STATE OF VERMONT

SUPERIOR COURT
BENNINGTON UNIT

CRIMINAL DIVISION
DOCKET NO. 173-2-19 Bncr

STATE OF VERMONT)
)
v.)
)
MAX MISCH)

AMICUS BRIEF OF GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, BRADY CENTER TO PREVENT GUN VIOLENCE, AND MARCH FOR OUR LIVES IN SUPPORT OF STATE OF VERMONT'S OPPOSITION TO MOTION TO DISMISS

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INTEREST OF AMICI CURIAE

Amici curiae are national gun violence prevention organizations that have filed numerous amicus briefs involving firearms regulations and constitutional principles affecting gun policy. Giffords Law Center to Prevent Gun Violence promotes and defends the laws and policies proven to reduce gun violence. Brady Center to Prevent Gun Violence is the nation's most longstanding non-partisan, non-profit organization dedicated to reducing gun violence through education, research, legal advocacy and political action. March for Our Lives is a youth-led non-profit organization dedicated to promoting civic engagement, education and direct action by youth to achieve sensible gun violence prevention policies.

INTRODUCTION

This Court should deny Defendant's Motion to Dismiss. As the State persuasively argues, Defendant has not shown that the Second Amendment's plain text covers firearm accessories like large capacity ammunition feeding devices.

Vermont Act 94, enacted at 13 V.S.A. § 4021, prohibits the acquisition of large-capacity magazines ("LCMs") that are capable of accepting more than ten rounds of ammunition for a long gun or 15 rounds for a handgun.[1] Act 94 is consistent with the history and tradition of firearms regulation in this country because it regulates the manner in which firearms may be carried without burdening the right of armed self-defense.

In *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court instructed courts considering a Second Amendment challenge to assess whether a firearms regulation is "relevantly similar" to historical firearms regulations by evaluating "whether modern and historical regulations impose a comparable burden on the right of armed self-defense" and "whether that burden is comparably justified." *Id.* at 2132–33.

Vermont's law is "relevantly similar" to historical regulations that limited where firearms could be carried, what weapons could lawfully be possessed, and the manner in which weapons could be carried. (Part I, *infra.*) Given the dramatic changes in firearms technology, the most relevant historical comparisons are to early twentieth century laws restricting guns capable of firing repeatedly without reloading. (Part I.C, *infra.*) Similar to these historical analogues, Vemont's LCM regulation does not burden the right to armed self-defense because LCMs are not necessary for self-defense. (Part II, *infra*.) Further, like historical considerations, policy considerations demonstrate Act 94's constitutionality. (Part III, *infra*.)

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[1] 13 V.S.A. § 4021

ARGUMENT

I. "REASONABLE, WELL-DEFINED" RESTRICTIONS ON THE MANNER OF CARRYING ARMS ARE NOT CONTRARY TO THE SECOND AMENDMENT.

a. Under the *Bruen* Test, Courts Should Evaluate Historical "Analogues" to a Challenged Firearms Regulation to Assess Whether It Imposes a "Comparable Burden" on Self-Defense.

Bruen instructed courts evaluating a Second Amendment challenge to assess whether a modern regulation is "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2126. The Court wrote that "determining whether a historical regulation is a proper analogue for a distinctly modern firearms regulation requires a determination of whether the two regulations are relevantly similar." *Id.* at 2132 (quotation and citation omitted). The Court explained that this "analogical reasoning requires only that the government identify a well-established and representative historical **analogue**, not a historical **twin**. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id*. at 2133.[2]

Bruen held that courts conducting this historical inquiry must consider "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133. "As we stated in *Heller* and repeated in *McDonald*, 'individual self-defense is "the **central component**" of the Second Amendment right.'" *Id*. at 2133 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)).

In *Bruen*, the Court invalidated New York's "proper-cause" standard, which required that applicants for a state license to carry a handgun in public demonstrate a special need for self-defense distinguishable from that of the general public. *Id*. at 2122–23. At the same time, the Court stated that the Second Amendment is "neither a regulatory straightjacket nor a regulatory

[2] All emphases in the original unless otherwise noted.

blank check." *Id.* at 2133. "Properly interpreted, the Second Amendment allows a 'variety' of gun regulations." *Id.* at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 636).

Bruen identified several presumptively lawful firearms regulations that are "relevantly similar" to historical laws. As the Court noted, "the right to keep and bear arms in public has traditionally been subject to well-defined restrictions governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms." *Id*. at 2138. Therefore, since "historical evidence from antebellum America does demonstrate that **the manner** of public carry was subject to reasonable regulation," laws that impose "reasonable, well-defined restrictions" on the manner of carrying firearms do not violate the Second Amendment. *Id.* at 2150, 2156.

The Supreme Court has not established a black-letter rule concerning the relevant timeframe for this historical analysis. In fact, in *Bruen*, the Court expressly declined to address "whether courts should primarily rely on the prevailing understanding of an individual right" at the time of the Second's Amendment's ratification in 1791, the Fourteenth Amendment's ratification 1868, or some other time. *Bruen*, 142 S. Ct. at 2138. Instead, the *Bruen* Court evaluated historical laws and evidence from various periods, including: "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries." *Id.* at 2135–36. The Court did not flatly reject evidence from any of these periods and intimated that late 19th century and early 20th century evidence could be probative to the extent it corroborated "earlier evidence." *Id*. at 2154, n.28; *see also Heller*, 554 U.S. at 671 (post-Civil War legislation can be "instructive").

b. Vermont's LCM Regulation Is Analogous to Historical Firearms Restrictions That Did Not Burden the Right of Armed Self-Defense.

From the Founding Era to the Civil War era, and onwards into the twentieth and twenty-first centuries, states have enacted restrictions on where arms may be brought, what arms may be possessed, and the manner in which arms may be carried. These laws included restrictions on carrying firearms into sensitive places, limitations on the type of arms individuals could lawfully possess, and prohibitions on the concealed carry of arms.

Under *Bruen*, "whether modern and historical regulations impose a ***comparable burden on the right of armed self-defense*** and whether that burden is comparably justified are '***central***' considerations when engaging in an analogical inquiry." 142 S. Ct. at 2133 (first emphasis added) (quoting *McDonald*, 561 U.S. at 767). Applying this standard, Vermont's LCM regulation is "relevantly similar" to these historical laws because it imposes a "comparable burden" on the right of armed self-defense. *Id.* at 2132–33. Unlike the regulations addressed in *Bruen* and *Heller*, which the Supreme Court held entirely prevented the exercise of the right to armed self-defense, *see id*. at 2156 (New York's "proper-cause" requirement); *Heller*, 554 U.S. at 635–36 (the District of Columbia's restriction on handgun possession in the home), Vermont's LCM regulation does not prevent armed self-defense (*see* Part II, *infra*) but rather imposes restrictions "relevantly similar" to those imposed by historical laws regulating firearms:

1. Sensitive places. Around the time of the ratification of the Bill of Rights, colonial Philadelphia, New York, and Boston prohibited the discharge of firearms within their cities.[3] By the time of the Fourteenth Amendment's ratification in 1868, states such as Virginia and Delaware had passed regulations on the discharge of firearms in sensitive or crowded public

[3] *See* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 162–63 (2007).

places.[4] Courts consistently upheld these regulations on the carrying or discharge of firearms in sensitive places, reasoning that such laws did not impinge on the right of armed self-defense.

For example, the Georgia Supreme Court in 1874 upheld a law forbidding the carrying of pistols, revolvers and other "deadly weapon[s]" to courthouses, polling places, places of public worship, "or any other public gathering in this state" against a challenge under the Second Amendment and Georgia state constitutional analogue. *Hill v. State*, 53 Ga. 472, 474, 482–83 (1874). The court found that carrying arms to sensitive places was simply not necessary for the right to "use [arms] as to become familiar with that use," but did risk impinging on the "constitutional duties of the legislature" to ensure "[t]he preservation of the public peace, and the protection of the people against violence." *Id*. at 477–79.[5]

2. Excessively dangerous weapons. States have also historically regulated weapons deemed excessively dangerous, and courts have consistently upheld these laws, reasoning that such arms are not necessary for self-defense. For example, the North Carolina Supreme Court wrote in 1824 that arming oneself with "dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people," is "an offence at common law, and is strictly prohibited by statute." *State v. Langford*, 10 N.C. 381, 383–84 (1824); *see also O'Neill v. State*, 16 Ala. 65, 67 (1849) (noting that persons arming themselves with "deadly or unusual weapons for the purpose of an affray . . . may be guilty of this offence, without coming to actual blows").

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[4] *See* Act of Jan. 30, 1847, ch. 79, 1846–47 Va. Acts 67; Act of Feb. 4, 1812, ch. 195, 1812 Del. Sess. Laws 522, 522–24.

[5] The post-Civil War judicial decisions discussed in text at Part I, b address statutes enacted before or shortly after ratification of the Fourteenth Amendment. The "public understanding" of the scope of the Second Amendment can be properly discerned from statutes adopted by legislatures shortly before or after they ratified the Fourteenth Amendment. See *Bruen*, 142 S. Ct. at 2136 (explaining that "evidence of 'how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century' . . . [is] a 'critical tool of constitutional interpretation'" in evaluating "the public understanding" of the Second Amendment (quoting *Heller*, 554 U.S. at 605)).

Shortly after the Civil War, in 1871, the Tennessee Supreme Court in *Andrews v. State* upheld the constitutionality of a statute making it unlawful "for any person to publicly or privately carry a dirk, swordcane, Spanish stiletto, belt or pocket pistol or revolver." 50 Tenn. 165, 171, 186 (1871). The court reasoned that the banned weapons were not needed for self-defense: "[a]dmitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good." *Id.* at 188–89.

That same year, the Texas Supreme Court in *English v. State* upheld a law that regulated, and in some cases prohibited, the carrying of pistols, dirks and certain other "deadly weapons" against a challenge under the Second Amendment and state constitutional analogue. 35 Tex. 473, 474, 477 (1871). The court held that the law did not interfere with the right to self-defense because the law "makes all necessary exceptions, and points out the place, the time and the manner in which certain deadly weapons may be carried as means of self-defense, and these exceptional cases, in our judgment, fully cover all the wants of society." *Id.* at 477.

3. Concealed carry. States across the country have regulated the concealed carry of firearms for more than two centuries, and courts have repeatedly upheld these laws. *See, e.g., State v. Mitchell*, 3 Blackf. 229, 229 (Ind. 1833) (upholding Indiana's concealed carry law against a Second Amendment challenge); *Ex parte Thomas*, 97 P. 260, 265 (Okla. 1908) (upholding a state concealed carry law against a state constitutional challenge). State supreme courts have often explicitly upheld concealed carry laws because they did not burden an individual's right to armed self-defense. For example, in 1840, the Alabama Supreme Court upheld a concealed carry conviction against a challenge under a state constitutional analogue to the Second Amendment, concluding that "[t]here was no evidence . . . that the defendant could

not have defended himself as successfully, by carrying the pistol openly, as by secreting it about his person." *State v. Reid*, 1 Ala. 612, 614, 621 (1840).

Two years later, the Arkansas Supreme Court upheld the state's concealed carry statute, which prohibited the "wear[ing] [of] any pistol . . . concealed as a weapon, unless upon a journey." *State v. Buzzard*, 4 Ark. 18, 18 (1842) (divided opinion). One justice observed that the rights protected by the Second Amendment were "not in the slightest degree encroached upon by the legislative enactment of this State prohibiting the wearing of concealed weapons." *Id*. at 31 (Dickinson, J.). Another justice similarly stated that the Second Amendment creates "no such immunity as exempts it from all legal regulation and control." *Id.* at 22 (Ringo, C.J.).

In 1850, the Louisiana Supreme Court upheld the constitutionality of a concealed carry statute, writing that the law "interfered with no man's right to carry arms" and was "absolutely necessary to . . . prevent bloodshed and assassinations." *State v. Chandler*, 5 La. Ann. 489, 489–90 (1850). Eight years later, the Louisiana Supreme Court reaffirmed the constitutionality of a substantially similar provision, holding that the statute did "not infringe the right of the people to keep or bear arms," but rather restricted "**only a particular mode** of bearing arms which is found dangerous to the peace of society." *State v. Jumel*, 13 La. Ann. 399, 399–400 (1858).

These regulations demonstrate that states have a broad and deep tradition of regulating the manner of carrying firearms, and that courts have consistently upheld such laws when they imposed little or no burden on the right of armed self-defense. Vermont's regulation is ***relevantly similar*** to these historical restrictions because Vermont's regulation also does not burden the right of armed self-defense (as addressed further below in Part II).

c. Vermont's Regulation Is "Relevantly Similar" to Historical Laws Restricting Weapons Capable of Firing Repeatedly Without Reloading.

Vermont's regulation is also consistent with nearly a century of state firearms laws, including laws from Vermont, restricting weapons capable of firing repeatedly without reloading.[6] In 1923, Vermont banned hunters from using a "machine gun of any kind or description, *or an automatic rifle of military type with a magazine capacity of over six cartridges."* 1923 Vt. Acts and Resolves 130 (emphasis added). The bill's initial language did not contain this final clause, which was added on the Senate's recommendation. *See* JOURNAL OF THE SENATE OF THE STATE OF VERMONT, 202-03 (1923). By adding this clause, the Legislature ensured that the law would specifically regulate the magazine capacity of military-style automatic rifles. This law remains in effect in a slightly amended form at 10 V.S.A. § 4704.

Other Vermont laws illustrate the Legislature's history of responding to new dangers posed by advancements in firearms and firearms accessory technology. On March 23, 1912, the Bennington Evening Banner ran one Vermonter's impassioned demand that the Legislature take up a ban on gun silencers, which the author called "an article which even the nations of the earth should combine against."[7] Later that year, the Legislature enacted a ban on gun silencers. 1912 Vt. Acts and Resolves No. 237 (this law remains in effect in amended form at 13 V.S.A. § 4010). Similarly, the Vermont Legislature has regulated the sale and possession of firearms by minors since as 1896. *See* 1896 Vt. Acts & Resolves No. 111; *see also* 1904 Vt. Acts & Resolves No. 152, § 1. These restrictions remain in effect in a slightly amended form at 13 V.S.A. §§ 4007-4008.

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[6] *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 68–71 (2017).

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

A 1927 Rhode Island law prohibited "any weapon which shoots automatically and any weapon which shoots more than twelve shots semi-automatically without reloading."[8] That same year, Michigan passed a law prohibiting any firearm that fired more than sixteen times without reloading.[9] In 1933, Ohio outlawed any firearm that "shoots automatically, or any firearm which shoots more than eighteen shots semi-automatically without reloading," and South Dakota banned firearms "from which more than five shots or bullets may be rapidly, or automatically, or semi-automatically discharged from a magazine."[10] In total, between 1927 and 1934, at least seven states and as many as ten restricted access to certain weapons capable of firing repeatedly without reloading.[11]

These laws demonstrate a clear history and tradition of regulations on firearms. They reflect a recognition that some regulations do not impinge on any legitimate need for armed self-defense. These laws do not date back to the Founding Era or the Civil War, but for good reason: weapons capable of firing repeatedly without reloading were not in widespread circulation until ***after*** the ratification of the Fourteenth Amendment in 1868 and ***long after*** the ratification of the Second Amendment in 1791. *See, e.g.*, *Or. Firearms Fed'n, Inc. v. Brown*, No. 2:22-CV-01815-IM, 2022 WL 17454829 (D. Or. Dec. 6, 2022) ("Defendants have proffered evidence that large-capacity magazines represent the kind of dramatic technological change envisioned by the *Bruen* Court."); Decl. of Michael Vorenberg at ¶ 43, *Ocean State Tactical, LLC v. Rhode Island*, No. 1:22-cv-00246 (D.R.I. Oct. 14, 2022) ("Rifles holding more than 10 rounds made up a tiny fraction of all firearms in the United States during Reconstruction. Furthermore . . . legal

[8] Act of Apr. 22, 1927, ch. 1052, 1927 R.I. Pub. Laws 256, §§ 1, 4.
[9] *Id*.
[10] Act of Apr. 8, 1933, no. 64, 1933 Ohio Laws 189, 189, § 12819-3; Act of Feb. 28, 1933, ch. 206, 1933 S.D. Sess. Laws 245, 245, § 1.
[11] *See* Spitzer, *supra* note 6, at 68, 70–71 (collecting laws).

possession . . . was limited almost exclusively to U.S. soldiers and civilian law enforcement officers.”).

1. Firearms Capable of Firing Repeatedly Without Reloading Were Not Broadly Available Until After Enactment of the Fourteenth Amendment.

During the Founding Era, civilians did not have widespread access to firearms capable of firing more than ten rounds without reloading.

Defendant identifies the Kalthoff, Lorenzoni, and Cookson as the first “successful systems of [repeating arms].”[12] These systems, however, were “experimental prototypes” and existed in the world as just that.[13] Indeed, refinement and perfection of these technologies took centuries.

Next, Defendant points to the Girandoni air rifle. This gun used a wagon-mounted pump filled with water to sustain the pressure needed to operate the rifle.[14] However, without the pump, the weapon took nearly 1,500 manual hand pumps to restore power.[15] Moreover, the weapon was delicate, would frequently malfunction, and faced significant manufacturing difficulties.[16] Only 1,500 or so were ever built.[17]

Defendant further claims that firearms that could fire over 10 or 15 rounds became “very popular” in the 1800s.[18] In reality, the multi-shot firearms developed during the antebellum

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[12] Def.[’s] Renewed Mot. to Dismiss, 6, Aug. 8, 2022.
[13] Decl. of Robert Spitzer, *Wiese et al. v. Bonta et al.*, ¶ 34 July 10, 2023.
[14] John Paul Jarvis, *The Girandoni Air Rifle: Deadly Under Pressure*, Guns.com (March 15, 2011), https://perma.cc/57AB-X2BE.
[15] *Id.*
[16] *Girandoni Air Rifle*, Fandom: Military Wiki, https://perma.cc/4RFA-Q9BK (last visited Nov. 29, 2022).
[17] Mike Markowitz, *The Girandoni Air Rifle: A Weapon Ahead of Its Time?* Defense Media Network (May 14, 2013), https://perma.cc/5F8G-UZAR.
[18] Def.[’s] Renewed Mot. to Dismiss, 13, Aug. 8, 2022.

period were merely "experimental efforts"[19] and suffered from numerous shortcomings that limited their popularity.[20]

In total, Defendant points to eleven experimental multi-shot firearms introduced in the 1800s prior to the ratification of the Fourteenth Amendment, yet none of these firearms were widely available to civilians prior to ratification of the Fourteenth Amendment in 1868:

1. ***Jennings Multi-Shot Flintlock Rifle*** **(1821)**: Just 521 of these multi-shot firearms were produced for use by the New York militia, and the weapon was considered to be "anything but a common firearm."[21] The Jennings flintlock rifle most frequently allowed for just four shots to be fired without reloading, and manual manipulation was required between each shot.[22]

2. ***"Pepperbox" Pistols*** **(1830s)**: The most common "pepperbox" pistols could fire just five or six rounds without reloading.[23] Although a Belgian pepperbox pistol with 24 different barrels was manufactured, it was "monstrously unwield[y]."[24] The weapon was also notorious because of its shortcomings: its accuracy did not extend "much beyond the width of a poker table"[25]; its firing power was extremely modest[26]; and it was so unreliable that at times all of its barrels would fire at the same time (known as "chain-firing").[27]

3. ***Bennett and Havilland Rifle*** **(1838)**[28]: The Bennett & Havilland rifle was known to be as "safe as juggling chainsaws," and the weapon's design was "inherently unsafe" because it could cause chain-firing that could result in severe injury or death for the gunman.[29] As a result, "very few of these rifles were actually produced, with experts saying that less than ten were ever made."[30]

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[19] John Paul Jarvis, *Bennett & Havilland Revolving Rifle: A Link in the Repeating Rifle Chain*, Guns.com (April 3, 2012), https://perma.cc/6FLX-AE5G.
[20] *See* Vorenberg Decl. ¶ 43.
[21] Rock Island Auction Co*., Repeating Flintlock Rifles?!?*, YouTube (Sept. 7, 2021), https://www.youtube.com/watch?v=0FkW-CSTCwo.
[22] *Id.*
[23] Charles Worman, *The Iconic Pepperbox Revolving Pistol*, J. Antiques & Collectibles, https://perma.cc/E3K8-W3LH (last visited Nov. 29, 2022).
[24] *Wheelgun Wednesday: A Closer Look at Pepperbox Pistols*, The Firearm Blog (Dec. 8, 2021), https://perma.cc/2Z2U-RJ62; Worman, supra note 28.
[25] Worman, *supra* note 23.
[26] Danielle Hollembaek, *The Pepperbox Pistol*, Rock Island Auction Co. (Jan. 16, 2019), https://perma.cc/2ERY-26CX.
[27] *Id.*
[28] This rifle was patented in 1838. *See* Jarvis *supra* note 19.
[29] *Id.*
[30] *Bennett & Havilland Revolving Rifle*, Fandom: Military Wiki, https://perma.cc/D68U-MSGU (last visited Nov. 29, 2022).

4. ***Pin-Fire Revolvers*** **(1850s)**: Pin-fire revolvers most commonly had a capacity of five or six rounds.[31] Although pin-fire revolvers capable of holding as many as 20 rounds did exist, they were "extraordinarily large and unwieldy."[32] The pin-fire revolver "was not a success" in the United States, in part because "accidental discharge of the cartridges before being loaded into the weapon became a serious problem."[33]

5. ***Rifle Invented by Alexander Hall*** **(mid-1850s)**[34]: There is very little publicly available information about this rifle, but collectors have stated that they are "extremely scarce."[35] Like the Bennett and Havilland Rifle, the rifle had a "giant flaw" in that the weapon could chain-fire, creating a risk of severe injury to the gunman.[36]

6. ***Rifle Invented by Colonel Perry W. Porter*** **(1851)**[37]: This rifle was known to be "unsafe in any direction" because it had a risk of chain-firing that could cause rounds to fire in different directions.[38] The rifle had "radial chambers" with at least one chamber pointing back at the shooter, creating a risk of self-harm.[39] In an era when firearms could chain-fire without warning, "the notion of having a loaded chamber pointing at your face was less than appealing to most people."[40] Only approximately 1,250 Porter rifles were ever produced.[41]

7. ***Ferris Wheel Pistol by Joseph Enouy*** **(1855)**: There are very few records on this pistol but it appears to have been a rare weapon with which few Americans would have been familiar. Most photographs of this gun depict only one manufactured product, which was held in an English collection before it was sent to Egypt.[42]

8. ***Volcanic Rifle*** **(1855)**: The Volcanic Rifle was "[u]npopular because of its unreliability" as "it suffered from design defects including gas discharge around the breech and misfires."[43] According to one expert, "[t]here weren't a lot of these weapons made."[44] The rifle was ineffective for self-defense because it was "grossly

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[31] Rare 20-Shot Lefaucheux "*High Capacity" Pin Fire Revolver, College Hill Arsenal*", https://perma.cc/TNY6-8PTL (last visited Nov. 29, 2022).
[32] *Id.*
[33] *Original U.S. Civil War French M1854 Lefaucheux Cavalry Model 12mm Pinfire Revolver with Round*, Int'l Military Antiques, https://perma.cc/58KW-PHS7 (last visited Nov. 29, 2022).
[34] This rifle was manufactured in the mid-1850s. *See Lot 1099. Very Rare Hall 15 Round Percussion Revolving Rifle*, Rock Island Auction Co., https://perma.cc/43X5-EKSG (last visited Nov. 29, 2022).
[35] *Rare Alexander Hall Percussion Revolving Rifle*, Cowan's, https://perma.cc/T4F3-49KM (last visited Nov. 29, 2022); see also *Lot 1099. Very Rare Hall 15 Round Percussion Revolving Rifle*, *supra* note 34.
[36] POTD. *Very Rare Hall 15 Round Percussion Revolving Rifle*, All Outdoor (June 18, 2021), https://perma.cc/39V8-75RR (last visited June 29, 2023).
[37] This rifle was patented in 1851. Forgotten Weapons, *Porter Turret Rifle (2nd Variation) – Unsafe in Any Direction,* YouTube (March 7, 2018), https://www.youtube.com/watch?v=Wm_1Ny6r6zg.
[38] *Id.*
[39] Ian McCollum, *RIA: Porter Turret Rifle, Forgotten Weapons* (Feb. 7, 2016), https://perma.cc/N5J5-R93H.
[40] *Id.*
[41] *Porter Turret Rifle*, *Forgotten Weapons supra* note 39.
[42] Decl. of Brennan Rivas, *Wiese et al. v. Bonta et al.* July 10, 2023.
[43] John Sammon, *The Case for Caselessness. The Volcanic Rifle*, Guns.com (April 19, 2011), https://perma.cc/462K-M6TA.
[44] *Id.*

underpowered" and did not fire with enough force to be a "man stopper."[45]

9. ***Henry Lever Action Rifle*** **(1862)**: Although the Henry rifle featured technological advances, "it also had some issues that hindered its rapid acceptance in the marketplace."[46] The rifle was "underpowered for a military firearm"; the "open magazine bottom under the barrel could easily become fouled"; the rifle's design could make it difficult to operate and aim; the rifle was prone to becoming jammed; the barrel became hot with repeated firing; the firing pins were fragile and could break, rendering the firearm inoperable; and the frame was prone to damage, causing the cartridges not to feed into the rifle.[47] Just 14,000 Henry rifles were manufactured by 1866, and the weapon saw only limited use during the Civil War.[48] After the Civil War, the Henry company ceased production of the Henry rifle.[49]

10. ***Josselyn Belt-Fed Chain Pistol*** **(1866)**: The Josselyn belt-fed pistol featured an "odd" design consisting of a loop of chambers linked together in a chain.[50] The design caused it to "fail[] to make it commercially,"[51] "possibly because of the inconvenience of carrying one around."[52] In addition, the design likely meant that "bringing the chain's next chamber into position isn't a rapid endeavour."[53] As one commentator quipped: "It is relatively easy to imagine what embarrassment might be experienced by a man who, in defense of his person, is required to extract from his pocket a gun with a foot or so of loose chain attached."[54] The weapon's shortcomings led it to become a "mechanical curiosity," and it does not "appear to have been produced in significant quantities."[55]

11. ***Winchester Repeating Rifle*** **(1866)**: The Winchester rifle represented a "serious leap forward in firearms capability," but it still suffered from significant limitations.[56] The rifle's exposed magazine was open to dirt and debris, which could lead to jamming, and the barrel could become dangerously hot after firing.[57] The Winchester rifle also suffered from "poor accuracy at longer ranges" and was very heavy when fully

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[45] *Volcanic Rifles & Pistols*, Winchester Arms Collectors Ass'n, https://perma.cc/52FB-2PCF (last visited Nov. 29, 2022).
[46] *1st DC Cavalry Martial Henry Rifle*, College Hill Arsenal, https://perma.cc/LFP3-AVDY (last visited Nov. 29, 2022).
[47] *Id.*
[48] Dan Alex, *Henry Model 1860. Lever-Action Repeating Rifle*, Military Factory, https://perma.cc/N47S-7PKR (last edited Feb. 4, 2022).
[49] *1860 Henry Repeating Rifle*, Fandom: Deadliest Warrior Wiki, https://perma.cc/H9YW-SZHG (last visited Nov. 29, 2022).
[50] *Josselyn Revolver—Patent Protype*, FLicense Blog (Sept. 23, 2014), https://perma.cc/8CRB-7XH7.
[51] *Id.*
[52] *Chain Guns—I*, Firearms History, Technology & Development Blog (July 23, 2014), https://perma.cc/MT7P-JP5L.
[53] *Old West Firearms—Weapons Locker*, writeups.org, https://perma.cc/RHY4-7GX4 (last visited Nov. 29, 2022).
[54] *Revolver - Invented by Samuel Colt*, Edubilla, https://perma.cc/4AS9-PQ5U (last visited Nov. 29, 2022).
[55] *Old West Firearms*—Weapons Locker, *supra* note 53.
[56] Ian McCollum, *Winchester Lever Action Development: Model 1866,* Forgotten Weapons (June 7, 2017), https://perma.cc/2LMH-CQK5.
[57] Ryan Hodges, *The 1866 Rifle*, Taylor's & Company (Aug. 26, 2020), https://perma.cc/7STW-8WMS.

loaded.[58] Professor David B. Kopel, described the Winchester as the first rifle with more than ten rounds of ammunition to achieve "mass-market success in the United States."[59] However, sales of the Winchester almost entirely postdated the ratification of the Fourteenth Amendment in 1868. The first deliveries of the Winchester rifle were not made until 1867, and the model sold just 4,500 firearms worldwide in its first five months on the civilian market.[60]

2. Modern Firearms Capable of Firing Repeatedly Without Reloading Require a "More Nuanced Approach" Under Bruen That Cannot Rely Solely on Historical Antecedents Pre-Dating the Fourteenth Amendment.

Defendant also notes several additional multi-shot weapons invented after ratification of the Fourteenth Amendment.[61] But, as discussed previously, when such multi-shot firearms began to see widespread civilian use, states across the country, including Vermont, passed laws limiting access to these weapons. *See* Part I.B-C, *supra*.

Moreover, modern firearms capable of firing repeatedly without reloading bear little resemblance to their historical predecessors. At the time of the Founding, the typical Revolutionary-era musket (i) could hold just one round at a time, (ii) could fire no more than three rounds per minute, (iii) had a maximum accurate range of 55 yards, and (iv) had a muzzle velocity of approximately 1,000 feet per second.[62] By contrast, a typical modern AR-15 (i) can hold 30 or 100 or even more rounds (at least 30 times more than a typical Revolutionary-era musket), (ii) can fire approximately 45 rounds per minute (15 times more), (iii) can shoot accurately from approximately 600 yards (11 times further), and (iv) attains a muzzle velocity of over 3,000 feet per second (3 times faster).[63]

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[58] *Why Britain Didn't Adopt the Winchester 1866*, The Armourer's Bench, https://perma.cc/PRY3-YHSN (last visited Nov. 29, 2022).
[59] David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 88 Alb. L. Rev. 849 (2015).
[60] Winchester *1866 Prototype Musket*, The Armourer's Bench, https://perma.cc/PB83-TSM4 (last visited Nov. 29, 2022).
[61] See Def.['s] Renewed Mot. to Dismiss, 17, Aug. 8, 2022.
[62] Christopher Ingraham, *What 'Arms' Looked Like When the 2nd Amendment Was Written*, Wash. Post (June 13, 2016), https://perma.cc/H6X5-C2NL.
[63] *Id.*

Although firearms technology had improved by the Civil War, even the most advanced firearms of the era were a far cry from the modern AR-15. For example, the Winchester Model 1866, discussed *supra*, had a maximum effective range of approximately 100 yards (about one-sixth of an AR-15) and had a muzzle velocity of just 1,100 feet per second (roughly one-third of an AR-15).[64] In short, modern LCMs, coupled with advances in firearm technology, pose a risk of far greater carnage than was possible—or could even be contemplated—during the Founding Era or the nineteenth century. Indeed, as of July 2020, LCMs were used in the ten deadliest mass shootings of the prior decade, and mass shootings from 1990 to 2017 involving LCMs resulted in a 62 percent higher death toll compared to those that did not involve an LCM.[65]

These modern advances in firearms technology constitute the type of "dramatic technological changes" that *Bruen* held require a "more nuanced approach" to judicial review of modern firearms regulations. 142 S. Ct. at 2132. In other words, *Bruen* itself recognizes that there cannot be a rote comparison to historical firearms regulations when firearms technology is now so fundamentally changed. Simply put, there can be no comparable regulation from the colonial period or antebellum era for a technology that did not exist then. As *Bruen* acknowledged, "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Id.* Unlike the handgun regulations addressed in *Bruen* and *Heller*, for which the Supreme Court looked to historical antecedents limiting the right of armed self-defense, a "more nuanced approach" is required when evaluating firearms restrictions on technology that did not exist before 1791 or 1868. *Id.*

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[64] Dan Alex, *Winchester Model 1866 Lever-Action Repeating Rifle*, Military Factory (March 12, 2019), https://perma.cc/4ZJA-5V4M.
[65] *Large Capacity Magazines*, Giffords Law Ctr., https://perma.cc/X84S-97DT (last visited Nov. 29, 2022).

Accordingly, the more pertinent historical comparison is to early twentieth century laws restricting guns capable of firing repeatedly without reloading. *See* Part I.C, *supra*. As those laws reflect, reasonable restrictions on the ability to shoot bullets repeatedly without reloading are not undue burdens on any right of armed self-defense, but are instead intended to reduce the carnage that can result when many rounds can be fired without reloading. *See, e.g., Heller*, 554 U.S. at 627 (suggesting that M16 rifles, an automatic firearm with a 20- or 30-round magazine capacity, "and the like" may be banned consistent with the Second Amendment).

In short, applying a "more nuanced approach" in light of the "dramatic technological changes" in firearms technology, as *Bruen* instructs, Vermont's LCM regulation is "relevantly similar" to laws from around the country regulating weapons capable of firing repeatedly without reloading. *See* 142 S. Ct. at 2132. These laws, passed in the early twentieth century, were enacted as firearms technology became more advanced and widely available.

II. VERMONT'S LCM REGULATION IS "REASONABLE" AND "WELL-DEFINED" BECAUSE IT DOES NOT BURDEN AN INDIVIDUAL RIGHT TO SELF-DEFENSE.

As the Supreme Court "stated in *Heller* and repeated in *McDonald*, 'individual self-defense is "the **central component**" of the Second Amendment right.'" *Bruen*, 142 S. Ct. at 2133 (quoting *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599)). Given that the core Second Amendment inquiry as instructed by *Bruen* is whether there is a "burden on the right of armed self-defense," Vermont's LCM regulation is constitutional. *Id.* The regulation does not burden the right to armed self-defense because LCMs are not necessary for civilian self-defense.

Defendant claims only that "millions of Americans own LCM's and the use of such magazines for self-defense is apparent in our shared national history," yet fails to identify a single

incident in which a Vermont resident required an LCM for self-defense.[66] Further, empirical research, thoroughly examined by the Vermont Supreme Court and other sister courts,[67] establishes that the ability to fire more than ten rounds of ammunition without reloading is not needed for self-defense.

In the Vermont Supreme Court's prior analysis in *State v. Misch*, the Court analyzed empirical evidence supporting Vermont's LCM ban. As the Court wrote, a weapon equipped with a large-capacity magazine "is almost never used for self-defense." *State v. Misch*, 2021 VT 10, ¶ 84, 214 Vt. 309, 356, 256 A.3d 519, 552. Relying on data collected by the NRA, the court observed that "[t]he average number of shots fired in self-defense between 1997 and 2001, and 2011 to 2013, has been estimated to be 2.2 or fewer." *Id.*[68] The court concluded that "[w]hile a large-capacity magazine could conceivably be used for self-defense purposes, and no doubt has on some occasion somewhere," no party, including the many amici that filed briefs in the case,

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[66] Def.['s] Renewed Mot. to Dismiss, 10, Aug. 8, 2022.

[67] *See Duncan v. Bonta*, 19 F.4th 1087, 1104–05 (9th Cir. 2021), cert. granted, judgment vacated, 142 S. Ct. 2895, and vacated and remanded on other grounds, 49 F.4th 1228 (9th Cir. 2022); *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019), abrogated on other grounds by Bruen, 142 S. Ct. 2111; *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. (ANJRPC) v. Att'y Gen. New Jersey*, 910 F.3d 106, 121 n.25 (3d Cir. 2018), abrogated on other grounds by Bruen, 142 S. Ct. 2111; *Kolbe v. Hogan*, 849 F.3d 114, 127 (4th Cir. 2017), abrogated on other grounds by *Bruen*, 142 S. Ct. 2111; *Rocky Mountain Gun Owners v. Polis*, 467 P.3d 314, 331 (Colo. 2020); Kolbe v. O'Malley, 42 F. Supp. 3d 768, 786 (D. Md. 2014), aff'd in part, vacated in part, remanded sub nom. *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), on reh'g en banc, 849 F.3d 114 (4th Cir. 2017), and aff'd, 849 F.3d 114 (4th Cir. 2017).

[68] The NRA's database of "armed citizen" accounts, describing private individuals' successful use of firearms in self-defense or defense of others, demonstrates that the use of more than ten rounds of ammunition for self-defense is "rare." Decl. of Lucy P. Allen ¶ 8, *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Grewal* (ANJRPC), 2018 WL 4688345 (D.N.J. Sept. 28, 2018), aff'd, 910 F.3d 106 (3d Cir. 2018), No. 3:18-cv-10507 (ECF No. 31-2) (filed July 5, 2018); *see also Armed Citizen Stories*, NRA-ILA, https://perma.cc/H9BC-95HF (last visited Nov. 29, 2022). Studies of this database by firearms instructor Claude Werner (analyzing data from 1997 to 2001), and by economist Lucy P. Allen (evaluating 2011 to 2017 data), have found that the average number of shots fired by civilians in self-defense was about ***two***. *See* Claude Werner, *The Armed Citizen – A Five Year Analysis*, Guns Save Lives (Mar. 12, 2012), https://perma.cc/QTL7-U8EM (average of 2.2 defensive shots fired per incident from 1997–2001); Allen Decl., *ANJRPC*, *supra* note 66, ¶ 10 (same, from January 2011 to May 2017). Moreover, of 736 self-defense incidents from January 2011 to May 2017 reflected in the NRA database, there were only "two incidents (0.3% of all incidents), in which the defender was reported to have fired more than 10 bullets." Allen Decl., *ANJRPC, supra* note 70, ¶ 10 (emphasis added).

"has provided an example of such an occurrence despite analysis of defensive shootings over more than two decades." *Id.*

Numerous federal and state courts have similarly found no evidence that firing more than ten bullets without the need to reload is necessary for self-defense. As recently as 2021, the Ninth Circuit concluded that "[t]he use of more than ten bullets in defense of the home is '**rare**,' or **non-existent**," and that the record in that case, "as in other cases," offered no indication that "the added benefit of a large-capacity magazine—being able to fire more than ten bullets in rapid succession— has **ever** been realized in self-defense in the home." *Duncan*, 19 F.4th at 1104–05 (citations omitted) (first two emphases added).

In 2019, the First Circuit found that "not one of the plaintiffs or their six experts could identify *even a single example of* . . . a self-defense episode in which ten or more shots were fired." *Worman*, 922 F.3d at 37. And the Colorado Supreme Court similarly concluded, based on trial testimony, "that [i]n no case had a person fired even five shots in self-defense, let alone ten, fifteen, or more." *Rocky Mountain Gun Owners*, 467 P.3d at 331 (quotation omitted); *see also ANJRPC*, 910 F.3d at 121 n.25 ("The record reflects that most homeowners only use two to three rounds of ammunition in self-defense."); *Kolbe*, 42 F. Supp. 3d at 787 ("Maryland law enforcement officials are unaware of any Marylander . . . needing to fire more than ten rounds, to protect himself.").

These findings are consistent with prior testimony and analyses of law enforcement officers that civilians do not need to fire more than ten rounds of ammunition for self-defense. The D.C. Council's Committee on Public Safety and the Judiciary "agree[d]" with the then-D.C. Chief of Police that "magazines holding[] over 10 rounds are more about firepower than self-defense."[69]

[69] D.C. Council Comm. on Public Safety & the Judiciary, *Report on Bill 17–843, "Firearms Registration Amendment Act of 2008*," at 9 (Nov. 25, 2008), https://perma.cc/YN6H-2U9M.

Edward Troiano, chief of Rhode Island's Bureau of Criminal Identification and Investigation and former Special Agent for the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), testified in a challenge to Rhode Island's LCM restriction that the "[c]ircumstances where it is necessary to have more than 10 rounds of ammunition without the need to change magazines involve ***limited circumstances applicable to law enforcement***." Decl. of Edward Troiano ¶¶ 9, 10, *Ocean State Tactical, LLC*, No. 1:22-cv-00246 (D.R.I. Oct. 14, 2022) ECF No. 19-3 (emphasis added) ("I am unaware of ***any incident*** in which a civilian has **ever** fired as many as 10 rounds in self-defense." (emphasis added)).

In a case challenging Maryland's LCM restriction, the then-Baltimore County Police Chief—head of the twentieth-largest police department in the U.S.—testified that he was "***unaware of any self-defense incident***" in Baltimore County or "anywhere else in Maryland" for which "it was necessary to fire as many as 10 rounds in self-defense." Decl. of James W. Johnson ¶¶ 2, 30, 31, *Kolbe v. O'Malley*, 42 F. Supp. 3d 768 (D. Md. 2014), No. 1:13-cv-02841 (ECF No. 44-3) (filed Feb. 14, 2014) (emphasis added). And in a case challenging an Illinois municipal ordinance regulating firearms capable of accepting more than ten rounds of ammunition, former longtime ATF official Mark D. Jones testified that "the ammunition capacity of a standard revolver (6 cartridges) would satisfy one's self defense needs most of the time and a semi-automatic pistol with a 10 round capacity magazine even more so."[70]

Even advocates of the permissive use of firearms have acknowledged that the ability to fire more than ten rounds of ammunition without reloading is not necessary for defensive purposes. For example, recent compilations by The Heritage Foundation's *The Daily Signal* of national reports of defensive gun use cases reflect that **none** involved the use of anywhere close to ten rounds of

[70] Decl. of Mark D. Jones ¶ 40, *Friedman v. City of Highland Park*, 68 F. Supp. 3d 895 (N.D. Ill. 2014), aff'd, 784 F.3d 406 (7th Cir. 2015), No. 13-cv-9073 (ECF No. 22-1, Ex. C) (filed Feb. 7, 2014).

ammunition.[71] A blog post for ammunitions retailer Lucky Gunner stated that in the "very rare instances . . . [that involved] round counts in the low double digits," the suspect was generally "disabled after the first couple of shots."[72] Firearms training officer Greg Ellifritz similarly found that "[a]ll the common defensive calibers required around 2 rounds on average to incapacitate," and that "in the majority of shootings, the person shot merely gives up without being truly incapacitated by the bullet."[73] Another advocate concluded that, in 98 percent of defensive gun use cases, "people simply brandish weapons to stop attacks."[74]

The available evidence, in other words, demonstrates that more than ten rounds are not needed for armed self-defense. Under the tests of *Bruen* and *Heller*, Vermont's LCM regulation is therefore constitutional because it does not "burden a law-abiding citizen's right to armed self-defense." *Bruen*, 142 S. Ct. at 2132–33.

III. LCMs' UNJUSTIFIABLE THREAT TO PUBLIC HEALTH AND SAFETY DEMONSTRATES THAT THE VERMONT REGULATION IS INDEED CONSTITUTIONAL.

LCMs allow shooters to kill more people and thus pose an unjustifiable threat to public health and safety. *Bruen* does not prevent legislatures from exercising their traditional police powers to pass commonsense gun laws, like Vermont's LCM ban, to protect public health and safety. *See* Bruen, 142 S. Ct. at 2161-62 (Kavanaugh, J., concurring) (properly interpreting the Second Amendment as allowing a "variety" of gun regulation including prohibitions on the

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[71] Amy Swearer & Holden Edwards, *Second Amendment Isn't About Deer in Kevlar Vests, Mr. President, As These 11 Incidents Show*, The Daily Signal (Sept. 26, 2022), https://perma.cc/DR5E-XQLR; Amy Swearer & Isaac Bock, *Second Amendment Protects Everyone, As 12 Examples of Defensive Gun Use Show*, The Daily Signal (July 29, 2022), https://perma.cc/8JJS-Z44K.
[72] Chris Baker, *How Much Ammo Capacity Is Enough*, Lucky Gunner: Lounge (Sept. 2, 2016), https://perma.cc/9UYC-7ZZC.
[73] Greg Ellifritz, *An Alternate Look at Handgun Stopping Power*, Buckeye Firearms Association (July 8, 2011), https://perma.cc/7AW4-EXJV.
[74] Tim Lambert, *Statements by John R. Lott, Jr. on Defensive Gun Brandishing*, ScienceBlogs (Oct. 17, 2002), https://perma.cc/65PN-YMA4.

possession of firearms by felons and the mentally ill). *See also Or. Firearms Fed'n, Inc.*, 2022 WL 17454829, at *14 ("[T]his Court finds that it may consider the public safety concerns of today.").

When Governor Phil Scott signed the LCM ban, Vermont joined several state and local governments across the country that have saved lives by banning LCMs.[75] LCMs are repeatedly and predictably used in mass shootings and attacks on law enforcement officers because they allow shooters to repeatedly fire bullets without pausing. Shooters use LCMs to kill and wound more people—more parents, teachers, police officers, students, and children—much more quickly than they otherwise could with a single weapon.

LCMs are intended for military-style assaults. With LCMs, a shooter can fire more bullets without pausing to reload, inflicting mass casualties in an extremely short timeframe using a single weapon. A review of mass shootings involving a firearm equipped with a LCM resulted in nearly 10 times as many total casualties.[76] The horrific nature of mass shootings involving LCMs is now burned into the national consciousness and has irreparably scarred communities across the country. In 2023 alone 19 people have died in mass shootings in the United States where the shooter used large capacity magazines containing more than 10 rounds.[77]

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[75] See Cal. Penal Code §§ 16740, 32310 (West 2015); Colo. Rev. Stat. Ann. §§ 18-12-301(2), 18-12-302 (West 2013); Conn. Gen. Stat. Ann. §§ 53- 202w(a)(1), 53-202w(b) (West 2013); D.C. Code Ann. § 7-2506.01(b) (West 2012); Haw. Rev. Stat. Ann. §§ 134-1, 134-4, 134-8(c) (West 2013); Md. Code Ann., Crim. Law §§ 4-306(b)(1) (West 2013); Mass. Gen. Laws Ann. ch. 140, §§ 121, 131M (West 2014); N.J. Stat. Ann. §§ 2C:39-1(y), 2C:39-3(j), 2C:39-9(h) (West 2014); N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.10 (McKinney 2018); R.I. Gen. Laws. §§ 11-47.1-2, 11-47.1-3; 13 V.S.A. § 4021(a); 2021 WA S 5078 (to be codified);Cook Cnty., Ill., Code of Ordinances §§ 54-211 – 54-213; Boulder Revised Code §§ 5-8-2, 5-8-28; S.F. Police Code § 619; Sunnyvale, Cal., Municipal Code § 9.44.050.

[76] Everytown for Gun Safety Support Fund, "*Mass Shootings in the United States*," March 2023, https://everytownresearch.org/mass-shooting-report.

[77] The Violence Policy Center, "*Mass Shootings in the United States Involving Large Capacity Ammunition Magazines*" April 2023, https://vpc.org/fact_sht/VPCshootinglist.pdf.

Medical research confirms that mass shootings involving LCMs are deadlier than ever before.[78] A research letter in the Journal of the American Medical Association described how, even as trauma medicine has improved, more patients are dying from gunshots because they have been shot multiple times, more severely.[79] Between 2000 and 2013, in one major American trauma center, the "number of severe [gunshot wounds] per patient increased significantly" and, as a result, patients were more likely to die from gunshots than they were in the preceding decade.[80] Increased gunshot mortality was unique: the trauma center did not observe the same mortality spike for any other class of traumatic injury, including stabbings, car crashes, and falls or accidents.[81] Other hospitals, cities, and states that have analyzed the number of gunshot wounds per patient have observed the exact same trend: more victims coming in with multiple bullet wounds, making them more likely to die from their injuries.[82]

Empirical research also documents strong links between LCM use, deadly mass shootings, and everyday gun crimes. A 2016 analysis of mass shooting data by Dr. Louis Klarevas observed that high-fatality "gun massacres" have become deadlier and more frequent since 1966, reaching unprecedented levels in the past decade.[83] The analysis concluded that LCM use is the "factor most associated with high death tolls in gun massacres."[84] A 2017 study by Dr. Christopher Koper

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[78] *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/guninjuries-more-deadly/.
[79] See A. Sauaia et al., *Fatality and Severity of Firearm Injuries in a Denver Trauma Center*, 2000-2013, 315 JAMA 2465 (Jun. 14, 2016), https://jamanetwork.com/journals/jama/fullarticle/2528198 (noting that in one trauma center, "[f]irearm in-hospital case-fatality rates increased, contrary to every other trauma mechanism, attributable to the rising severity and number of injuries").
[80] *Id.*
[81] *Id.*
[82] See J. George, Shoot to Kill, Baltimore Sun, (Sep. 30, 2016), http://data.baltimoresun.com/news/shoot-to-kill/ (in Maryland, statewide "the number of victims shot five to nine times doubled" from 2005 to 2015, "as did those shot 10 or more times"); D. Livingston et al., Unrelenting Violence: An Analysis of 6,322 Gunshot Wound Patients at a Level I Trauma Center, 76 J. Trauma Acute Care Surg. 2 (2014) (hospital in Newark, New Jersey saw that the percentage of patients with three or more bullet wounds increased from 10 percent in 2001 to 23 percent in 2011).
[83] Louis Klarevas, *Rampage Nation: Securing America from Mass Shootings*, 78-79 (2016).
[84] *Id.* at 257; *see also id.* at 215-25.

similarly found that LCMs are "particularly prominent in public mass shootings and those resulting in the higher casualty counts."[85]

The same study highlighted the role LCMs play in fueling gun crimes generally, finding that after federal magazine restrictions were repealed in 2004, criminals began using large-capacity firearms much more frequently. Since the repeal in 2004, such guns grew as a share of firearms recovered in crime by between 33% and 112% and were disproportionately used in murders of law enforcement officers.[86] As a result of the increased criminal use of LCMs, some police departments witnessed an uptick in gun fatalities despite fewer shootings, because shooters are firing more rounds during a single shooting.[87]

LCM bans are an evidence-based counter to the epidemic use of large-capacity magazines in mass shootings and crimes. Between 1994 and 2004, when federal law restricted the sale and possession of LCMs, both the number of large-scale mass shootings and the number of deaths during such shootings fell dramatically.[88] A 2019 Stanford study found that the federal restrictions were "associated with a 25 percent drop in gun massacres" and "a 40 percent drop in fatalities" between 1994 and 2004, compared to the decade before their adoption.[89]Another study concluded that during the federal ban period, "mass shooting fatalities were 70% less likely to occur."[90] Unfortunately, when the federal restrictions expired in 2004, deadly largescale shootings spiked

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[85] 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).
[86] *Id.* at 313.
[87] Police Executive Research Forum, Guns and Crime: Breaking New Ground By Focusing on the Local Impact 24 (2010), https://www.issuelab.org/resources/14333/14333.pdf (although Newark, New Jersey "made an enormous reduction in shooting incidents," the city saw "an increase of 11 percent in our murder rate, because more rounds are being fired in particular incidents").
[88] *See* Klarevas at 240-243 & n. 40.
[89] John Donohue and Theodora Boulouta, *That Assault Weapon Ban? It Really Did Work*, N.Y. Times, (Sept. 4, 2019), https://www.nytimes.com/2019/09/04/opinion/assaultweapon-ban.html.
[90] Charles DiMaggio et al., *Changes in US Mass Shooting Deaths Associated with the 1994-2004 Federal Assault Weapons Ban: Analysis of Open-Source Data*, 86 Trauma Acute Car Surg. No. 1 11, 14 (2018).

once more, and deaths involving LCMs quadrupled.[91] With all this evidence that LCM access fuels deadly gun rampages, it is not surprising that one Boston University researcher identified LCM bans as the strongest driver of lower mass shooting rates at the state level. Using data from Stanford University's Mass Shooting Database, which defines a mass shooting as an event with three or more casualties, Dr. Michael Siegel found that state laws prohibiting LCMs correlate with a 63% lower rate of mass shootings.[92] After considering "many possible socio-demographic factors," Dr. Siegel concluded that whether "a state has a large capacity ammunition magazine ban is the single best predictor of the mass shooting rate in that state.[93]

This 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. When that shooter has to pause to reload, fewer people will be injured and killed because during that pause the shooter could be disarmed by the victims, or victims could escape to safety. There are numerous, powerful examples illustrating the importance of this momentary pause to reload:

- When the Parkland shooter (who used 30- and 40-round LCMs) paused to reload, eight students were able to escape down a stairwell and survive the shooting.[94]
- During the mass shooting in Thousand Oaks, California (where the shooter used an LCM), rescuers were able to pull people through windows to safety as the gunman paused to reload.[95]

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[91] Klarevas at 350 n.40.
[92] 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-lasvegas/index.html.
[93] *Id*.
[94] Marjory Stoneman Douglas High School Public Safety Commission Report, Fl. Dep't of Law Enforcement, at 32 (Jan. 2, 2019), available at http://www.fdle.state.fl.us/MSDHS/CommissionReport.pdf; see also id. at 262 ("Eight 30- and 40-round capacity magazines were recovered from the scene.")
[95] See Veronica Miracle, *Thousand Oaks Mass Shooting Survivor: "I Heard Somebody Yell, 'He's Reloading*,'" ABC News, (Nov. 8, 2018), https://abc7.com/thousand-oaks-survivori-heard-somebody-yell-hes-reloading/4649166/.

- When the Sandy Hook shooter (who used 30-round LCMs) stopped to reload, nine children were able to flee to safety.[96]

As recently as April 2023, a 20-year-old student from Middlesex, Vermont was arrested on charges related to an alleged threat at his college in Minnesota where prosecutors said he was planning to carry out a "mass casualty event."[97] Among other evidence leading to the arrest was the discovery of high-capacity magazine packages and packages bearing the individual's name in a garbage can located outside a dorm.[98]

In February 2018, a young man named Jack Sawyer was arrested and charged in connection with his detailed plan for a mass shooting at Fair Haven Union High School. Sawyer's "Journal of an Active Shooter" described his extensive plan for a catastrophic shooting at his former school. Sawyer admitted that he was influenced by the 1999 Columbine massacre and planned to "beat the highest casualty count of all the other school shootings," in part by using ammunition that "would cause greater casualties and injuries."[99]

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

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[96] Final Report, Sandy Hook Advisory Commission, at 12 (Mar. 6, 2015), available at http://www.shac.ct.gov/SHAC_Final_Report_3-6-2015.pdf.
[97] Patrick Crowley, *Student from Vermont arrested in Minnesota for allegedly planning to attack school*, Valley News, https://www.vnews.com/Student-from-Vermont-arrested-in-Minnesota-for-allegedly-planning-to-attack-school-50610712 (last visited June 23, 2023)
[98] Carla Occaso*, Police Arrest Former Rumney,U-32 Student in Minnesota Potential Alleged 'Full Scale Attack' Thwarted by Custodian Police*, the bridge, https://montpelierbridge.org/2023/04/police-arrest-former-rumneyu-32-student-in-minnesota/ (last visited June 23, 2023)
[99]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-SawyerCharging-Document.html#document/p3. This Court subsequently held that Sawyer's preparations were not sufficient to constitute "attempt" to cause bodily injury with a deadly weapon or attempted murder.

both the side and back doors alongside the note "Heads: 3. Shoulders: 3. 2 Teachers. 2 to the legs."[100] 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.[101] 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.[102]

Unfortunately, not all shootings are averted. In August 2015, Jody Herring shot and killed three of her family members and then murdered social worker Lara Sobel outside a state office building in Barre.[103] And in August 2006, the Town of Essex experienced a deadly shooting rampage involving three different crime scenes, including Essex Elementary School.[104]

Following the averted mass shooting in Fair Haven, Vermont citizens mobilized in support of gun safety regulations.[105] 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.[106] Ultimately, Act 94, Vermont's comprehensive gun safety bill was signed into law, reflecting the broad desire to reduce the risk of

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[100] 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/wpcontent/uploads/2018/07/US-v.-Greene-ECF-14.pdf; http://lawcenter.giffords.org/us-vgreene-ecf-14-1/; http://lawcenter.giffords.org/us-v-greene-ecf-14-2/.
[101] 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-accusedof-plotting-attack-in-vermont.html.
[102] 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/wpcontent/uploads/2018/07/US-v.-Greene-ECF-54.pdf.
[103] Abbey Gingras, *Herring Pleads Guilty to Four Murder Charges*, Burlington Free Press, (July 6, 2017), https://www.burlingtonfreepress.com/story/news/2017/07/06/herringhearing-homicide-barre-vt/453332001/.
[104] Wilson Ring, *Christopher Williams Pleads Innocent in Shooting Spree*, Rutland Herald, (Aug. 26, 2006), http://www.rutlandherald.com/articles/christopher-williams-pleadsinnocent-in-shooting-spree/.
[105] *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-attendmarch-for-our-lives-rally-in-montpelier.
[106] Peter Hirschfeld, *In Less Than a Week, Scott and Lawmakers Put Gun Control Bills on Fast Track*, VPR, (Feb. 22, 2018), http://digital.vpr.net/post/less-week-scott-andlawmakers-put-gun-control-bills-fast-track#stream/0.

high-fatality shootings in Vermont.[107] Indeed, the Vermont Supreme Court has already found the Act to be within the reasonable limits of the Vermont Constitution. *See State v. Misch*, 2021 VT 10, ¶ 45, 214 Vt. 309, 256 A.3d 519 (recognizing that "Vermont has had, and continues to have, numerous firearms-related restrictions" and that "the use of firearms has long been understood to be subject to regulation by the State"; *id.* ¶ 49 (recognizing that "[g]iven the stark reality of gun violence, subject to the limitations of the Constitution, the Legislature acts within its authority in exercising its inherent power to impose such reasonable regulations and restraints as are essential to the preservation of the health, safety and welfare of the community" (citing *State v. Curley-Egan*, 2006 VT 95 ¶ 9, 180 Vt. 305, 910 A.2d 200). As such, this Court should defer to the Legislature's sound judgment and the Vermont Supreme Court's ruling in *Misch*, 2021 VT at ¶ 84 that Act 94's LCM regulation reasonably and properly protects public health and safety.

CONCLUSION

13 V.S.A. § 4021(a) is consistent with the Second Amendment because it is "relevantly similar" to historical laws that imposed reasonable restrictions on the manner of carrying firearms. *Bruen*, 142 S. Ct. at 2132–33. Applying the standards of *Bruen* and *Heller*, Vermont's LCM regulation does not burden the right to self-defense because LCMs are not necessary for "a law-abiding citizen" to engage in "armed self-defense." *Id*. Further, Vermont's LCM regulation is well within the Legislature's police power to address LCM's deadly and unjustifiable threat to public health and safety.

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

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Respectfully submitted,

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