Centers for Disease Control and Prevention, Web-Based Injury Statistics Query & Reporting System (WISQARS) Injury Mortality Reports, 1999-2014, for National, Regional, and States (Nov. 2014), http://www.cdc.gov/injury/wisqars/fatal_injury_reports.html and Nonfatal Injury, 2001-2014 (Nov. 2014), http://www.cdc.gov/injury/wisqars/nonfatal.html.

[18] *Id.*

[19] Stephanie R. Morain, Cassandra K. Crifasi "*Time to pull the trigger? Examining the ethical permissibility of minimum age restrictions for gun ownership and use*" Preventive Medicine 118, 207 (2019).

[20] *Id.*

[21] Sara B. Johnson, Robert W. Blum, et al. "*Adolscent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*" J. Adoslesc. Health. 2009 Sept., 45(3), 216-221 *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2892678/#R1

[22] NPR, "*Brain Maturity Extends Well Beyond Teen Years*" (Oct. 10, 2011) https://www.npr.org/templates/story/story.php?storyId=141164708

The fact that impulse regulation and emotional control continues to develop into the mid-20s can put minors, including those ages 18 to 20, at higher risk for suicide than older populations.[23] In addition, suicide risk is often much higher in the early stages of the onset of major psychiatric conditions, and these symptoms usually first develop in adolescence.[24] Most mental illnesses have their onset by age 24, meaning that 18- to 20-year-olds are at a heightened risk of experiencing psychiatric symptoms for the first time.[25] These psychiatric vulnerabilities are exacerbated for young people over age 18 who are leaving home for the first time and experiencing shifts in social connections, reduced structure, and social support.[26]

Responding in part to this growing body of information, the Vermont Legislature has taken steps to reform its criminal justice system to acknowledge that individuals under the age of 21 should not face the same standards and systems as full adults. In 2018, Vermont enacted Act 251, which in part grants State's Attorneys the power to "commence a proceeding in the Family Division of the Superior Court concerning a child who is alleged to have committed an offense after attaining 16 years of age but not 22 years of age that could otherwise be filed in the Criminal Division." S.234, Act 201 (2018) (emphasis added). Just as the Legislature could, as a matter of public policy, raise the age at which some young people are treated as full adults in the criminal justice system, so too could it place conditions on the possession of firearms by the same class of young people.

---

[23] See Nitin Gogtay et al., Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood, 101 Proc. of the Nat'l Acad. Sci. 8174, 8178 (2004) *available at* https://www.pnas.org/content/pnas/101/21/8174.full.pdf.

[24] Merete Nordentoft et al., Absolute Risk of Suicide after First Hospital Contact in Mental Disorder, 68 Archives of Gen. Psychiatry 1058, 1060 (2011) *available at* https://jamanetwork.com/journals/jamapsychiatry/fullarticle/1107316.

[25] Ronald C. Kessler et al., Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication, 62 Archives of Gen. Psychiatry 593, 595 (2005) *available at* https://jamanetwork.com/journals/jamapsychiatry/fullarticle/208678.

[26] See Carole Hooven et al., Suicide Risk at Young Adulthood: Continuities and Discontinuities from Adolescence, 44 Youth & Society 1, 2-3 (2012) *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3487406/.

CONCLUSION

For the foregoing reasons, Plaintiff's complaint should be dismissed.

Burlington, Vermont

December 17, 2018

Respectfully submitted,

By: _____

Tristram J. Coffin, Esq.
Jennifer McDonald, Esq.
William T. Clark, 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
(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 Giffords Law Center
To Prevent Gun Violence

18810634.6

STATE OF VERMONT

SUPERIOR COURT
WINDHAM UNIT

CIVIL DIVISION
DOCKET NO. 315-8-18 Wmcv

GUN OWNERS OF VERMONT, INC.

Plaintiff,

v.

MATTHEW BIRMINGHAM, in his Official Capacity as Director of the Vermont State Police,

T. J. DONOVAN, in his Official Capacity as Attorney General of the State of Vermont,

TRACY KELLY SHRIVER, in her Official Capacity as State's Attorney for Windham County,

Defendants.

MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

Now comes Gun Sense Vermont, Inc., by and through its attorneys, Downs Rachlin Martin, PLLC and Stris & Maher, LLP, and submits this Motion For Leave to Appear as Amicus Curiae. As grounds for this motion, Movant-Amicus submits the following:

1. Movant-Amicus Gun Sense Vermont, Inc. is a grassroots Vermont organization formed in 2013 following the shootings of 20 children and 6 adults at the Sandy Hook elementary school in Connecticut. Gun Sense Vermont represents a coalition of concerned Vermonters who support common-sense gun 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. Gun Sense Vermont supported S. 55, including the three provisions at issue in this case.

2. Plaintiff in this action is a non-profit association with the stated mission "to actively oppose all proposed gun control bills." Compl. ¶ 10. Invoking Article 16 of the Vermont Constitution, Plaintiff challenges three recently enacted Vermont statutes: (1) 13 V.S.A. § 4019, which requires persons transferring a firearm to appear together before a licensed dealer and use the licensed dealer to facilitate the transfer; (2) 13 V.S.A. § 4020, which prohibits the sale of a firearm to a person under the age of 21 unless the person is a law enforcement officer, an active or veteran member of the armed forces, or has completed an approved hunter safety course; and (3) 13 V.S.A. § 4022, which prohibits the possession of bump-fire stocks. The suit seeks, *inter alia*, to enjoin these Defendants and others from enforcing the above statutes and to declare that these statutes violate Article 16 of the Vermont Constitution.

3. By appearing as *amicus curiae,* Gun Sense Vermont seeks to provide the Court with additional perspective based on its expertise in using evidence-based practices in support of gun safety issues in Vermont. On this basis, Gun Sense Vermont respectfully requests to appear in this matter as *amicus curiae*. *See State v. Bell,* 136 Vt. 144, 147 (1978)*; Avellino v. Herron*, 991 F. Supp. 730, 732 (E.D. Pa. 1998); *Leigh v. Engle,* 535 F. Supp. 418, 419 (N.D. Ill. 1982).

4. Gun Sense Vermont, Inc. was recently granted permission to file a brief as *amicus curiae* jointly with Amicus Giffords Law Center in *Vermont Federation of Sportsmen's Clubs et al. v. Birmingham et al.*, Dkt. No. 224-4-18 (Vt. Super. Ct. Wash. Cnty.), a case before Judge Teachout challenging the constitutionality of a recently enacted Vermont statute regulating the possession and distribution of certain large capacity ammunition magazines under Article 16 of the Vermont Constitution.

5. On December 12, 2018, this Court granted Amicus Giffords Law Center's motion to appear as *amicus curiae*. Movant-Amicus Gun Sense Vermont, Inc. seeks leave to file its brief as *amicus curiae* jointly with Amicus Giffords Law Center on or before December 17, 2018.

WHEREFORE,

Gun Sense Vermont respectfully requests that the Court grant its motion and permit it to appear as *amicus curiae* in the above-captioned case.

December 17, 2018

Respectfully submitted,

GUN SENSE VERMONT, INC.

By: _____

Tristram J. Coffin, Esq.
Jennifer McDonald, Esq.
William T. Clark, 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

18841375.2

STATE OF VERMONT

SUPERIOR COURT
WINDHAM UNIT

CIVIL DIVISION
DOCKET NO. 315-8-18 Wmcv

GUN OWNERS OF VERMONT, INC.

Plaintiff,

v.

MATTHEW BIRMINGHAM, in his Official Capacity as Director of the Vermont State Police,

T. J. DONOVAN, in his Official Capacity as Attorney General of the State of Vermont,

TRACY KELLY SHRIVER, in her Official Capacity as State's Attorney for Windham County,

Defendants.

NOTICE OF APPEARANCE

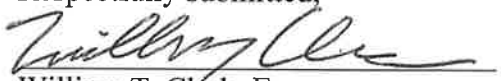
Now comes attorney William T. Clark of Downs Rachlin Martin PLLC and enters his appearance on behalf of Amicus Giffords Law Center to Prevent Gun Violence. Counsel for Giffords Law Center can be contacted at the below address with regard to this matter:

William T. Clark, Esq.
Downs Rachlin Martin, PLLC
P.O. Box 190, 199 Main Street
Burlington, VT 05402-0190
(802) 863-2375
wclark@drm.com

Burlington, Vermont

December 17, 2018

Respectfully submitted,

By: 

William T. Clark, Esq.
Downs Rachlin Martin, PLLC
P.O. Box 190, 199 Main Street
Burlington, VT 05402-190
(802) 863-2375

STATE OF VERMONT

SUPERIOR COURT
WINDHAM UNIT

CIVIL DIVISION
DOCKET NO. 315-8-18 Wmcv

GUN OWNERS OF VERMONT, INC.

Plaintiff,

v.

MATTHEW BIRMINGHAM, in his Official Capacity as Director of the Vermont State Police,

T. J. DONOVAN, in his Official Capacity as Attorney General of the State of Vermont,

TRACY KELLY SHRIVER, in her Official Capacity as State's Attorney for Windham County,

Defendants.

CERTIFICATE OF SERVICE

I, Tristram J. Coffin, counsel for Giffords Law Center, certify that on December 17, 2018, I served a copy of the Amicus Brief of Giffords Law Center and Gun Sense Vermont, Inc. in Support of State's Motion to Dismiss, a Motion For Leave To Appear As Amicus Curiae of Gun Sense Vermont, Inc., and a Notice of Appearance via electronic mail and by mailing a copy thereof via U. S. mail, on the following attorneys of record:

Michael K. Shane, Esq.
Marsicovetere & Levine Law Group, P.C.
128 Gates Street, PO Box 799
White River Junction, VT 05001
(802) 296-6200
(802) 296-6202 (fax)
mshane@rivercitylawyers.com

Benjamin Battles, Esq.
Vermont Attorney General's Office
109 State St., 3rd Fl.
Montpelier, VT 05609-1001
(802) 828-5500
(802) 828-3187 (fax)
Benjamin.battles@vermont.gov

Burlington, Vermont

December 17, 2018

Respectfully submitted,

Tristram J. Coffin, Esq.
Jennifer McDonald, Esq.
William T. Clark, 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
Montpelier, VT 05602
(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 Giffords Law Center
To Prevent Gun Violence

18841382.2