

**In the  
Supreme Court of the State of Vermont**

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STATE OF VERMONT,

*Plaintiff-Appellant,*

v.

MAX MISCH,

*Defendant-Appellee.*

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**On Certification from the Vermont Superior Court  
Bennington Unit, Criminal Division  
Docket No. 172–2–19 BNCR**

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**BRIEF OF *AMICI CURIAE* CATO INSTITUTE,  
FIREARMS POLICY COALITION, FIREARMS POLICY  
FOUNDATION, AND INDEPENDENCE INSTITUTE  
IN SUPPORT OF APPELLEE**

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## STATEMENT OF INTEREST

**Cato Institute** is a nonpartisan public policy research foundation that advances the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was founded in 1989 to restore the principles of constitutional government that are the foundation of liberty.

**Firearms Policy Coalition ("FPC")** is a nonprofit membership organization that defends constitutional rights and promotes individual liberty. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education.

**Firearms Policy Foundation ("FPF")** is a nonprofit organization that serves its members and the public through charitable programs including research, education, and legal efforts, with a focus on constitutional rights.

**Independence Institute** is a nonpartisan public policy research organization founded on the eternal truths of the Declaration of Independence. The scholarship of the Institute's Research Director, David Kopel, has been cited in fourteen state supreme court opinions.

This case concerns *amici* in that it goes to the heart of the fundamental right to armed self-defense, as protected by the Vermont Constitution.

### **CONSENT TO FILE**

All parties have consented to the filing of this brief.<sup>1</sup>

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<sup>1</sup> No counsel for a party authored any part of this brief. No party or counsel contributed money intended to fund this brief's preparation or submission. Only *amici* and their members contributed money intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

The first step in this Court’s framework for analyzing constitutional challenges is to examine historical materials as well as the social and political setting in which the constitutional provision originated.

Firearms capable of shooting more than 10 and 15 consecutive rounds are two centuries older than Vermont’s constitution. Such arms were manufactured in the American colonies. During the American Revolution, the Continental Congress ordered firearms that could “discharge sixteen, or twenty [rounds], in sixteen, ten, or five seconds.”

The state-of-the-art rifle when Vermont’s 1793 constitution was ratified had a 22-round magazine. Meriwether Lewis famously carried one on the Lewis and Clark Expedition. Later, repeating arms with greater than 15-round capacities became some of the 19th century’s most popular arms—including the iconic Winchester and Henry rifles.

Today, magazines over 10 rounds constitute about half of all magazines. They are about as numerous as handguns were in 2008 when the United States Supreme Court held that handguns may not be banned because they are so common.

Vermont's 1777, 1786, and 1793 constitutions were ratified in the context of years of attempted British arms prohibitions and confiscations. Americans resisted by all means necessary—including armed force. The well-armed Green Mountain Boys and the Battle of Bennington changed the course of the war. There is no evidence that the constitutions' arms right guarantees were so feeble that the people could be deprived of typical, common, numerous arms.

In constitutional cases, this Court also looks to sibling states. There were no magazine restrictions in any state prior to the 20th century. During Prohibition, a few states enacted—and later repealed—ammunition-capacity restrictions. None were as severe as Vermont's.

Additionally, this Court weighs policy considerations. Speculation that magazine bans reduce the lethality of mass shootings is not supported by empirical data. Magazines over 10 and 15 rounds are often chosen by law-abiding Americans for self-defense because they are superior for that purpose.

## ARGUMENT

### **I. Magazines holding more than 10 and 15 rounds predate the Vermont Constitution by over two hundred years and are common today.**

The first step in this Court’s “framework for constitutional inquiry” is “examining...historical considerations.” *State v. Rheaume*, 2004 VT 35, ¶16. Thus, “[o]ne approach to constitutional argument involves the use of fundamentally historical materials.” *State v. Jewett*, 146 Vt. 221, 225 (1985). “[H]istorical argument may also touch...on the social and political setting in which it originated.” *Id.* at 226 (quotations omitted). Indeed, “[o]n every question of construction [we should] carry ourselves back to the time, when the Constitution was adopted.” *Id.* (quoting Joseph Story, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 390 n.1 (1st ed. 1833)).

When Vermont’s constitutions were adopted, repeating arms capable of firing more than 10 and 15 rounds were well known. Indeed, such arms predate Vermont’s constitutions by two centuries.

#### **A. Repeating arms were invented around 1500, and repeating arms capable of firing more than 15 rounds existed by 1580.**

“The desire for...repeating weapons is almost as old as the history of firearms, and there were numerous attempts to achieve this goal,

beginning at least as early as the opening years of the 16th century.”  
Harold Peterson, *ARMS AND ARMOR IN COLONIAL AMERICA, 1526–1783*, at 215 (1956).

The first known repeating firearms date to between 1490 and 1530; when fired, they shot ten bullets in succession with a single trigger pull.<sup>2</sup> England’s King Henry VIII (reigned 1509–1547) owned a similar firearm.<sup>3</sup> The first known firearms capable of firing more than 15 shots was a 16-shot model invented around 1580.<sup>4</sup>

With a single trigger pull, the above firearms shot all their bullets sequentially. In the next century, technological improvements allowed users to fire one bullet per trigger pull.

**B. Repeating arms gained popularity in the 17th century, including some with 30-round magazines.**

“Successful systems [of repeating arms] definitely had developed by 1640, and within the next twenty years they had spread throughout most

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<sup>2</sup> M.L. Brown, *FIREARMS IN COLONIAL AMERICA: THE IMPACT ON HISTORY AND TECHNOLOGY, 1492–1792*, at 50 (1980).

<sup>3</sup> W.W. Greener, *THE GUN AND ITS DEVELOPMENT* 81–82 (9th ed. 1910).

<sup>4</sup> Lewis Winant, *FIREARMS CURIOSA* 168–70 (1955); *16-Shot Wheel Lock*, AMERICA’S 1ST FREEDOM, May 10, 2014, <https://www.americas1stfreedom.org/articles/2014/5/10/16-shot-wheel-lock/>.

of Western Europe and even to Moscow.” Harold Peterson, *THE TREASURY OF THE GUN* 229 (1962). “[T]he two principal magazine repeaters of the era [were] the Kalthoff and the Lorenzoni. These were the first guns of their kind to achieve success.” *Id.*

“The Kalthoff repeater was a true magazine gun. In fact, it had two magazines, one for powder and one for balls. The earliest datable specimens which survive are two wheel-lock rifles made by Peter Kalthoff in Denmark in 1645 and 1646.” *Id.* “[T]he number of charges in the magazines ran all the way from six or seven to thirty.” *Id.* at 230.

Kalthoff repeaters “were undoubtedly the first magazine repeaters ever to be adopted for military purposes. About a hundred flintlock rifles of their pattern were issued to picked marksmen of the Royal Foot Guards and are believed to have seen active service during the siege of Copenhagen in 1658, 1659, and again in the Scanian War of 1675–1679.” *Id.*

“Examples spread throughout Europe wherever there were gunsmiths with sufficient skill and knowledge to make them, and patrons wealthy enough to pay the cost...[A]t least nineteen gunsmiths are known to have made such arms in an area stretching from London on the west to

Moscow on the east, and from Copenhagen south to Salzburg. There may well have been even more.” *Id.*

“The Lorenzoni also was developed during the first half of the Seventeenth Century.” *Id.* It was a magazine-fed Italian repeating pistol that “used gravity to self-reload.” Martin Dougherty, *SMALL ARMS VISUAL ENCYCLOPEDIA* 34 (2011). The Lorenzonis’ ammunition capacity was typically around seven shots. The gun’s repeating mechanism quickly spread throughout Europe and to the colonies, and the mechanism was soon applied to rifles also. Peterson, *TREASURY*, at 232. The famous English gunsmiths John Cookson and John Shaw adopted the Lorenzoni action for their firearms. So did “a host of others throughout the 18th century.” Peterson, *ARMS*, at 215.

“The Kalthoff and Lorenzoni actions...were probably the first and certainly the most popular of the early magazine repeaters. But there were many others. Another version, also attributed to the Lorenzoni family, boasted brass tubular magazines beneath the forestock...Guns of this type seem to have been made in several parts of Europe during the Eighteenth Century and apparently functioned well.” Peterson, *TREASURY*, at 233.

“The Lorenzoni system even found its way to America where records indicate that at least two New England gunsmiths actually manufactured such guns.” *Id.* at 232.

**C. American colonists began manufacturing repeating arms in the mid-1600s and the Founders embraced repeaters capable of firing more than 15 consecutive rounds.**

Lorenzonis were not the only repeaters manufactured in America. In the mid-1600s, American repeaters often employed a revolving cylinder that was rotated by hand. *See, e.g.*, 2 Charles Sawyer, FIREARMS IN AMERICAN HISTORY 5 (1939) (six-shot flintlock); Charles Chapel, GUNS OF THE OLD WEST 202–03 (1961) (revolving snaphance).

As is often the case, the cost of the most advanced firearms precluded much of the population from owning them. But “[b]eginning about 1710 commerce brought wealth to some of the merchants in the northern Colonies, and with other luxuries fancy firearms began to be in demand.” Sawyer, at 31.

In September 1722, John Pim, a Boston gunsmith, entertained some Native Americans with a repeater he sold. “[L]oaded but once,” it “was discharged eleven times following, with bullets, in the space of two minutes, each which went through a double door at fifty yards’ distance.”

Samuel Niles, *A Summary Historical Narrative of the Wars in New England*, in MASSACHUSETTS HISTORICAL SOCIETY COLLECTIONS, 4th ser., vol. 5, at 347 (1837).

The most common American repeaters of the early 18th century were probably Lorenzoni variants known as Cooksons. Peterson, TREASURY, at 230. “[T]his type of repeating flintlock popular in England from the third quarter of the 17th century, was known and manufactured in Massachusetts early in the 18th century.” Peterson, ARMS, at 215.

In 1777, the Continental Congress ordered one hundred rifles from Joseph Belton, who had informed the Congress that his rifles could “discharge sixteen, or twenty [rounds], in sixteen, ten, or five seconds.” 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 324 (1907); Joseph Belton, *letter to the Continental Congress*, Apr. 11, 1777, in PAPERS OF THE CONTINENTAL CONGRESS, COMPILED 1774–1789, vol. 1 A-B, at 123. Belton demonstrated his rifle before leading military officers (including General Horatio Gates and Major General Benedict Arnold) and scientists (including David Rittenhouse), who verified that “[h]e discharged Sixteen Balls loaded at one time.” Belton, at 139.

Ultimately, the deal fell through when Belton demanded what the Congress deemed “an extraordinary allowance.” JOURNALS OF THE CONTINENTAL CONGRESS, at 361. The exchange between Belton and the Congress nevertheless proves that the Founders knew about and embraced repeating arms capable of firing more than 10 rounds.

When Vermont’s 1793 constitution was ratified, the state-of-the-art repeater was the Girandoni air rifle, which could consecutively shoot 21 or 22 rounds in .46 or .49 caliber. Although an air gun, the Girandoni was ballistically equal to a powder gun,<sup>5</sup> and powerful enough to take an elk with one shot.<sup>6</sup> At the time, “there were many gunsmiths in Europe producing compressed air weapons powerful enough to use for big game hunting or as military weapons.” Jim Garry, WEAPONS OF THE LEWIS AND CLARK EXPEDITION 91 (2012). The Girandoni was invented for the Austrian army; 1,500 were issued to sharpshooters and remained in service for 25 years, including during the French Revolutionary and

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<sup>5</sup> John Plaster, THE HISTORY OF SNIPING AND SHARPSHOOTING 69–70 (2008).

<sup>6</sup> Jim Supica et al., TREASURES OF THE NRA NATIONAL FIREARMS MUSEUM 31 (2013).

Napoleonic Wars, between 1792 and 1815.<sup>7</sup> Isaiah Lukens of Pennsylvania manufactured such rifles,<sup>8</sup> along with “many makers in Austria, Russia, Switzerland, England, and various German principalities.” Garry, at 99.

Meriwether Lewis carried a Girandoni on the Lewis and Clark Expedition. He mentioned it in his journal twenty-two times. Sixteen times, Lewis was demonstrating the rifle to impress Native American tribes they encountered—often “astonishing” or “surprising” them. Meriwether Lewis & William Clark, *THE JOURNALS OF THE LEWIS & CLARK EXPEDITION* (Gary Moulton ed., 1983).<sup>9</sup> The demonstrations proved that although the expedition was usually outnumbered, the smaller group could defend itself. Defense against multiple assailants is one reason why magazines over 15 rounds have long been standard on many common firearms.

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<sup>7</sup> Gerald Prenderghast, *REPEATING AND MULTI-FIRE WEAPONS* 100–01 (2018); Garry, at 91–94.

<sup>8</sup> Nancy McClure, *Treasures from Our West: Lukens Air Rifle*, BUFFALO BILL CENTER FOR THE AMERICAN WEST, Aug. 3, 2014, <https://centerofthewest.org/2014/08/03/treasures-west-lukens-air-rifle/>.

<sup>9</sup> *E.g.*, 6 Lewis & Clark, at 233 (Jan. 24, 1806: “My Air-gun also astonishes them very much, they cannot comprehend it’s [sic] shooting so often and without powder”).

**D.Repeating arms with greater than 10- and 15-round capacities became some of the most popular arms in the 19th century.**

During the 19th century, the cost of high-quality firearms that could fire over 10 or 15 rounds sharply declined, and such arms became very popular.

In 1821, the *New York Evening Post* lauded New Yorker Isaiah Jennings for inventing a repeater, “importan[t], both for public and private use,” whose “number of charges may be extended to fifteen or even twenty...and may be fired in the space of two seconds to a charge.” “[T]he principle can be added to any musket, rifle, fowling piece, or pistol” to make it fire “from two to twelve times.” *Newly Invented Muskets*, N.Y. EVENING POST, Apr. 10, 1822, in 59 Alexander Tilloch, THE PHILOSOPHICAL MAGAZINE AND JOURNAL 467–68 (Richard Taylor ed., 1822). “About 1828 a New York State maker, Reuben Ellis, made military rifles under contract on the Jennings principle.” Winant, FIREARMS CURIOSA, at 174.

In the 1830s, the popular pepperbox handguns were introduced. These pistols had multiple barrels—as many as 24—that could fire

sequentially.<sup>10</sup> That same decade, the Bennett and Haviland Rifle used the same concept as the pepperbox. It had 12 individual barrels that fired sequentially.<sup>11</sup>

Revolvers were also introduced in the 1830s, by Samuel Colt. They fired repeating rounds like pepperboxes but used a rotating cylinder rather than rotating barrels. Pin-fire revolvers with capacities of up to 21 rounds entered the market in the 1850s.<sup>12</sup> So did the Walch 12-Shot Navy Revolver; it was used in the Civil War and made its way to the western frontier.<sup>13</sup> In 1866, the 20-round Josselyn belt-fed chain pistol debuted. Some later chain pistols had greater capacities.<sup>14</sup>

Alexander Hall's rifle with a 15-round rotating cylinder was introduced in the 1850s.<sup>15</sup> In 1851, Parry Porter created a rifle with a 38-

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<sup>10</sup> Jack Dunlap, *AMERICAN BRITISH & CONTINENTAL PEPPERBOX FIREARMS* 148–49, 167 (1964); Lewis Winant, *PEPPERBOX FIREARMS* 7 (1952).

<sup>11</sup> Norm Flayderman, *FLAYDERMAN'S GUIDE TO ANTIQUE AMERICAN FIREARMS AND THEIR VALUES* 711 (9th ed. 2007).

<sup>12</sup> Supica, at 48–49; Winant, *PEPPERBOX FIREARMS*, at 67–70.

<sup>13</sup> Chapel, at 188–89.

<sup>14</sup> Winant, *FIREARMS CURIOSA*, at 204, 206.

<sup>15</sup> Flayderman, at 713, 716.

shot canister magazine. A Porter Rifle could fire 60 shots in 60 seconds.<sup>16</sup>

In 1855, Joseph Enouy invented a 42-shot Ferris Wheel pistol.<sup>17</sup>

In 1855, an alliance between Daniel Wesson and Oliver Winchester led to a series of famous lever-action repeating rifles. First came the 30-shot Volcanic Rifle, which an 1859 advertisement boasted could be loaded then fired 30 times within a minute.<sup>18</sup>

Then came the 16-shot Henry Rifle in 1861. Tested at the Washington Navy Yard in 1862, “187 shots were fired in three minutes and thirty-six seconds (not counting reloading time), and one full fifteen-shot magazine was fired in only 10.8 seconds...hits were made from as far away as 348 feet, at an 18-inch-square target...The report noted, ‘It is manifest from the above experiment that this gun may be fired with great rapidity.’” R.L. Wilson, WINCHESTER: AN AMERICAN LEGEND 11–12 (1991). “Advertisements claimed a penetration of eight inches at one hundred

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<sup>16</sup> *A New Gun Patent*, ATHENS POST, Feb. 25, 1853 (reprinted from *N.Y. Post*), <http://deadmemphistalking.blogspot.com/2014/04/pw-porter-inventor-of-porter-rifle.html>; 2 Sawyer, at 147.

<sup>17</sup> Winant, FIREARMS CURIOSA, at 208.

<sup>18</sup> Harold Williamson, WINCHESTER: THE GUN THAT WON THE WEST 26–27 (1952).

yards, five inches at four hundred yards, and power to kill at a thousand yards.” Peterson, TREASURY, at 240.

“[F]ueled by the Civil War market, the first Henrys were in the field by mid-1862.” Wilson, at 11. One of the most famous testimonials of the Henry came from Captain James M. Wilson of the 12th Kentucky Cavalry, who used a Henry Rifle to kill seven of his Confederate neighbors who broke into his home and ambushed his family. Wilson praised the rifle’s 16-round capacity: “When attacked alone by seven guerillas I found it (Henry Rifle) to be particularly useful not only in regard to its fatal precision, but also in the number of shots held in reserve for immediate action in case of an overwhelming force.” H.W.S. Cleveland, HINTS TO RIFLEMEN 181 (1864). Soon after, Wilson’s entire command was armed with Henry rifles.<sup>19</sup>

The Henry evolved into the Winchester Model 1866, which was touted as having a capacity of “eighteen charges, which can be fired in nine seconds.” Louis Garavaglia & Charles Worman, FIREARMS OF THE AMERICAN WEST 1866–1894, at 128 (1985). Another advertisement

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<sup>19</sup> Andrew Bresnan, *The Henry Repeating Rifle*, RAREWINCHESTERS.COM, Aug. 17, 2007, [https://www.rarewinchesters.com/articles/art\\_hen\\_00.shtml](https://www.rarewinchesters.com/articles/art_hen_00.shtml).

contained pictures of Model 1866 rifles underneath the heading, “Two shots a second.” Peterson, TREASURY, at 234–35.

“The Indians labeled these guns the ‘many-shots’ or ‘heap-firing.’” Wilson, at 32. In 1876, Native American tribes used the Model 1866 and Henry rifles in their victory at the Battle of Little Bighorn, also known as “Custer’s Last Stand.” *Id.*

“One of the most popular of all Winchester arms, the Model 1866 was widely used in opening the West and, in company with the Model 1873, is the most deserving of Winchesters to claim the legend ‘The Gun That Won the West.’” *Id.* at 22. “Easily one of the most treasured endorsements of the 1873 was from Colonel William F. ‘Buffalo Bill’ Cody,” who praised the firearm’s versatility. *Id.* at 55. Magazine capacity for the Model 1873 ranged from 6 to 25.<sup>20</sup> Over 170,000 Model 1866s were produced. Over 720,000 Model 1873s were produced by 1919.<sup>21</sup>

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<sup>20</sup> Arthur Pirkle, WINCHESTER LEVER ACTION REPEATING FIREARMS: THE MODELS OF 1866, 1873 & 1876, at 107 (2010).

<sup>21</sup> Flayderman, at 306–09.

The Evans Repeating Rifle, manufactured in Maine, was also introduced in 1873; its innovative rotary helical magazine held 34 rounds.<sup>22</sup>

Winchester's other iconic 19th-century rifles were the Model 1886, then the Model 1892, made legendary by Annie Oakley, and later by John Wayne. These arms had a capacity of 15 rounds.<sup>23</sup> Over a million were produced from 1892 to 1941.<sup>24</sup>

The most famous pump-action rifle of the 19th century was the Colt Lightning, introduced in 1884. It could fire 15 rounds.<sup>25</sup>

The first functional semiautomatic firearm was the Mannlicher Model 85 rifle, invented in 1885.<sup>26</sup> Mannlicher introduced new models in 1891, 1893, and 1895.<sup>27</sup> Numerous semiautomatic handguns utilizing detachable magazines were introduced before the turn of the century:

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<sup>22</sup> Dwight Demeritt, *MAINE MADE GUNS & THEIR MAKERS* 293–95 (rev. ed. 1997); Flayderman, at 694.

<sup>23</sup> *Model 1892 Rifles and Carbines*, WINCHESTER REPEATING ARMS, <http://www.winchesterguns.com/products/rifles/model-1892.html>.

<sup>24</sup> Flayderman, at 307–12.

<sup>25</sup> *Id.* at 122.

<sup>26</sup> U.S. NAVY SEAL SNIPER TRAINING PROGRAM 87 (2011).

<sup>27</sup> John Walter, *RIFLES OF THE WORLD* 568–69 (3rd ed. 2006).

including the Mauser C96,<sup>28</sup> Bergmann Simplex,<sup>29</sup> Borchardt M1894,<sup>30</sup> Borchardt C-93, Fabrique Nationale M1899, Mannlicher M1896 and M1897, Luger M1898 and M1899, Roth-Theodorovic M1895, M1897, and M1898, and Schwarzlose M1898.<sup>31</sup> Many of these were issued with magazines over 10 rounds, including Luger's M1899, which could be purchased with 32-round magazines.<sup>32</sup>

**E. Repeating arms with greater than 10-round capacities continued to grow in popularity in the early 20th century and thereafter.**

As manufacturing improvements made repeating firearms ever-more affordable, Americans rapidly acquired them. Introduced in 1910, the Remington Model 12B Gallery Special had an optional 25-round magazine.<sup>33</sup> The next year, Savage Arms Company introduced its 20-shot

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<sup>28</sup> Dougherty, at 84.

<sup>29</sup> *Id.* at 85.

<sup>30</sup> *Springfield Armory Museum – Collection Record*, REDISCOV.COM, <http://ww2.rediscov.com/spring/VFPCGI.exe?IDCFile=/spring/DETAILS.IDC,SPECIFIC=9707,DATABASE=objects>.

<sup>31</sup> Leonardo Antaris, *In the Beginning: Semi-Automatic Pistols of the 19th Century*, AMERICAN RIFLEMAN, Jan. 4, 2018.

<sup>32</sup> Jean-Noel Mouret, PISTOLS AND REVOLVERS 126–27 (1993); Supica, at 86.

<sup>33</sup> Roy Marcot, REMINGTON: “AMERICA’S OLDEST GUN MAKER” 149 (James Bequette & Joel Hutchcroft eds., 1998).

Model 1911 rifle, which was especially popular for boys and for shooting galleries.<sup>34</sup>

“Based on firearms catalogues from 1936 to 1971, there are over twenty such firearms models from major American manufacturers with magazines of sixteen to thirty rounds in one or more of the calibers.” David Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALBANY L. REV. 849, 858 (2015) (listing firearms from Marlin, Mossberg, Remington, Savage, Stevens, Stevens-Springfield, and Winchester).

Today, Americans own tens of millions of magazines over ten rounds. See *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1143 (S.D. Cal. 2019) (evidence of over 100 million); *Worman v. Healey*, 922 F.3d 26, 35 (1st Cir. 2019) (115 million); *Kolbe v. Hogan*, 849 F.3d 114, 129 (4th Cir. 2017) (en banc) (75 million); *NSSF Magazine Chart*, NSSF.ORG, at 6.<sup>35</sup> (115

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<sup>34</sup> Jim Perkins, AMERICAN BOYS’ RIFLES 1890–1945, at 191 (1976).

<sup>35</sup>

[https://d3n8a8pro7vhmx.cloudfront.net/firearmspolicycoalition/pages/495/attachments/original/1498246461/Renewed\\_Motion\\_-\\_Decl\\_Curcuruto.pdf?1498246461](https://d3n8a8pro7vhmx.cloudfront.net/firearmspolicycoalition/pages/495/attachments/original/1498246461/Renewed_Motion_-_Decl_Curcuruto.pdf?1498246461).

million).<sup>36</sup> Indeed, such magazines comprise about half of all magazines owned by American citizens. *Id.*

If there are approximately 100 million magazines over 10 rounds, they are about as common as handguns were when *District of Columbia v. Heller*, 554 U.S. 570 (2008) was decided. At the time, Americans owned about 109 million handguns.<sup>37</sup>

Even taking the Attorney General's assertions about magazines at face value, the magazines are a vastly smaller part of the violent crime problem than handguns. *Id.* at 693 (Breyer, J., dissenting) ("handguns...are the overwhelmingly favorite weapon of armed criminals").

To suggest that prohibiting such common arms does not violate Vermont's constitutional arms right is to disrespect the personal decisions about prudent self-defense that Americans have been making for centuries.

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<sup>36</sup> *Supra* note 35.

<sup>37</sup> The figure is calculated by starting with data on the U.S. civilian firearms stock from 1994. See Gary Kleck, TARGETING GUNS: FIREARMS AND THEIR CONTROL 96–97, tbl. 3.1 (1997) (84.7 million). To this was added annual ATF data on U.S. manufacture, plus imports, minus exports. See *Firearms Commerce in the United States: Annual Statistical Update 2018*, ATF, exhibits 1, 3, 5.

## **II. Vermont's magazine ban is irreconcilable with the social and political setting of the Vermont Constitution.**

### **A. Vermont's constitutional right to arms was ratified during the Revolutionary War; a war that was sparked by British gun control.**

Vermont declared independence from the competing claims of New York and New Hampshire in January 1777 and adopted a constitution in July.<sup>38</sup> Thus, the social and political setting in which Vermont's constitutional right to arms originated was during the Revolutionary War.

British gun controls led to the Revolutionary War.<sup>39</sup> In 1774, Great Britain banned American commerce in gunpowder, and “forcibly purchased arms and ammunition held in the inventory of merchants.”

David Hackett Fischer, *PAUL REVERE'S RIDE* 50 (1994).<sup>40</sup> The colonists

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<sup>38</sup> Celise Schneider, *The Green Mountain Boys Constitute Vermont*, in *THE CONSTITUTIONALISM OF AMERICAN STATES* 79 (George Connor & Christopher Hammons eds., 2008); Harvey Strum & Paul Pierpaoli, *Vermont*, in *THE ENCYCLOPEDIA OF THE WARS OF THE EARLY AMERICAN REPUBLIC, 1783–1812*, at 705 (Spencer Tucker et al. eds., 2014).

<sup>39</sup> See David Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 *CHARLESTON L. REV.* 283 (2012).

<sup>40</sup> Massachusetts's royal governor, Thomas Gage, “order'd the Keeper of the Province's Magazine not to deliver a kernel of powder (without his express order) of either public or private property.” John Andrews,

disobeyed the gunpowder restrictions by seizing gunpowder from British control,<sup>41</sup> smuggling imports of gunpowder from other countries,<sup>42</sup> and learning how to make their own.<sup>43</sup> When British General Thomas Gage dispatched Redcoats to the Charlestown, Massachusetts, powder house to seize hundreds of barrels of gunpowder on September 1, 1774, it set off the “Powder Alarm” throughout New England: colonists “began to collect in large bodies, with their arms, provisions, and ammunition, determining by some means to give a check to a power which so openly

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LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON, 1772–1776, at 19–20 (Winthrop Sargent ed., 1866).

<sup>41</sup> See THE BOOK OF ABIGAIL & JOHN: SELECTED LETTERS OF THE ADAMS FAMILY 1762–1784, at 72 (L.H. Butterfield ed., 2002) (Abigail Adams informing John that roughly two hundred American patriots had seized gunpowder from the powder house in Braintree, Massachusetts, “in consequence of the powders being taken” from Charlestown).

<sup>42</sup> See Peter Oliver, ORIGIN & PROGRESS OF THE AMERICAN REBELLION 116–17 (1961) (Chief Justice of the Massachusetts Superior Court explaining how colonists sent smugglers to obtain powder from the Dutch Caribbean trading post St. Eustatius.); Andrews, at 52 (on September 21, 1774, a ship “brought a quantity of powder, which comes very seasonably at this time, as it’s now five or six weeks since the Governor has allow’d any to be taken out of the magazine here, whereby for some weeks there has not been a pound to be sold or bought in town.”).

<sup>43</sup> For example, to encourage domestic production in August 1774, Paul Revere “engraved a plate diagramming how to refine saltpeter, an essential component in the making of gunpowder,” and published the instructions in *Royal American Magazine*. Stephen Halbrook, THE FOUNDERS’ SECOND AMENDMENT 33 (2008).

threatened their destruction, and in such a clandestine manner rob them of the means of their defence.” Unsigned report, Sept. 5, 1774, *in* 1 AMERICAN ARCHIVES, 4th ser., 762 (Peter Force ed., 1843). Because the British had taken the gunpowder in a pre-dawn raid, there had been no violence, and war was averted for the time being.

As General Gage despairingly observed, his gunpowder restrictions had only encouraged the Americans to arm themselves more. So on October 19, 1774, King George III and his ministers issued an order prohibiting the importation of arms and ammunition into America.<sup>44</sup> But the Americans disobeyed these orders, too. Benjamin Franklin masterminded arms imports from the Spanish, French, and Dutch,<sup>45</sup>

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<sup>44</sup> See 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES, A.D. 1766–1783, at 401 (2005).

<sup>45</sup> See, e.g., PENNSYLVANIA REPORTER, Apr. 24, 1775, at 2, col. 1 (report from London, Feb. 16, 1775; three large ships recently sailed from Holland, and three more from France, “with arms and ammunition and other implements of war, for our colonies in America, and more preparing for the same place.”); Daniel Miller, SIR JOSEPH YORKE AND ANGLO-DUTCH RELATIONS 1774–1780, at 41 (1970) (In May 1776, eighteen Dutch ships with “powder shipments disguised as tea chests, rice barrels, *et cetera*” for the colonists sailed from Amsterdam.).

while Americans reclaimed arms from the British<sup>46</sup> and increased production within the colonies.<sup>47</sup>

To Americans, disarmament was the road to slavery. South Carolina's legislature declared that, "by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them." 1 John Drayton, *MEMOIRS OF THE AMERICAN REVOLUTION* 166

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<sup>46</sup> After Paul Revere reported that seized arms were being held at Fort William and Mary in southern New Hampshire, "about four hundred men...proceeded to his Majesty's castle...and forcibly took possession thereof." Gov. Wentworth, letter to Gov. Gage, Dec. 14, 1774, *in* 18 *THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803*, at 145 (1813). The patriots took "upwards of 100 barrels of powder, 1500 stand of small arms, and several pieces of light cannon." Hugh Percy, *LETTERS OF HUGH EARL PERCY FROM BOSTON AND NEW YORK, 1774–1776*, at 46 (Charles Bolton ed., 1902). A "stand of arms" is a firearm plus accessories, such as a bayonet, cartridge box, and so on.

<sup>47</sup> For example, the Massachusetts Provincial Congress encouraged "such persons, as are skilled in the manufacturing of fire arms and bayonets, diligently to apply themselves thereto." The Congress promised to purchase "so many effective arms and bayonets as can be delivered in a reasonable time upon notice given to this congress at its next session." *THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS* 108 (1838).

John Adams similarly encouraged self-reliance: "We could make a sufficient quantity of both [firearms and ammunition]. We have many manufacturers of fire-arms now, whose arms are as good as any in the world. Powder has been made here, and may be again, and so may saltpeter." 4 Charles Adams, *THE WORKS OF JOHN ADAMS* 39–40 (1851).

(1821). After a British seizure of imported arms in New York, a note was “secretly conveyed into almost every house in town” asking, “when Slavery is clanking her infernal chains...will you supinely fold your arms, and calmly see your weapons of defence torn from you?” 1 AMERICAN ARCHIVES, at 1071.

When General Gage sent seven hundred soldiers to seize American munitions at Lexington and Concord on April 18, 1775, the Americans resisted with arms. “The shot heard round the world” was fired, and the American Revolution commenced.<sup>48</sup>

In 1777, while the arms embargo was still in force and British victory appeared imminent, Colonial Under Secretary of State William Knox drafted a comprehensive plan entitled, “What Is Fit to Be Done with America?” His plan was to keep the Americans in perpetual submission by disarming them:

The Militia Laws should be repealed and none suffered to be re-enacted...the Arms of all the People should be taken away...nor should any Foundery or manufactory of Arms, Gunpowder, or Warlike Stores, be ever suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence.

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<sup>48</sup> Kopel, *British Gun Control*, at 308–12.

William Knox, *Considerations on the Great Question, What Is Fit to be Done with America*, Memorandum to the Earl of Shelburne, in 1 SOURCES OF AMERICAN INDEPENDENCE: SELECTED MANUSCRIPTS FROM THE COLLECTIONS OF THE WILLIAM L. CLEMENTS LIBRARY 140 (Howard Peckham ed., 1978).

**B. Vermont won sovereignty and freedom because Vermonters were well-armed.**

Vermont Founders Ethan and Ira Allen led the Green Mountain Boys—a notably effective militia group. From 1776 to 1786, “few if any state papers of Vermont were issued that [Ira] did not prepare or assist in preparing.” 1 J. Wilbur, IRA ALLEN: FOUNDER OF VERMONT, 1751–1814, at 87 (1928).

Ira Allen recalled how in 1772, armed resistance prevented the royally appointed governor of New York, William Tryon, from seizing Vermont’s land. The Green Mountain Boys, including Ira with his “case of pistols,” were able to capture the larger group sent by Tryon. Ira Allen, *Autobiography* (1799), in Wilbur, at 17. A “case of pistols” was a matching pair of handguns sold together.

Ira often carried multiple firearms at a time, enabling him to increase his ammunition capacity. When Ethan Allen, Ira Allen, and another Green Mountain Boy went in 1772 to purchase land desired by New York near New York’s border, they were “armed with holsters and pistols, a

good case of pistols each in our pockets, with each a good hanger....” *Id.* at 39. In other words, they each carried three or four firearms, and a sword.

The following year, after Governor Tryon placed a bounty on Ethan Allen’s head, Ethan and Eli Roberts (of Vergennes) encountered a dozen British soldiers in a tavern. “[T]hat he and Roberts had each a gun and a case of pistols”—three firearms each—seemingly deterred any attack by the soldiers before Allen and Roberts were able to escape out a window. Ira Allen, *NATURAL AND POLITICAL HISTORY OF THE STATE OF VERMONT* 43–44 (1798).<sup>49</sup>

When a New York act sentenced to death any Green Mountain Boy who refused to surrender, Vermont town committees vowed to protect the Green Mountain Boys with armed resistance, resolving to “hold themselves in readiness, at a minute’s warning, to aid and defend such friends of ours.” *Id.* at 49–50.

A few weeks after Americans had resisted forcible disarmament at Lexington and Concord, the Green Mountain Boys—“two hundred undisciplined men, with small arms”—captured the British garrison at

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<sup>49</sup> In the usage of the time, “gun” meant a long gun, and not a pistol.

Fort Ticonderoga, earning the Americans' first victory of the war. *Id.* at 60.

America could not have won the war without the Franco-American alliance. The French decided to ally with America after the tremendous American victory at Saratoga, New York, in October 1777. Success at Saratoga was made possible by Vermonters during the summer of 1777. It was "the Vermont militia who, with their repulse of a Hessian foraging party at the Battle of Bennington, sounded the death knell of the Burgoyne expedition." Walter Millis, *ARMS AND MEN: A STUDY IN AMERICAN MILITARY HISTORY* 36 (1956).

British General Burgoyne was trying to lead a force south from Montreal. The plan was to meet up with General Howe's force marching north from New York City. Together, they would control the Hudson River, and cut off New England from the other states.

A few days before the August 16 Battle of Bennington, Burgoyne wrote, "Wherever the king's forces point, militia, to the amount of three or four thousand assemble in twenty-four hours; they bring with them their subsistence, &c. and the alarm over, they return to their farms. The Hampshire Grants [Vermont]...abounds in the most active and most

rebellious race of the continent, and hangs like a gathering storm on my left.” Because Vermont militias made it impossible to obtain supplies from the countryside, “it becomes impracticable to move without portable magazines.” Likewise, communication between General Burgoyne and General Howe was very difficult because their messengers kept getting captured. *Letter from Lt. Gen. John Burgoyne to Lord George Germain* [Secretary of State for the American Department] (Aug. 20, 1777) in John Burgoyne, *A STATE OF THE EXPEDITION FROM CANADA*, app’x xxv (1780); Nicholas Johnson, David Kopel, George Mocsary & Michael O’Shea, *FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY* 282–83 (2d ed. 2017).

In 1796, with the original arms right guarantee of 1777 still intact in the new 1793 Vermont Constitution, Ira Allen traveled to France and purchased from the French Directory (the revolutionary government there) 20,000 muskets and 24 field pieces for Vermont’s militia. The arms were seized by the British while shipped to America. Suspected of planning a revolt against the British in Canada, Allen was prosecuted in Britain’s Court of Admiralty. At trial, Allen’s claim that he intended to

distribute the arms across Vermont, and the idea of one individual possessing 20,000 arms, were received with skepticism.

Allen responded by explaining that in Vermont, “Government have nothing to fear from its Militia...Arms and military stores are free merchandise, so that any who have property and choose to sport with it, may turn their gardens into parks of artillery, and their houses into arsenals, without danger to Government.” Ira Allen, PARTICULARS OF THE CAPTURE OF THE OLIVE BRANCH, LADEN WITH A CARGO OF ARMS 403 (1798). The arms were restored to Ira Allen. *Id.*

In the vision of Vermont’s Founders, “Pistols in the pocket and an arsenal at home were options available to every free citizen of the Green Mountain State.” Stephen Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255, 295 (1985).

### **C. The Vermont Constitution safeguards the inherent right of self-defense.**

The 1777 Vermont Constitution drew on Pennsylvania’s 1776 Constitution, which was the first state constitution adopted after the Declaration of Independence. Vermont copied Pennsylvania’s right to hunt: “that the inhabitants of this State, shall have liberty to hunt and

fowl, in seasonable times, on the lands they hold, and on other lands (not enclosed).” Vt. Const. ch. II, art. XXXIX (1777).

Vermont’s Declaration of Rights included human rights language, based on models from Pennsylvania, Massachusetts, and Virginia, that would, with variations in wording, become ubiquitous in American state constitutions:

That all men are born equally free and independent, and have certain *natural, inherent and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.*

Vt. Const. ch. II, art. I (1777) (emphasis added). To further protect the “natural, inherent, and unalienable” right of defending life, the Constitution declared “[t]hat the people have a right to bear arms for the defence of themselves and the State.” Vt. Const. ch. I, art. XV (1777).

When Vermont wrote a new constitution in 1786, the convention entertained a proposal to change “a right to bear arms for the defence of themselves and the State” into “a right to bear arms for the defence of the community.” The narrowing language was rejected. VERMONT STATE PAPERS 518 (1823).

The social and political history of the 1777 Vermont Constitution and its successors was years of relentless disarmament efforts by the British, a War of Independence that sprung from the Americans’ refusal to be disarmed, and British plans for post-war arms prohibition. Having won their own independence, and done much to win independence for the entire United States, Vermonters did not intend that their government have the power to outlaw common defensive weaponry.

### **III. Magazine restrictions have been a rarity throughout American history.**

In constitutional cases, this Court looks to sibling states. *Rheaume*, 2004 VT at ¶ 16. Magazine bans have little place in American history and tradition. Historically, the only examples come from a seven-year period of the alcohol prohibition era, when six states enacted restrictions involving ammunition capacity. *See* 1927 R.I. Pub. Laws 256, §§1, 4 (banning sales of guns that fire more than 12 shots semiautomatically without reloading); 1927 Mich. Pub. Acts ch. 372, §3 (banning sales of firearms “which can be fired more than sixteen times without reloading”); 1933 Minn. Laws ch. 190 (banning “machine gun[s]” and including in the definition semiautomatics “which have been changed, altered or modified to increase the magazine capacity from the original design as

manufactured by the manufacturers”); 1933 Ohio Laws 189 (license needed for semiautomatics with over 18-round capacity); 1933 Cal. Laws, ch. 450 (licensing system for machineguns, defined to include semiautomatics with detachable magazines of over 10 rounds); 1934 Va. Acts ch. 96 s137, §§1(a), 4(d) (defining machineguns as anything able to fire more than 16 times without reloading, and prohibiting possession for an “offensive or aggressive purpose”; presumption of such purpose when possessed outside one’s residence or place of business, or possessed by an alien; registration required for “machine gun” pistols of calibers larger than .30 or 7.62mm).

All these statutes were repealed, sometimes in stages. *See* 1959 Mich. Pub. Acts 249, 250 (sales ban applies to only actual machineguns); 1959 R.I. Acts & Resolves 260, 263 (exempting .22 caliber and raising limit for other calibers to 14 rounds); 1975 R.I. Pub. Laws 738, 738–39, 742 (sales ban applies to only actual machineguns); 1963 Minn. Sess. L. ch. 753, at 1229 (following federal law by defining “machine gun” as automatics only); 1965 Stats. of Calif., ch. 33, at 913 (“machine gun” fires more than one shot “by a single function of the trigger”); 1972 Ohio Laws 1866 (exempting .22 caliber; for other calibers, license required for only 32 or

more rounds); H.R. 234, 2013–2014 Leg., 130th Sess. §2 (Ohio 2014) (full repeal); 1975 Va. Acts, ch. 14, at 67 (defining “machine gun” as automatics only).

None of the state laws prohibited possession of firearms and their standard magazines. California and Ohio had licensing systems. Ohio did not require a license to purchase any firearm or magazine; a license was needed for only the simultaneous purchase of the magazine and the relevant firearm.<sup>50</sup> Rhode Island and Michigan limited sales, but did not ban gifts, inheritance, or purchasing in another state. Minnesota had no capacity limit, and only forbade altering firearms from how they had been manufactured. Virginia’s law forbade carry of some arms in public places and registered some handguns.

No state law went as far as Vermont’s current law. Only California’s law limited magazine capacity as low as 10 rounds, and that was a licensing system, not a prohibition.

Only the District of Columbia banned possession. A 1932 law banned any firearm that “shoots automatically or semiautomatically more than

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<sup>50</sup> See David Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 ALBANY L. REV. 849, 865 (2015).

twelve shots without reloading.” Pub. L. No. 72-275, §§1, 8, 47 Stat. 650, 650, 652. In 1975, soon after Congress granted the District of Columbia home rule, the District prohibited functional firearms in the home, and handguns altogether. When the *Heller* Court ruled these prohibitions unconstitutional, the District enacted a new ban on magazines capable of holding more than 10 rounds. 2008 District of Columbia Laws 17–372 (Act 17–708).

None of the above laws are longstanding, for all have been repealed. Something that is “longstanding” has two characteristics: being “long” and being “standing.” 1 SHORTER OXFORD ENGLISH DICTIONARY 1625 (1993) (“adj. Of long standing; that has existed a long time, not recent.”). As for current bans, the earliest is New Jersey’s 15-round limit enacted in 1990. 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. §2C:39-1(y), -3(j) (2014)). Three decades is shorter than the 33 years the D.C. handgun ban had been in effect when *Heller* ruled it unconstitutional. As *Heller* pointed out, the D.C. law was contrary to American tradition. 554 U.S. at 629 (“Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban.”). Thirty-three years was

insufficient to establish a tradition of prohibiting what had been legal for centuries.

#### **IV. Policy considerations demonstrate the ban's unconstitutionality.**

In constitutional inquiries, this Court also examines “policy considerations.” *Rheaume*, 2004 VT at ¶16. Like historical considerations, policy considerations demonstrate the ban’s unconstitutionality.

##### **A. Feeble judicial review would be contrary to this Court’s stated principles.**

The Attorney General and his *amici* essentially suggest that any firearm prohibition is constitutional as long as it does not go as far as the handgun ban stricken in *Heller*. Even under that standard, the magazine ban is void. As noted in Part I.E, magazines over 10 rounds constitute half of all magazines today. They are as numerous as handguns were when *Heller* was decided.

In the Attorney General’s view, gun control laws are entitled to a near-absolute presumption of constitutionality. With such a standard, Vermont’s constitutional right to arms is of trivial legal consequence. This Court does not treat so callously the other enumerated rights in the

Declaration of the Rights of the Inhabitants of the State of Vermont. Thus, the Attorney General is asking that the right to arms be judged as a lesser, inferior right, not entitled to the same protections as the other individual freedoms in the Declaration. But the very purpose of the Declaration is to put certain fundamental rights beyond the reach of the legislature:

Our constitutions are restraints on governmental powers. The rights of citizens are not conditioned on grants given by constitutional fiat...Since the citizens have long since chosen to be governed through a limited grant of authority to each branch of government, it is their right, and this Court's duty, to see that any legislative action prohibiting as a crime otherwise lawful activity is bottomed on the proper exercise of a constitutional power...

*State v. Ludlow Supermarkets, Inc.*, 141 Vt. 261, 264 (1982). *See also State v. Badger*, 141 Vt. 430, 448 (1982) (“The Vermont Constitution is the fundamental charter of our state, and it is this Court's duty to enforce the constitution.”).

Indeed, because the Vermont Constitution’s protections are so robust, the Attorney General’s heavy reliance on cases decided under the United States Constitution is misguided. In this Court, “we recognize the inherent and independent value in the rights and protections enshrined

in our own constitution.” *In re Town Highway No. 20*, 2012 VT 17, ¶27. “[O]ur constitution is not a mere reflection of the federal charter. Historically and textually, it differs from the United States Constitution. It predates the federal counterpart, as it extends back to Vermont’s days as an independent republic. It is an independent authority, and Vermont’s fundamental law.” *State v. Badger*, 141 Vt. 430, 448–49 (1982). “Indeed, we have at times interpreted our constitution as protecting rights which were explicitly excluded from federal protection.” *Id.* at 449 (citing several examples). And “[w]e are free, of course, to provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter.” *Id.*

Because this case is a facial challenge to the magazine ban, it does not implicate the legislature’s power to disarm individuals based on proven danger. Nor does this case challenge a licensing law or some other prophylactic for the acquisition of the magazines at issue. Rather, the issue is an absolute prohibition extending to even the most law-abiding, best-trained citizens.

The Attorney General and *amici* make two empirical claims to justify the absolute prohibition: First, magazine bans reduce fatalities in mass

shootings. Second, banning magazines over 10 or 15 rounds does not impair lawful defense of self and others. Both claims are misguided.

**B. Magazine bans have not been shown to reduce mass shooting fatalities.**

The cases cited by the Attorney General and *amici* involve courts that uncritically accepted assertions regarding the above claims, while ignoring evidence that undermined the claims. As Judge Bibas of the Third Circuit explained, the six federal circuit courts that have upheld magazine restrictions “err[ed] in subjecting the Second Amendment to different, watered-down rules and demanding little if any proof.” *Ass’n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 126 (3d Cir. 2018) (Bibas, J., dissenting). Indeed, several of the cases drew sharp dissents that disagreed with the majority’s cavalier treatment of evidence. *See id.* (Bibas, J., dissenting) (“the majority substitutes anecdotes and armchair reasoning for the concrete proof that we demand for heightened scrutiny anywhere else. New Jersey has introduced no expert study of how similar magazine restrictions have worked elsewhere. Nor did the District Court identify any other evidence, as opposed to armchair reasoning, that illuminated how this law will reduce the harm from mass shootings.”); *Kolbe*, 849 F.3d at 155 (Traxler,

J., dissenting, joined by Judges Niemeyer, Shedd, and Agee) (“Because the evidence before us clearly demonstrates that these popular weapons are commonly possessed for lawful purposes and are therefore not dangerous and unusual, they are covered by the Second Amendment. The majority errs in holding otherwise.”); *Heller v. District of Columbia*, 670 F.3d 1244, 1270 n.2 (D.C. Cir. 2011) (“*Heller II*”) (Kavanaugh, J., dissenting) (expressing a need “for further factual development” before a ruling should be made); *Friedman v. City of Highland Park, Illinois*, 784 F.3d 406, 415–16 (7th Cir. 2015) (Manion, J., dissenting) (“the evidentiary record is unequivocal: a statistically significant amount of gun owners...use...high-capacity magazines for lawful purposes. This evidence is sufficient to demonstrate that these weapons...are covered by the Second Amendment.”).

The opinion that most thoroughly engages with the actual evidence is *Duncan v. Becerra*, 265 F. Supp. 3d 1106 (S.D. Cal. 2017), *aff’d*, 742 F. App’x 218 (9th Cir. 2018) (upholding preliminary injunction). The *Duncan* court critically examined the evidence on both sides, and found the evidence purporting to show benefits from a ban to be flimsy and unpersuasive: “[T]he Attorney General has submitted...incomplete

studies from unreliable sources upon which experts base speculative explanations and predictions. The evidentiary record is a potpourri of news pieces, State-generated documents, conflicting definitions of ‘mass shooting,’ amorphous harms to be avoided, and a homogenous mass of horrible crimes in jurisdictions near and far for which large capacity magazines were not the cause.” *Id.* at 1120.

After examining the evidence, the court concluded that “a mass shooting accomplished with the use of a gun magazine holding more than 10 rounds of ammunition...is [] a rare event.” *Id.* at 1128. A recent study reached similar findings: “There are over 58.9 million firearms magazines holding over ten rounds in private possession in the U.S. and at least 14.8 percent of private guns are equipped with magazines this large, while no more than 15.8 percent of U.S. mass shootings (4+ dead) in 2012–2019 involved a shooter using such a magazine.” Gary Kleck, *Do Mass Shooters Prefer Large-Capacity Magazines?* 2 (2020).<sup>51</sup>

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<sup>51</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3552203](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552203). Gary Kleck is professor emeritus of criminology at Florida State University. His book POINT BLANK: GUNS AND VIOLENCE IN AMERICA (1991) earned the Michael J. Hindelang Award from the American Society of Criminology, as the most important contribution to criminology in a three-year period.

**C. As the statute recognizes, magazines over 10 or 15 rounds are the best for lawful defense of self and others.**

The statute's exemption for all law enforcement—including off duty and retired law enforcement—necessarily concedes that the banned magazines enhance lawful defense of self and others. 13 V.S.A. §4021(d)(1)(B),(D). The arms of typical law enforcement officers (not SWAT teams and the like) are selected solely for defensive purposes and are especially suitable for defense of self and others in civil society. Indeed, tens of millions of civilians keep the banned magazines for self-defense. Their choices are prudent for several reasons:

*Not every shot hits the target:* Even the most highly trained shooters miss their target. For instance, a study on police officer shootings found that “[b]etween 1998 and 2006, the average hit rate [for NYPD officers] was 18 percent for gunfights. Between 1998 and 2006, the average hit rate [for NYPD officers] in situations in which fire was not returned was 30 percent.” Bernard Rostker et al., EVALUATION OF THE NEW YORK CITY POLICE DEPARTMENT FIREARM TRAINING AND FIREARM-DISCHARGE

REVIEW PROCESS 14 (2008).<sup>52</sup> Awoken in the dark of night, victims of home invasions cannot be expected to always stop an attacker with a single shot either.

*Not every shot that hits the target disables the target:* Unlike in the movies, a single shot does not always stop an attacker. “Doctors who have treated gunshot victims say that being shot is not automatically a death sentence.” John Eligon, *One Bullet Can Kill, but Sometimes 20 Don’t, Survivors Show*, N.Y. TIMES, Apr. 3, 2008.<sup>53</sup> Rather, Dr. Martin Fackler, a former military surgeon, says that “shots to roughly 80 percent of the body would not be fatal blows.” *Id.*

A Georgia home invader was shot five times and managed to flee the scene. After breaking through multiple locked doors, the home invader encountered a mother hiding in an attic with her children. The mother emptied a six-shot revolver, hitting the invader five times. Neither party realized the gun was empty, so by keeping it pointed at the invader the mother and her children were able to escape safely. The invader then fled

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[http://www.nyc.gov/html/nypd/downloads/pdf/public\\_information/RAND\\_FirearmEvaluation.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/public_information/RAND_FirearmEvaluation.pdf).

<sup>53</sup> [https://www.nytimes.com/2008/04/03/nyregion/03shot.html?\\_r=1](https://www.nytimes.com/2008/04/03/nyregion/03shot.html?_r=1).

in his SUV. Had the invader realized the mother was out of ammunition and thereby defenseless, the ending could have been tragic.<sup>54</sup>

*Sometimes there is more than one attacker:* Public attacks and home invasions are often conducted by multiple criminals; nearly 20 percent of violent crimes involve multiple attackers.<sup>55</sup>

In 2015, a Detroit woman fended off five home invaders with her 9mm Glock.<sup>56</sup> Although the news report did not specify magazine size, the most popular 9mm Glock comes with a standard magazine of 17 rounds.<sup>57</sup>

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<sup>54</sup> Rich Phillips, *Gun Rights Groups say Georgia home invasion proves their point*, CNN, Jan. 11, 2013, <https://www.cnn.com/2013/01/10/us/home-invasion-gun-rights/index.html>.

<sup>55</sup> U.S. Dept. of Justice, *Criminal Victimization in the United States, 2008 Statistical Tables*, NCJ 227669 (2010). Table 46, *Percent distribution of multiple-offender victimizations, by type of crime and perceived race of offenders*, shows 946,580 violent crimes with “multiple-offender victimizations.” Table 1, *Number, percent distribution, and rate of victimizations, by type of crime*, shows 4,856,510 “crimes of violence” in 2008. Thus, 19.49 percent of violent crimes had “multiple-offender victimization.” In the last decade, the Survey has not reported data that allow calculation of national figures for multiple offender victimizations.

<sup>56</sup> Holly Fournier & George Hunter, *Woman fires at home burglars: ‘I let loose on them’*, DETROIT NEWS, June 9, 2015, <https://www.detroitnews.com/story/news/local/detroit-city/2015/06/09/woman-hospital-gunfight-home-invaders/28727561/>.

<sup>57</sup> See *Glock 17*, GLOCK.COM, <https://us.glock.com/en/products/model/g17gen4> (listing standard magazine capacity as 17- rounds).

A 61-year-old Texas woman was less fortunate. Awoken at night by two home invaders, the woman managed to shoot one of the burglars, but “when the woman’s gun ran out of bullets, she said the uninjured burglar attacked her.” “He must have heard me clicking it [from running out of ammunition] because that’s when he came back and beat me up really bad,” the woman said. Brian New, *61-Year-Old Woman Shoots Intruder, Then Burglars Attack Her*, CBSDFW, Mar. 28, 2016.<sup>58</sup>

*Reserve Capacity:* The awareness that a defensive shooter is capable of firing enough rounds to defuse the threat affects every party to a potential attack. Reserve capacity is a credible deterrent to criminals—especially for a victim confronted by multiple assailants. For example, the five criminals chased off by the Detroit woman in the example above would have had less reason to fear her if she had only a 5-shot revolver. Additionally, a defensive shooter can confidently act knowing she will not suddenly exhaust her ammunition and become a defenseless victim—like the Texas woman in the example above.

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<sup>58</sup> <https://dfw.cbslocal.com/2016/03/28/61-year-old-woman-shoots-intruder-then-burglars-attack-her/>.

Violent confrontations are inherently unpredictable. The criminal, not the victim, chooses the time and place for a surprise attack. Victims usually must try to survive with only one gun and one magazine. If a victim sees one assailant, she cannot know if a second assailant may be hiding nearby. If she sees two, there may be three. When a defender has a greater reserve, she will fire more shots at the first attacker knowing that she will have sufficient ammunition to deal with a possible second or third attacker. Obviously, the more shots the defender fires, the greater the possibility that the attacker(s) will be injured and the lesser the chance that the defender will be injured.

Moreover, when a defender lacks necessary reserves, she must make a calculation before each shot to determine whether she can successfully make a threat-ending shot now or whether it is worth the risk to wait a few moments in hopes of a better opportunity. These critical moments the defender spends hesitating and analyzing the situation could be the difference between life and death. By constricting reserve capacity, Vermont's ban increases the risk of injury for victims and reduces it for attackers. That is the opposite of the Constitution's guarantees of the inherent rights of self-defense.

## CONCLUSION

This Court should hold 13 V.S.A. §4021 unconstitutional.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Vermont Rule of Appellate Procedure 32(a)(7)(A) because this brief contains 8,998 words.

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Dated this 24th day of April 2020.

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