

October 15, 2019

ATTORNEY GENERAL RAOUL DEFENDS STATES' RIGHTS TO BAN LARGE-CAPACITY MAGAZINES TO PREVENT GUN VIOLENCE

Chicago — Attorney General Kwame Raoul today joined a coalition of 17 attorneys general to defend states' rights to ban large-capacity magazines and protect public safety. In an amicus brief filed in the Vermont Supreme Court, Raoul and the coalition argue that states have the right to enact reasonable firearm restrictions that reduce the number of deaths and injuries caused by gun violence.

Raoul and the coalition [filed the brief](#) today in Vermont v. Misch, a lawsuit in which the Vermont Supreme Court will determine whether Vermont's prohibition on large-capacity magazines violates the Vermont Constitution's right to bear arms.

"States have the right and responsibility to enact laws and policies that will help protect residents from gun violence," Raoul said. "A ban on high-capacity magazines for guns that are often used to commit horrible acts of mass violence is a reasonable and necessary common-sense restriction."

In 2018, Vermont prohibited the manufacture, importation, possession, and sale of large-capacity magazines, with some exceptions, including for magazines lawfully possessed before the law went into effect. The law bans magazines that hold more than 10 rounds of ammunition for long guns and more than 15 rounds for handguns. Eight other states and the District of Columbia have enacted similar prohibitions. The constitutionality of those laws has been consistently upheld by federal courts of appeals under the Second Amendment, as have similar assault-rifle bans enacted by Illinois municipalities.

Raoul and the coalition argue that a ban on large-capacity magazines is a reasonable restriction that Vermont has the right to adopt because:

- **The right to bear arms does not prevent states from enacting common-sense gun safety measures.** The brief explains that states are entitled to adopt reasonable restrictions on firearms to address the unique conditions within their borders and protect public safety. Restricting access to large-capacity magazines is reasonable because doing so would reduce firearm injuries and deaths leaving many other options available for individuals who wish to exercise the Second Amendment right to self-defense.
- **States have a responsibility to prevent gun violence and protect public safety.** The brief explains that states have primary responsibility for ensuring public safety. This includes a duty to reduce the likelihood that their residents will become victims of preventable gun violence, and to minimize fatalities and injuries when that violence does occur. The brief notes that deciding how best to protect the safety of residents is a question better suited to state legislatures than courts.
- **Regulating large-capacity magazines protects the public.** The brief cites evidence that large-capacity magazines are especially attractive to mass shooters and criminals, posing increased risks to innocent civilians and law enforcement. At the same time, there is no proof that large-capacity magazines are necessary – or even commonly used – for self-defense.

Joining Raoul in the amicus brief are the attorneys general from California, Connecticut, Delaware, the District of Columbia, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, and Washington.

No. 2019-266

IN THE SUPREME COURT OF THE STATE OF VERMONT

STATE OF VERMONT,
PLAINTIFF-APPELLANT,

v.

MAX MISCH,
DEFENDANT-APPELLEE.

ON CERTIFICATION FROM THE VERMONT SUPERIOR COURT,
BENNINGTON UNIT, CRIMINAL DIVISION, DOCKET NO. 173-2-19 BNCR

**BRIEF FOR THE DISTRICT OF COLUMBIA, CALIFORNIA, CONNECTICUT,
DELAWARE, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS,
MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK,
OREGON, PENNSYLVANIA, RHODE ISLAND, VIRGINIA, AND
WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLANT**

KARL A. RACINE
Attorney General for the
District of Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Deputy Solicitor General

JONATHAN T. ROSE (ERN #6128)
Dunkiel Saunders Elliott
Raubvogel & Hand, PLLC
91 College Street
P.O. Box 545
Burlington, VT 05401-0545
(802) 860-1003
jrose@dunkielsaunders.com

SONYA L. LEBSACK (ERN #10788)
Assistant Attorney General
Office of the Solicitor General
Office of the Attorney General
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
(202) 724-5667
sonya.lebsack@dc.gov

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE*1

SUMMARY OF ARGUMENT2

ARGUMENT6

 I. The Right To Bear Arms Is Compatible With A Range Of State-
 Law Measures To Address Gun Violence And Gun Fatalities6

 A. The right to bear arms preserves States’ authority to enact
 firearm restrictions in furtherance of public safety.....7

 B. Vermont made a considered and well-supported judgment
 that restricting LCMs permissibly promotes public safety.....13

CONCLUSION.....19

TABLE OF AUTHORITIES

Cases

<i>Appeal of Newton Enters.</i> , 167 Vt. 459, 708 A.2d 914 (1998).....	13
<i>Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. N.J.</i> , 910 F.3d 106 (3d Cir. 2018)	4, 5, 15
<i>Badgley v. Walton</i> , 2010 VT 68, 188 Vt. 367, 10 A.3d 469 (2010).....	17
<i>City of Erie v. Pap’s A.M.</i> , 529 U.S. 277 (2000)	13
<i>City of Renton v. Playtime Theatres, Inc.</i> , 475 U.S. 41 (1986)	13
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008)	3, 6, 8
<i>Duncan v. Becerra</i> , 742 F. App’x 218 (9th Cir. 2018).....	4
<i>Ex parte Guerra</i> , 94 Vt. 1, 110 A. 224 (1920)	9
<i>Fla. Bar v. Went For It, Inc.</i> , 515 U.S. 618 (1995)	13
<i>Friedman v. City of Highland Park</i> , 784 F.3d 406 (7th Cir. 2015)	4, 12, 17
<i>Fyock v. City of Sunnyvale</i> , 779 F.3d 991 (9th Cir. 2015)	4, 5, 14
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011)....	4, 5, 14, 15, 16, 17
<i>Kolbe v. Hogan</i> , 849 F.3d 114 (4th Cir. 2017)	4, 12, 14, 15, 16, 17, 18
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010)	5, 6, 7, 8, 9
<i>New State Ice Co. v. Liebmann</i> , 285 U.S. 262 (1932)	18
<i>N.Y. State Rifle & Pistol Ass’n v. Cuomo</i> , 804 F.3d 242 (2d Cir. 2015)	4, 5, 13, 14, 16
<i>Oregon v. Ice</i> , 555 U.S. 160 (2009).....	9
<i>Patterson v. New York</i> , 432 U.S. 197 (1977).....	12

<i>State v. Curley-Egan</i> , 2006 VT 95, 180 Vt. 305, 910 A.2d 200 (2006).....	8
<i>State v. Diamondstone</i> , 132 Vt. 303, 318 A.2d 654 (1974).....	12
<i>State v. Duranleau</i> , 128 Vt. 206, 260 A.2d 383 (1969).....	5, 6, 8
<i>Turner Broad. Sys., Inc. v. FCC</i> , 512 U.S. 622 (1994)	17
<i>Turner v. Shumlin</i> , 2017 VT 2, 204 Vt. 78, 163 A.3d 1173 (2017)	9
<i>United States v. Lopez</i> , 514 U.S. 549 (1995).....	7, 18
<i>United States v. Morrison</i> , 529 U.S. 598 (2000)	7
<i>Wilson v. Cook County</i> , 937 F.3d 1028 (7th Cir. 2019)	4
<i>Worman v. Healey</i> , 922 F.3d 26 (1st Cir. 2019).....	4, 16, 17

Constitutional and Statutory Provisions

13 V.S.A. § 4021.....	2, 11
U.S. Const. amend. II.....	5, 6, 8
Cal. Penal Code §§ 16740, 32310.....	3
Colo. Rev. Stat. §§ 18-12-301, -302, -303.....	3
Conn. Gen. Stat. § 53-202w.....	3
D.C. Code § 7-2506.01(b).....	3
Haw. Rev. Stat. Ann. § 134-8(c).....	3
Md. Code Ann., Crim. Law § 4-305(b)	3
Mass. Gen. Laws ch. 140 §§ 121, 131M	3
N.J. Stat. Ann. §§ 2C:39-1, 2C:39-3, 2C:39-9.....	3, 11
N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.10, 265.11	3

Vt. Const., ch. I, art. 57
 Vt. Const., ch. I, art. 166

Other Authorities

Kevin Dolak & Justin Weaver, *Woman Wrestled Fresh Ammo Clip from Tucson Shooter as He Tried to Reload*, ABC News (Jan. 9, 2011)15
 Everytown for Gun Safety, *Assault Weapons and High-Capacity Magazines* (Mar. 22, 2019).....3
 FBI, *Aggravated Assault: Crime in the United States 2018*.....10
 FBI, *Law Enforcement Officers Killed and Assaulted*.....10
 FBI, *Murder: Crime in the United States 2018*.....10
 FBI, *Uniform Crime Reporting Statistics: Their Proper Use* (May 2017)10
 H.R. Rep. No. 103-489 (1994).....16
 Law Ctr. To Prevent Gun Violence, *Concealed Carry: Summary of State Law*11
 Law Ctr. To Prevent Gun Violence, *Large Capacity Magazines*11
 Law Ctr. To Prevent Gun Violence, *Universal Background Checks: Summary of State Law*11
 S. 55 (Act 94), *Bill Status*14
 Violence Policy Ctr., *High-Capacity Ammunition Magazines* (June 3, 2019).....3
 Adam Winkler, *The Reasonable Right to Bear Arms*, 17 *Stan. L. & Pol’y Rev.* 597 (2006).....9
 Katie Zezima, *12 People Killed, Including Sheriff’s Deputy, in ‘Horrific’ California Bar Shooting*, *Wash. Post* (Nov. 8, 2018).....16

INTEREST OF *AMICI CURIAE*

The District of Columbia, for itself and on behalf of the States of California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Virginia, and Washington (“*Amici States*”), files this brief under Rule 29 of the Vermont Rules of Appellate Procedure.¹ Together, the *Amici States* seek to protect their governmental prerogative to enact and implement sensible legislation that promotes public safety and reduces the incidence and lethality of gun violence, including mass shootings that have become all too prevalent. The *Amici States* have each taken different approaches to addressing gun violence based on their own determinations about the measures that will best meet the needs of their residents. They join this brief not to endorse Vermont’s particular limitations on large-capacity ammunition magazines or to suggest that they would be optimal for all States, but to emphasize that the challenged law represents a policy choice that Vermont is constitutionally free to adopt.

¹ No party or counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No entities other than *amici curiae*, their members, or their counsel made a monetary contribution to the brief’s preparation or submission.

Well-reasoned decisions from a number of federal courts of appeals establish that reasonable restrictions on large-capacity magazines are fully compatible with the right to bear arms. That is true under the Second Amendment of the United States Constitution, and it is equally true under Article 16 of the Vermont Constitution. The *Amici* States urge this Court to defer to Vermont’s well-considered judgment in enacting laws that restrict particularly lethal weapons and protect its residents and law enforcement officers.

SUMMARY OF ARGUMENT

In 2018, the State of Vermont prohibited the manufacture, importation, possession, and sale of large-capacity magazines (“LCMs”) that, with some exceptions (including for magazines lawfully possessed before the law’s effective date), hold more than 10 rounds of ammunition for a long gun or more than 15 rounds for a hand gun. 13 V.S.A. § 4021. LCMs jeopardize public safety by allowing the rapid fire of ammunition without the need to reload, resulting in more shots fired in a given period of time, more victims wounded, more wounds per victim, and more fatalities. Vermont determined that restricting LCMs would reduce the lethality and

injuriousness of firearms used in unlawful activity—particularly mass shootings—without significantly burdening the right to bear arms in self-defense.²

That conclusion is consistent with those reached by California, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New York, and the District of Columbia, all of which have enacted similar laws.³ It is also consistent with the conclusion of numerous federal courts of appeals that have upheld those laws under the Second Amendment, which the U.S. Supreme Court has recognized as “analogous” to Vermont’s right-to-bear-arms provision. *District of Columbia v. Heller*, 554 U.S. 570, 600-01 (2008) (noting that each codified an individual right

² Since 1980, LCMs have been involved in at least 74 mass shootings, resulting in 720 fatalities and 1,116 persons injured. See Violence Policy Ctr., High-Capacity Ammunition Magazines (Aug. 19, 2019), http://vpc.org/fact_sht/VPCshootinglist.pdf (last visited Oct. 10, 2019). An analysis of mass shootings from 2009 to 2017 revealed that, of the incidents with known magazine capacity data, 58 percent involved LCMs, resulting in twice as many fatalities and 14 times as many injuries per incident on average compared to those that did not involve LCM use. Everytown for Gun Safety, Assault Weapons and High-Capacity Magazines (Mar. 22, 2019), <https://everytownresearch.org/assault-weapons-high-capacity-magazines> (last visited Oct. 10, 2019). As Vermont notes in its brief, its LCM restrictions were prompted in part by the arrest of a Vermont teenager who intended to commit a mass shooting at Fair Haven Union High School.

³ See Cal. Penal Code §§ 16740, 32310; Colo. Rev. Stat. §§ 18-12-301 to -303; Conn. Gen. Stat. § 53-202w; Haw. Rev. Stat. Ann. § 134-8(c); Md. Code Ann., Crim. Law § 4-305(b); Mass. Gen. Laws ch. 140 §§ 121, 131M; N.J. Stat. Ann. §§ 2C:39-1(y), 2C:39-3(j), 2C:39-9(h); N.Y. Penal Law §§ 265.00(23), 265.02(8), 265.10, 265.11; D.C. Code § 7-2506.01(b).

“inherited from our English ancestors”); *see Worman v. Healey*, 922 F.3d 26, 30-31 (1st Cir. 2019), *petition for cert. filed* (U.S. Sept. 23, 2019) (No. 19-404); *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. N.J.*, 910 F.3d 106, 110 (3d Cir. 2018) (affirming the denial of a preliminary injunction); *Kolbe v. Hogan*, 849 F.3d 114, 135, 138 (4th Cir.) (en banc), *cert. denied*, 138 S. Ct. 469 (2017); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 1001 (9th Cir. 2015) (affirming the denial of a preliminary injunction); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir.), *cert. denied*, 136 S. Ct. 447 (2015);⁴ *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 261-64 (2d Cir. 2015), *cert. denied sub nom. Shew v. Malloy*, 136 S. Ct. 2486 (2016); *Heller v. District of Columbia (“Heller II”)*, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011). *But see Duncan v. Becerra*, 742 F. App’x 218, 221 (9th Cir. 2018) (affirming the grant of a preliminary injunction).⁵ This Court, applying Vermont law, should reach the same result.

⁴ In a recent challenge to a “materially indistinguishable” LCM law enacted by a county in Illinois, the Seventh Circuit refused to “revisit [its] holding in *Friedman*.” *Wilson v. Cook County*, 937 F.3d 1028, 1029, 1036-37 (7th Cir. 2019).

⁵ The Ninth Circuit has thus upheld lower court rulings both denying and granting preliminary injunctions against LCM laws. *Compare Fyock*, 779 F.3d at 1000, *with Duncan*, 742 F. App’x at 221-22. As an unpublished disposition, however, *Duncan*, is non-precedential, and its divided panel relied heavily on the abuse-of-discretion standard of review and refused to reweigh the district court’s evidentiary determinations. 742 F. App’x at 221-22. The Ninth Circuit is presently considering *Duncan* on the merits, following summary judgment. *Duncan v. Becerra*, No. 19-55376 (appeal filed Apr. 4, 2019).

The right to bear arms enshrined in Vermont’s Constitution is fully compatible with restrictions on LCMs. Indeed, both this Court and the U.S. Supreme Court have affirmed that the right to bear arms “does not imperil every law regulating firearms.” *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality opinion); *State v. Duranleau*, 128 Vt. 206, 210, 260 A.2d 383, 386 (1969) (“[T]he language of [Vermont’s] constitutional provision does not suggest that the right to bear arms is unlimited[.]”). Limiting the market for, or possession of, a particular type of firearm or firearm accessory, even if those limits burden a protected right, is well within the realm of permissible public safety regulation.⁶

⁶ For the reasons stated by Vermont and other *amici*, it is not clear that Vermont’s LCM law burdens conduct protected by Vermont’s right to bear arms in self-defense. *Cf. Kolbe*, 849 F.3d at 135-37 (LCMs are not protected under the Second Amendment because they are “like M-16 rifles”—*i.e.*, “weapons that are most useful in military service”; they “enable a shooter to hit multiple human targets very rapidly” (internal quotation marks omitted)). Even if there is some burden associated with not being able to shoot more than 10 rounds without having to reload, the law does not “render any lawfully possessed firearms inoperable, nor does it restrict the number of magazines that an individual may possess.” *Fyock*, 779 F.3d at 999; *Cuomo*, 804 F.3d at 260 (same); *Heller II*, 670 F.3d at 1261-62 (same); *Ass’n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 118 (same).

ARGUMENT

I. The Right To Bear Arms Is Compatible With A Range Of State-Law Measures To Address Gun Violence And Gun Fatalities.

This Court and the U.S. Supreme Court have each determined that the right to bear arms does not amount to “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626 (federal constitutional right); *Duranleau*, 128 Vt. at 210, 260 A.2d at 386 (state constitutional right is not “unlimited”). As relevant here, the right under the Vermont Constitution is textually committed to self-defense. Vt. Const., ch. I, art. 16 (“[T]he people have a right to bear arms for the defence of themselves[.]”).⁷ The Second Amendment similarly “protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.” *McDonald*, 561 U.S. at 780 (plurality opinion); *Heller*, 554 U.S. at 626-27, 636. Further, within these parameters, a State may address the problem of gun violence, including the lethality of mass shootings, in a manner consistent with local needs and values. *Duranleau*, 128 Vt. at 211, 260 A.2d at 386 (legislature may place reasonable conditions on the Article 16 right); *see McDonald*, 561 U.S. at 785 (plurality opinion) (under the Second Amendment “state and local experimentation with reasonable firearms regulations *will continue*”

⁷ The right is also textually committed to the purpose of militia service. Vt. Const., ch. I, art. 16 (“defence . . . of the State”). Defendant Misch has made no argument that Vermont’s LCM law burdens his ability to defend the State.

(emphasis added) (quotation marks and brackets omitted)). In restricting the possession of and market for LCMs, Vermont has made a constitutional choice.

A. The right to bear arms preserves States’ authority to enact firearm restrictions in furtherance of public safety.

States have primary responsibility for ensuring public safety, which includes reducing the likelihood that their citizens will fall victim to preventable firearm violence, and minimizing fatalities and injuries when that violence does occur. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) (“[W]e can think of no better example of the police power . . . reposed in the States[] than the suppression of violent crime and vindication of its victims.”); Vt. Const., ch. I, art. 5 (“[T]he people of this state by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same.”). As States address the problem of firearm violence—and the lethality of mass shootings involving LCMs specifically—they “perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.” *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

Indeed, the U.S. Supreme Court has explained that the federal codification of the right to keep and bear arms “by no means eliminates” States’ “ability to devise solutions to social problems that suit local needs and values.” *McDonald*, 561 U.S. at 785 (plurality opinion); *see also id.* at 877, 902-03 (Stevens, J., dissenting); *id.* at

926-27 (Breyer, J., dissenting). Within constitutional limits, policymakers retain “a variety of tools for combating” gun violence. *Heller*, 554 U.S. at 636. The Second Amendment does not “protect the right of citizens to carry arms for *any sort* of confrontation, just as . . . the First Amendment [does not] protect the right of citizens to speak for *any purpose*.” *Id.* at 595 (emphasis in original); *cf. McDonald*, 561 U.S. at 802 (Scalia, J., concurring) (“No fundamental right—not even the First Amendment—is absolute.”). The Court accordingly generated a list—which did “not purport to be exhaustive”—of “presumptively lawful” regulations, such as prohibitions on carrying concealed weapons, bans on the possession of firearms by felons and the mentally ill, bans on carrying firearms in sensitive places, and bans on weapons “not typically possessed by law-abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 625, 626-27 & n.26.

The Vermont Constitution is in complete accord. This Court has explained that where “the statutory purpose is reasonable, as it must be assumed to be,” laws that “condition[] the unrestrained carrying and operation of firearms” are constitutional. *Duranleau*, 128 Vt. at 210, 260 A.2d at 386. This Court “presume[s] that the legislative act in question is valid unless it bears no just relation to the purposes underlying the police power or amounts to a plain and palpable invasion of constitutional rights.” *State v. Curley-Egan*, 2006 VT 95, ¶ 12, 180 Vt. 305, 310-11, 910 A.2d 200, 204 (2006) (footnote and internal quotation marks omitted). In

other words, the mode of constitutional interpretation is not “so narrow as to present an obstacle to” the Legislature’s ability to define the “working details” of a policy, a range of which may be “possible and constitutional.” *Turner v. Shumlin*, 2017 VT 2, ¶ 24, 204 Vt. 78, 95, 163 A.3d 1173, 1183 (2017) (internal quotation marks omitted).

Indeed, many States, including the *Amici* States—consistent with the flexibility provided by the federal and their own state constitutional provisions—have addressed the threat to public safety posed by firearm violence along a variety of tracks. *See Ex parte Guerra*, 94 Vt. 1, 110 A. 224, 227 (1920) (“Subject to [federal] constitutional limitations, a state Legislature is authorized to pass measures for the general welfare of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.”); Adam Winkler, *The Reasonable Right to Bear Arms*, 17 *Stan. L. & Pol’y Rev.* 597, 598 (2006) (noting the “uniform application of a deferential ‘reasonable regulation’ standard to laws infringing on the arms right”). This reflects that States are “laboratories for devising solutions to difficult legal problems,” *Oregon v. Ice*, 555 U.S. 160, 171 (2009), and that, while firearm violence is a national phenomenon, “conditions and problems differ from locality to locality,” *McDonald*, 561 U.S. at 783 (plurality opinion).

For instance, the Federal Bureau of Investigation (“FBI”) has identified many factors “known to affect the volume and type of crime occurring from place to place.”⁸ These factors include demographic conditions such as population density, composition, and stability, and the extent of urbanization; economic conditions such as median income, poverty level, and job availability; the strength of law enforcement; and the policies of other components of the criminal-justice system, including prosecutors, courts, and probation and correctional agencies. These and many other factors vary widely across States and within them. As a result, the number of murders and aggravated assaults committed with firearms varies significantly from State to State.⁹ There are also regional variations in the number of law enforcement officers killed by firearms in the line of duty.¹⁰ Because of such local and regional differences, an approach that may be appropriate or effective in one State may not be appropriate or effective in another.

⁸ FBI, *Uniform Crime Reporting Statistics: Their Proper Use* (May 2017), <https://ucr.fbi.gov/ucr-statistics-their-proper-use> (last visited Oct. 10, 2019).

⁹ *See* FBI, *Murder: Crime in the United States 2018*, tbl. 20, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-20> (last visited Oct. 10, 2019); FBI, *Aggravated Assault: Crime in the United States 2018*, tbl. 22, <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/tables/table-22> (last visited Oct. 10, 2019).

¹⁰ *See* FBI, *Law Enforcement Officers Killed and Assaulted*, <https://www.fbi.gov/services/cjis/ucr/leoka> (last visited Oct. 10, 2019).

These differences help explain policymakers' varied responses to firearm violence. Thirty-five States and the District of Columbia, for example, require a permit to carry a concealed firearm, but they afford different degrees of discretion to licensing authorities.¹¹ Twenty-one States and the District of Columbia require some form of background check for certain firearms transactions.¹² And nine States (including Vermont) and the District of Columbia have enacted laws that restrict assault weapons, LCMs, or both.¹³ Even within restrictions on LCMs, there is a diversity of approaches. New Jersey, for example, prohibits the possession of LCMs regardless of when they were made or owned, with specified exemptions, N.J. Stat. Ann. §§ 2C:39-1(y), 2C:39-3(j), while Vermont chose to grandfather LCMs lawfully possessed before the law's effective date, 13 V.S.A. § 4021(c)(1)-(2).

Whatever measures a State may adopt, all States have an interest in maintaining the flexibility, within the constraints established by the U.S.

¹¹ Law Ctr. To Prevent Gun Violence, *Concealed Carry: Summary of State Law*, <http://smartgunlaws.org/gun-laws/policy-areas/guns-in-public/concealed-carry/#state> (last visited Oct. 10, 2019).

¹² Law Ctr. To Prevent Gun Violence, *Universal Background Checks: Summary of State Law*, <http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/#state> (last visited Oct. 10, 2019).

¹³ Law Ctr. To Prevent Gun Violence, *Large Capacity Magazines*, <https://lawcenter.giffords.org/wp-content/uploads/2019/09/Giffords-Law-Center-Large-Capacity-Magazines.pdf>. In 2019, 11 additional States introduced legislation to ban LCMs. *Id.*

Constitution and their own State constitutions, to enact regulations aimed at minimizing the adverse effects of gun violence while ensuring that law-abiding citizens may use arms in self-defense. Indeed, a State's ability to craft innovative solutions is most pronounced in areas, like police powers and criminal justice, where States have long been understood to possess special competencies. *State v. Diamondstone*, 132 Vt. 303, 318 A.2d 654, 656 (1974) (“The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the states.” (citing *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1908))); *cf. Patterson v. New York*, 432 U.S. 197, 201 (1977) (courts should “not lightly construe the Constitution so as to intrude upon” a State’s crime-fighting efforts).

Because the use of firearms touches on a range of public safety concerns, it is not possible “to draw from the profound ambiguities of [a constitutional provision] an invitation to courts to preempt this most volatile of political subjects and arrogate to themselves decisions that have been historically assigned to other, more democratic, actors.” *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring); *see Friedman*, 784 F.3d at 412. States and localities should not be prevented from adopting reasonable restrictions to combat advances in firearm technology, access, or use. Neither the policy choices of other States, nor the policy preferences of the criminal defendant here, should limit Vermont’s ability to respond to gun violence within its borders.

B. Vermont made a considered and well-supported judgment that restricting LCMs permissibly promotes public safety.

As this Court has observed, the State’s “paramount obligation” is to “protect the safety and general welfare of the public.” *Appeal of Newton Enters.*, 167 Vt. 459, 465, 708 A.2d 914, 918 (1998); *accord, e.g., Cuomo*, 804 F.3d at 261 (“It is beyond cavil that [New York and Connecticut] have substantial, indeed compelling, governmental interests in public safety and crime prevention” (internal quotation marks omitted)). Determinations made by other States, including the *Amici* States, that restricting LCMs will promote public safety and reduce the incidence and lethality of mass shootings—upheld against Second Amendment challenge by every federal court of appeals to have reviewed an LCM prohibition on the merits—strongly support Vermont’s well-considered judgment here. *See Cuomo*, 804 F.3d at 264 (crediting expert testimony that banning possession of LCMs may “prevent and limit shootings in the state over the long run”).¹⁴

¹⁴ The U.S. Supreme Court has recognized that States may rely not only on legislative records amassed by other jurisdictions, but also on the judicial decisions incorporating those records. *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (permitting litigants to rely on “studies and anecdotes pertaining to different locales altogether”); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986) (“Renton was entitled to rely on the experiences of Seattle and other cities, and in particular on the detailed findings summarized in the Washington Supreme Court’s *Northend Cinema* opinion” (internal quotation marks omitted)); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 297 (2000) (recognizing that the City of Erie “could reasonably rely on the evidentiary foundation set forth in *Renton* and [*Young v.*]

As federal courts of appeals have recognized—on the basis of extensive records—LCMs are disproportionately used in mass shootings and result in increased wounds and fatalities. *See Cuomo*, 804 F.3d at 264 (because LCMs allow shooters to fire without pausing to reload, they “result in more shots fired, persons wounded, and wounds per victim than do other gun attacks” (internal quotation marks omitted)); *Heller II*, 670 F.3d at 1264 (LCMs “greatly increase the firepower of mass shooters”). Indeed, “[o]ne study of sixty-two mass shootings between 1982 and 2012 . . . found that the perpetrators were armed with . . . [LCMs] in 50% or more” of the attacks, and another showed that, in 1994, LCMs “were used in 31% to 41% of” murders of on-duty law enforcement officers. *Kolbe*, 849 F.3d at 126-27; *see Fyock*, 779 F.3d at 1000-01 (summarizing the evidence that LCMs “are disproportionately used in mass shootings as well as crimes against law enforcement”); *Heller II*, 670 F.3d at 1264 (noting that LCMs “tend to pose a danger to innocent people and particularly to police”). That LCMs are particularly lethal is by “design[]”: They are “most suitable for military and law enforcement

American Mini Theatres[, Inc., 427 U.S. 50 (1976)]”). As Vermont’s brief explains, the Vermont legislature considered testimony from dozens of witnesses, both for and against the legislation, and an extensive documentary record, including the decisions in *Cuomo* and *Kolbe*. *See generally*, S. 55 (Act 94), Bill Status, <https://legislature.vermont.gov/bill/status/2018/S.55> (last visited Oct. 10, 2019).

applications” and they “enhance a shooter’s capacity to shoot multiple human targets very rapidly.” *Kolbe*, 849 F.3d at 125 (internal quotation marks omitted).

Vermont’s decision to restrict LCMs means that a mass shooter must reload his weapon more frequently to continue his onslaught. This provides would-be victims with a chance to escape the carnage and for law enforcement officers to apprehend the assailant. *See Kolbe*, 849 F.3d at 127; *Heller II*, 670 F.3d at 1264 (noting that “the 2 or 3 second pause during which a criminal reloads his firearm can be of critical benefit to law enforcement” (internal quotation marks omitted)). “Reducing the capacity of the magazine to which a shooter has access means that the shooter will have fewer bullets immediately available and will need to either change weapons or reload to continue shooting.” *Ass’n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 119.

High-profile mass shootings demonstrate the life-saving impact of giving bystanders more opportunities to flee, shelter, or intervene. *Id.* at 113 (citing incidents). At Sandy Hook Elementary School, “[n]ine terrified children ran from one of the classrooms when the gunman paused to reload, while two youngsters successfully hid in a restroom.” *Kolbe*, 849 F.3d at 120. In the 2011 mass shooting in Tucson, where six were killed and thirteen were wounded, bystanders disarmed the shooter when he paused to reload his gun. Kevin Dolak & Justin Weaver, *Woman Wrestled Fresh Ammo Clip from Tucson Shooter as He Tried to Reload*,

ABC News (Jan. 9, 2011); *see also* H.R. Rep. No. 103-489, at 15 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 1820 (commuters on the Long Island Railroad “overpowered” a mass shooter “while [he was] trying to reload”). And in 2018, between 30 and 35 patrons reportedly escaped a mass shooting at a bar in California when the gunman paused to reload after emptying his magazine. Katie Zezima, *12 People Killed, Including Sheriff's Deputy, in 'Horrific' California Bar Shooting*, Wash. Post (Nov. 8, 2018).

Conversely, there are almost no instances of people firing (or even needing to fire) more than ten bullets in self-defense. Evidence from the National Rifle Association itself demonstrates that the “average number of shots fired in self-defense” between 1997-2001 and 2011-2013 was 2.2 or less. *Kolbe*, 849 F.3d at 127. Courts often observe the paucity of evidence that LCMs are used or are well-suited for this purpose. *See, e.g., id.* (noting that no party “could identify a single incident in which a Marylander . . . needed to fire more than ten rounds[] to protect herself”); *Cuomo*, 804 F.3d at 260 (an LCM prohibition does “not . . . substantially affect [individuals’] ability to defend themselves” (quoting *Heller II*, 670 F.3d at 1262)). When the First Circuit recently examined Massachusetts’s LCM law, it noted that “when asked directly, 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. The court therefore concluded

that, “[v]iewed as a whole, the record suggests that wielding [LCMs] for self-defense within the home is tantamount to using a sledgehammer to crack open the shell of a peanut.” *Id.* Indeed, the *Amici States* are not aware of any evidence that LCMs are commonly used for self-defense.¹⁵

Legislators in Vermont therefore acted well within constitutional limits when they placed restrictions on magazine capacity. As federal courts considering the Second Amendment have concluded, the best way to evaluate how crime, self-defense, and LCMs relate to each other “is through the political process and scholarly debate.” *Friedman*, 784 F.3d at 412. This Court, too, has explained that where—as here—the Legislature has evaluated data and drawn a conclusion about what is in the best interest of public safety, the Court will “accord deference to the [Legislature’s] policy choices.” *Badgley v. Walton*, 2010 VT 68, ¶ 38, 188 Vt. 367, 384, 10 A.3d 469, 481 (2010); *cf. Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (courts “accord substantial deference” to a State’s “predictive judgment[.]”); *Worman*, 922 F.3d at 41 (“[W]e are obliged to cede some degree of

¹⁵ By contrast, even when used by law-abiding civilians, LCMs remain dangerous because “the tendency is for defenders to keep firing until all bullets have been expended, which poses grave risks to others in the household, passersby, and bystanders.” *Heller II*, 670 F.3d at 1263-64; *see also Kolbe*, 849 F.3d at 127 (“[W]hen inadequately trained civilians fire weapons equipped with large-capacity magazines, they tend to fire more rounds than necessary.”).

deference to the decision of the Massachusetts legislature about how best to regulate the possession and use of [LCMs].”).

Neither Vermont nor any other State should be prevented from “experimenting and exercising their own judgment in an area to which [they] lay claim by right of history and expertise.” *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). To do so “would be the gravest and most serious of steps,” as it would “impair the ability of government to act prophylactically” on a “life and death subject.” *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring); *cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“Denial of the right to experiment may be fraught with serious consequences to the nation.”).

CONCLUSION

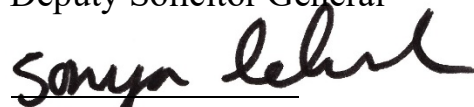
This Court should hold that Vermont's law restricting LCMs is constitutional.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of
Columbia

LOREN L. ALIKHAN
Solicitor General

CAROLINE S. VAN ZILE
Deputy Solicitor General



SONYA L. LEBSACK (ERN #10788)
Assistant Attorney General
Office of the Solicitor General



JONATHAN T. ROSE (ERN #6128)
Dunkiel Saunders Elliott
Raubvogel & Hand, PLLC

91 College Street
P.O. Box 545
Burlington, VT 05401-0545
(802) 860-1003
jrose@dunkielsaunders.com

Office of the Attorney General
441 4th Street, NW, Suite 630 South
Washington, D.C. 20001
(202) 724-5667
sonya.lebsack@dc.gov

Submitted October 14, 2019

Also on behalf of:

XAVIER BECERRA
Attorney General
State of California
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

KATHLEEN JENNINGS
Attorney General
State of Delaware
820 North French Street
Wilmington, DE 19801

KWAME RAOUL
Attorney General
State of Illinois
100 West Randolph Street
Chicago, IL 60601

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Place, 20th Floor
Boston, MA 02108

KEITH ELLISON
Attorney General
State of Minnesota
75 Rev. Dr. Martin Luther
King Jr. Blvd.
St. Paul, MN 55155

WILLIAM TONG
Attorney General
State of Connecticut
55 Elm Street
Hartford, CT 06106

CLARE E. CONNORS
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

GURBIR S. GREWAL
Attorney General
State of New Jersey
R.J. Hughes Justice Complex
P.O. Box 080
Trenton, NJ 08625

HECTOR BALDERAS
Attorney General
State of New Mexico
408 Galisteo Street
Santa Fe, NM 87501

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, NY 10005

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

JOSH SHAPIRO
Attorney General
State of Pennsylvania
Strawberry Square
Harrisburg, PA 17120

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North Ninth Street
Richmond, VA 23219

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation in Vermont Rule of Appellate Procedure 32(a)(7)(A) because the brief contains 4,368 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Vermont Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point.



JONATHAN T. ROSE

CERTIFICATE OF VIRUS SCAN

Pursuant to Vermont Rule of Appellate Procedure 32(b)(4), I certify that the Portable Document Format version of this brief has been scanned for viruses using Vipre Business Premium Version 9.6.6194, and according to that program, the document is free of viruses.



JONATHAN T. ROSE


CERTIFICATE OF SERVICE

I certify that on October 14, 2019, copies of this brief were served through electronic mail and first-class mail to the following attorneys of record:

Benjamin D. Battles
Ultan Doyle
Vermont Solicitor General
109 State Street, Third Floor
Montpelier, VT 05609-1001
benjamin.battles@vermont.gov
ultan.doyle@vermont.gov
ago.crctappear@vermont.gov
amy.farr@vermont.gov
jessica.mishaan@vermont.gov

Rebecca Turner
Office of the Defender General
6 Baldwin Street, 4th Floor
Montpelier, VT 05633-3301
rebecca.turner@vermont.gov
anthony.bambara@vermont.gov

Frederick Bragdon
Bennington County Public Defender's Office
Public Defender
411 Gage Street
Bennington, VT 05201
frederick.bragdon@vermont.gov
victoria.lamoureux@vermont.gov
dianna.leazer@vermont.gov



JONATHAN T. ROSE