diGENOVA & TOENSING, LLP
ATTORNEYS-AT-LAW

August 27, 2018

By Hand

Donna Waters
Court Office Manager
Washington Superior Court
Civil Division
65 State Street
Montpelier, VT 05602

RE: ***Vermont Federation of Sportsmen's Clubs, et al. v. Matthew Birmingham, et al.,***
Docket No. 224-4-18-Wcnv

Dear Ms. Waters:

Enclosed for filing with the Court in the above-referenced matter are originals of the following documents.

1. Plaintiffs' Opposition to Defendants' Motion to Dismiss, Cross Motion for Summary Judgment, and Brief in Support Thereof (including a certificate of service); and
2. Plaintiffs' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment.

Please feel free to contact me if you have any questions. I can be reached any time at (202) 297-4245 or by email at Brady@digtoe.com. Thank you for your assistance with this matter.

Sincerely,

Brady C. Toensing

Enc.

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STATE OF VERMONT

SUPERIOR COURT
WASHINGTON UNIT

CIVIL DIVISION
Docket No. 224-4-18-Wncv

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

Plaintiffs,

v.

MATTHEW BIRMINGHAM, in his Official Capacity as Director of the Vermont State Police, T. J. DONOVAN, in his Official Capacity as Attorney General of the State of Vermont, SARAH GEORGE, in her Official Capacity as State's Attorney for Chittenden County, DAVID CAHILL, in his Official Capacity as State's Attorney for Windsor County, *and* WILLIAM PORTER, in his Official Capacity as State's Attorney for Orange County,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, CROSS-MOTION FOR SUMMARY JUDGMENT, AND BRIEF IN SUPPORT THEREOF

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Plaintiffs respectfully oppose Defendants' Motion to Dismiss and cross-move for summary judgment pursuant to V.R.C.P. 56. In support of this motion, Plaintiffs are contemporaneously submitting a separate Statement of Undisputed Material Facts. No material facts are in dispute and Plaintiffs are entitled to judgment as a matter of law. V.R.C.P. 56(a). Accordingly, judgment should be entered in favor of Plaintiffs. Plaintiffs submit the following Memorandum of Law in support of their opposition and cross-motion.

Memorandum of Law

INTRODUCTION

In the first week of July 1777, Ira Allen, Jonas Fay, and other leading figures of the Republic of Vermont met in Windsor to frame a formal government and constitution for the State. These were hardy patriots. Most of the delegates to the convention were also leaders in Vermont's militia—the storied Green Mountain Boys. In fact, most had come to Windsor directly from Fort Ticonderoga, where they had called forth the militia to defend the Fort from an impending attack from the British General John Burgoyne. Vermont's militia, led by Ira's brother Ethan Allen, had been bearing arms in defense of their families, property, and State for decades, using their privately-owned muskets, flintlocks, cartridges, and powder—which they were required to bring with them when mustering for militia service.

On the first day of the convention, the delegates received a letter from the Green Mountain Boys indicating that Burgoyne's attack was imminent. For a week, Allen and the others toiled over the draft constitution—including protections for religious freedom and private property, forbidding chattel slavery, and guaranteeing all citizens "a right to bear arms for the defence of themselves and the State." At the end of the week, the convention received word that Ticonderoga had fallen to Burgoyne. Recognizing that the "families of many of the members . . . were within

the very line of march of the triumphant enemy," the delegates hurriedly concluded their business so that they could "fly to the defence of their homes." Plaintiffs' Statement of Undisputed Material Facts ¶ 72 (Aug. 27, 2018) ("SOF").

On April 11, 2018, the Government of Vermont banned the sale, purchase, and possession of standard-capacity ammunition magazines. Though framed as a ban on "large capacity" magazines, let there be no mistake: the 11- and 16-plus-round long-gun and handgun magazines covered by the new law are common to the point of ubiquity in Vermont. They come standard on the most popular rifles and handguns in the nation, are legal in the vast majority of states, and are owned by the tens of millions by law-abiding citizens throughout the United States. If you visit a firing range in Vermont, you are almost certain to see people practicing with these magazines; if you ask your neighbors what firearm they use for home-defense, there are good odds that they use a rifle or handgun equipped with one of them.

Because Vermont's law flatly bans the possession of these common magazines—by *anyone*, in *any place*, and for *any purpose*—it is categorically unconstitutional. That is how constitutional rights work. If the legislature passed a ban forbidding all Catholics in the State from practicing their religion, this Court would not ask whether that was a "reasonable" restriction on religious freedom, it would invalidate the ban as unconstitutional *per se*. If the Government enacted a law providing that henceforth the Miranda warning was *never* to be given upon arrest under any circumstances, this Court would not pause to consider the measure's public-safety justifications before striking it down. So too here: because Vermont's law flatly bans the possession of standard-capacity magazines that are in common use for lawful purposes, including self-defense, it is flatly unconstitutional. And that conclusion follows not only from ordinary legal reasoning; it is also dictated by the Vermont Supreme Court's binding decision in *State v.*

Rosenthal, 75 Vt. 295 (1903)—which struck down a ban on carrying common arms (in *Rosenthal*, pistols) concealed in public as "repugnant to and inconsistent with the Constitution"—without even bothering to address the State's contentions that the ban was a necessary and reasonable public-safety measure. *Id.* at 295.

Even if the Court takes up the State's invitation to examine whether the magazine ban reasonably advances public safety, the ban must still fall, for there is simply no evidence that banning the standard-capacity magazines in question will cause *any* appreciable increase in public safety. These magazines are rarely used in gun related crime—a point Vermont itself bears out, for the magazines have long been legal here, and the State has above average levels of gun-ownership, yet it is tied for the lowest homicide rate in the Nation. That is also true with respect to the tragic—but rare—mass shootings that Vermont focuses its gaze upon: most of these mass-shooting events don't involve magazines like the ones Vermont has banned at all, and the now-defunct federal ban on 11-plus-round magazines that was in place from 1994 to 2004 did *nothing* to decrease the number or severity of these tragic incidents. Moreover, even if reducing the number of banned magazines in criminal hands *did* have some public safety benefit, Vermont's law is unlikely to accomplish that aim, given that, as the Attorney General Office's testified to the legislature, there are "serious concerns about the practical enforceability" of the ban. SOF ¶ 122.

Finally, the State's attempts to undermine Plaintiffs' standing to challenge the magazine ban fail. The Retailer Plaintiffs are plainly injured by the ban because it is *costing them significant amounts of revenue this year*; under black-letter law, that gives them standing to assert the constitutional rights of their customers to acquire the banned magazines. The Individual Plaintiffs have standing because they wish to purchase new magazines after October 1 as their existing magazines wear out over the coming months from regular use. Those magazines have worn out—

and required replacement—regularly in the past, and there is no "speculation" involved in forecasting that they will wear out—and require replacement—again after October 1st. The Associational Plaintiffs also have standing, both because—like the retailers—they are economically injured by the ban, and—like the individuals—their members are prevented by the ban from replacing their magazines after October 1st.

The standard-capacity magazines now banned by Vermont are commonly used by Vermonters for practice at the range and for defense in the home. There can be no serious question that if the modern civilian firearm stock were transposed to 1775, Ethan Allen and his Green Mountain Boys would have been using these magazines in their assault on Fort Ticonderoga. If these standard-capacity magazines are not protected by the Article 16 right to bear arms, the delegates in Windsor in 1777 might just as well not have included it in the Constitution.

FACTUAL BACKGROUND

I. Vermont's ban on common firearm magazines

"Ammunition magazines that hold more than 10 rounds are popular." *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1112 (S.D. Cal. 2017), *aff'd*, 2018 WL 3433828 (9th Cir. July 17, 2018). Across the Nation, law-abiding citizens own these magazines by the scores of millions. It is estimated that approximately 40 million long-gun magazines capable of holding more than 10 rounds and about 10 million handgun magazines holding 16 rounds and up are lawfully owned by Americans throughout the country. SOF ¶¶ 91–93.

Nonetheless, on April 11, 2018, Vermont enacted a flat ban on the purchase, sale, or possession of these popular magazines—pejoratively dubbed "large capacity ammunition feeding devices" by the new statute. 13 V.S.A. § 4021 provides that "A person shall not manufacture, possess, transfer, offer for sale, purchase, or receive or import into this State a large capacity ammunition feeding device," which the statute defines generally as an ammunition magazine that

has the capacity to accept "more than 10 rounds of ammunition for a long gun," or "more than 15 rounds of ammunition for a hand gun." 13 V.S.A. § 4021(a), (e)(1). Section 4021 contains exceptions that, *inter alia*, grandfather the possession of magazines "lawfully possessed on or before the effective date" of the statute and allow licensed dealers to lawfully sell their existing stock of magazines if they do so by October 1, 2018. *See id.* § 4021(c)(1), (c)(2). But apart from these exceptions, any individual who violates the ban is subject to imprisonment for up to one year, a fine of up to $500, or both. *Id.* § 4021(b).

II. The ban's impact on Plaintiffs

Like thousands of other law-abiding Vermont citizens, the Plaintiffs in this case have possessed, sold, purchased, and used the common magazines now banned by Section 4021 in the past—and but for the ban, they would continue to do so.

A. Powderhorn and Locust Creek

Plaintiff Powderhorn Outdoor Sports Center, Inc. ("Powderhorn") is a sporting-goods store located in Williston, Vermont, and licensed under federal law to engage in the business of selling firearms. SOF ¶¶ 27, 28. For many years, Powderhorn has sold long-gun magazines with a capacity greater than 10, handgun magazines with a capacity greater than 15, and firearms that come equipped with magazines with capacities greater than allowed by Section 4021. *Id.* ¶ 28. Indeed, before Vermont's new ban, these magazine sales made up a substantial and profitable portion of Powderhorn's business. *Id.* ¶ 29. In the three most recent months, for example, sales of magazines now illegal under Vermont law generated nearly $30,000 of revenue for Powderhorn—nearly 80% of Powderhorn's revenue from sales of magazines of *any* type. *Id.* ¶ 30. And in 2017, Powderhorn took in over $37,000 of revenue from sales of the now-prohibited magazines—about 57% of its revenue from all magazine sales. Because of the ban, however, Powderhorn will no longer be able to sell the long-gun and handgun magazines in question, and its customers will no longer be able

to purchase them. *Id.* ¶¶ 32, 33. Based on past sales, Powderhorn expects the ban to cut its gross revenue by a third or more—approximately $1 million a year, based on prior years' data. *Id.* ¶ 36.

Plaintiff Willow LLC—a Vermont Limited Liability Company that does business under the name Locust Creek Outfitters ("Locust Creek")—is a family-friendly gun and outdoor sporting-goods consignment store, located in Bethel, Vermont, and licensed under federal law to engage in the business of selling firearms. *Id.* ¶¶ 37, 39. Like Powderhorn, Locust Creek has sold the long-gun and handgun magazines banned by Section 4021 for many years. *Id.* ¶ 39. Also like Powderhorn, Locust Creek must now exit this part of the magazine market entirely, because of Vermont's new ban, causing it financial loss. *Id.* ¶ 40.

B. The Individual Plaintiffs

Plaintiff John Fogarty is a citizen of the United States and a resident and citizen of the State of Vermont. Mr. Fogarty meets all of the qualifications required under state law to purchase a firearm magazine (apart from the challenged ban), and he owns several firearms that typically come equipped with magazines that hold more than 15 rounds of ammunition. *Id.* ¶¶ 41, 43. While Mr. Fogarty currently possesses a number of the prohibited magazines, he has explained that these magazines must regularly be replaced due to wear and tear. *Id.* ¶ 44. For example, the three 20-round magazines he uses with two of his firearms are beginning to wear out, and they will likely need to be replaced within the next 18 months. *Id.* ¶ 47. Similarly, the 25-round magazine he uses with another of his firearms is made out of plastic, and based on his current usage and past experience, he expects this magazine to wear out within 18 months. *Id.* ¶ 48. Accordingly, Mr. Fogarty wishes to acquire replacement magazines as his existing ones wear out—including after October 1, 2018—so that he can continue to use them for recreational shooting and self-defense. *Id.* ¶ 52. Vermont's ban injures him by preventing him from replacing these magazines. Indeed, because of the ban Mr. Fogarty has *already* been unable to obtain replacements for these 20-round

and 25-round magazines. *Id.* ¶ 47.

Like Mr. Fogarty, the other two Individual Plaintiffs—Samuel Frank and Leah Stewart—are law-abiding citizens and residents of Vermont who are qualified to purchase firearm magazines in Vermont generally and who in fact own firearms that typically come equipped with magazines now illegal under Section 4021. *Id.* ¶¶ 53, 55, 60, 61. Both Mr. Frank and Ms. Stewart wish to continue to purchase these magazines even after October 1, as their existing magazines wear out over the coming months, but they are now prevented from doing so by the law. *Id.* ¶¶ 58, 64.

C. The Associational Plaintiffs

Plaintiff Vermont Federation of Sportsmen's Clubs ("VTFSC") is a nonprofit Vermont association founded to protect and conserve the outdoor resources of Vermont, as well as to preserve and protect traditional outdoor activities, including shooting sports. VTFSC also petitions the government on matters related to these activities. *Id.* ¶ 1. VTFSC is organized as an association of 50-plus sporting clubs across the State, with a combined membership of over 10,000 individuals. *Id.* ¶ 2. And VTFSC itself, the organization's member clubs, and those clubs' individual members are each tangibly and significantly harmed by the challenged magazine ban.

VTFSC itself, for instance, holds an annual banquet, in which it has historically given away the magazines now prohibited by Vermont as prizes. This annual banquet is the source of a significant share of VTFSC's revenue, and the organization is concerned that because it will no longer be able to give away these prizes, attendance at the banquet—along with the attendant donations to VTFSC—will decline. *Id.* ¶ 12. VTFSC's member clubs, for their part, also regularly conduct numerous competitions, shooting matches, and other events that crucially involve the use of the long-gun and handgun magazines that are now illegal. *Id.* ¶¶ 4, 12. As the ban takes effect and the number of magazines within the State dwindles, VTFSC's member clubs believe that participation in their events will be significantly curtailed by the ban. *Id.* ¶¶ 8, 13. And because the

clubs charge for participation in these events, as attendance declines, so will their income. *Id.* ¶ 11. Finally, the individual members of VTFSC's member clubs—including Plaintiff Frank and Affiant Scott Chapman—are also harmed by the ban because they wish to continue to purchase the banned magazines but will no longer be able to do so. *See Id.* ¶¶ 15, 16–19.

The other Associational Plaintiff, Vermont State Rifle and Pistol Association, Inc. ("VSRPA"), is a Vermont nonprofit organized for the purpose of actively advancing and supporting competitive shooting in Vermont, with a particular emphasis on expanding the participation of Vermont's youth. *Id.* ¶ 21. VSRPA has hundreds of members who reside throughout Vermont. *Id.* ¶ 22. And as with VTFSC, both VSRPA itself and its members are injured by Vermont's new magazine ban. VSRPA itself is injured because the New England Civilian Marksmanship Program ("CMP") Cup and Games—which VSRPA conducts each year at the Camp Ethan Allen Training Site in Jericho, VT—requires the use of magazines that Vermont now prohibits. *Id.* ¶¶ 23, 24. VSRPA fears that participation will be significantly curtailed by the ban, and because VSRPA's primary stream of income comes from revenue generated by the CMP Cup and Games, this turn of events will negatively affect its income. *Id.* ¶¶ 24, 25. VSRPA's individual members are harmed because—like the Individual Plaintiffs—they are now barred by Vermont law from purchasing the standard-capacity magazines. *Id.* ¶ 26. Indeed, one of VSRPA's members is Plaintiff Fogarty. *Id.* ¶ 26.

ARGUMENT

Pending before the Court are two competing cross-motions: Defendants' motion to dismiss pursuant to VT. R. CIV. P. 12 and Plaintiffs' motion for summary judgment pursuant to Rule 56. These motions are governed by distinct, though overlapping, standards of review. For purposes of the motion to dismiss, the Court must "assume that all factual allegations in the complaint are true"

and also "accept as true all reasonable inferences that may be derived from plaintiffs' pleadings." *Welch v. Home Two, Inc.*, 172 Vt. 632, 632 n.2, 783 A.2d 419, 420 n.2 (2000). For purposes of the summary judgment cross-motion, by contrast, "the nonmoving party receives the benefit of all reasonable doubts and inferences," *Robertson v. Mylan Labs., Inc.*, 2004 VT 15, ¶ 15, 176 Vt. 356, 363, 848 A.2d 310, 317, and the Court's task is to determine whether "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party," *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 14, 200 Vt. 125, 134, 129 A.3d 108, 115.

Defendants argue, in their motion to dismiss (I) that the Court lacks jurisdiction over this case because none of the Plaintiffs has sufficiently demonstrated standing to sue, and (II) that Plaintiffs' claim under Article 16 fails on the merits as a matter of law. As demonstrated below, the amended complaint adequately alleges standing and adequately states a claim, and Defendants' motion must be denied. Indeed, as explained below and shown in our accompanying affidavits and motion papers, no fact material to the outcome in this case is genuinely subject to dispute, and Plaintiffs are entitled to judgment as a matter of law.

I. Each of the Plaintiffs has standing to challenge Vermont's magazine ban.

"Vermont courts are vested with subject matter jurisdiction only over actual cases or controversies involving litigants with adverse interests." *Brod v. Agency of Nat. Res.*, 2007 VT 87, ¶ 8, 182 Vt. 234, 238, 936 A.2d 1286, 1289. To define these limits, Vermont courts have "adopted the constitutional and prudential components of the standing doctrine enunciated by the United States Supreme Court." *Schievella v. Department of Taxes*, 171 Vt. 591, 592, 765 A.2d 479, 481 (2000). Under that familiar doctrine, Plaintiffs must (1) identify an "injury-in-fact"; (2) trace a "causal connection between the injury and the conduct complained of"; and (3) show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks omitted).

The State effectively concedes that each of the Plaintiffs in this case meets the second and third prongs of this test, and with good reason. The injuries identified by each of the Plaintiffs flows directly from their (or their members') inability, after October 1, to either purchase, sell, or possess firearms, and the challenged ban is the direct, but-for, and sole cause of that state of affairs. *See* SOF ¶¶ 13, 14, 24, 25, 33, 36, 40. And because the magazine ban *caused* Plaintiffs' injury, enjoining the ban's continued enforcement would naturally *redress* their injury. *See National Rifle Ass'n v. Magaw*, 132 F.3d 272, 282 (6th Cir. 1997) (finding redressability because plaintiffs' "injury . . . stems directly from the Act's ban" on purchasing, selling, and possessing magazines and "were the Act to be declared unconstitutional, they would promptly resume the prohibited activities"). Accordingly, the causation and redressability elements of the standing analysis are satisfied, and Defendants have said nothing to the contrary.

Instead, the only issue Vermont raises in its Motion to Dismiss is whether Plaintiffs have adequately pleaded an injury-in-fact. They have. The seven Plaintiffs in this case may be sorted into three groups: (A) retailers, (B) individuals, and (C) associations. The Plaintiffs in each group have suffered injury-in-fact. Of course, the Court need only determine that a single Plaintiff has standing to conclude that its jurisdiction is secure, and it need not proceed to examine the standing of other Plaintiffs once it makes that determination. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977).

A. Retailors Powderhorn and Locust Creek have standing.

The sale of the now-prohibited magazines has historically been a substantial and profitable share of Powderhorn and Locust Creek's businesses. First Amended Complaint ¶¶ 44–45 (June 19, 2018) ("Am. Compl."); SOF ¶¶ 29, 40. In the past three months alone, for example, Powderhorn earned nearly $30,000 of revenue from sales of magazines that are now banned by Vermont. SOF ¶ 30. Because of the ban, both retailers will soon be forced to exit this segment of

the market, causing them substantial financial harm. Am. Compl. ¶¶ 44–45; SOF ¶¶ 33, 40. This imminent financial loss constitutes the paradigmatic injury-in-fact for standing purposes; and because they have suffered an injury, under well-settled law, the retailers have third-party standing to vindicate their customers' constitutional rights.

1. Economic loss constitutes an injury-in-fact.

United States Supreme Court case law makes clear that where a criminal statute threatens a retailer with imminent economic harm, the retailer has standing to mount a pre-enforcement challenge to the statute. In *Virginia v. American Booksellers Association*, several booksellers' organizations challenged a Virginia law that criminalized the display of certain sexualized content. 484 U.S. 383, 386–87 (1988). The case was a pre-enforcement challenge, and the only harm to the plaintiffs was economic: the lost sales and compliance costs they expected to suffer because of the ban. *Id.* at 388–89, 392. The Court squarely held that this economic injury sufficed to give the plaintiffs Article III standing. *Id.* at 392.

The present case is on all fours with that holding. As in *American Booksellers*, the challenged magazine ban is "aimed directly at plaintiffs" Powderhorn and Locust Creek, *id.*, prohibiting the further sale of the retailers' products. And as in that case, Powderhorn and Locust Creek are forced by the ban to either undertake "significant and costly" actions or "risk criminal prosecution." *Id.* It is well-established that, for standing purposes, a plaintiff need only allege a "substantial probability" of harm, *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 5 (D.C. Cir. 2017), and that "a loss of even a small amount of money is ordinarily an 'injury,' " *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017). Powderhorn and Locust Creek clearly face a "substantial probability"—indeed, a *near certainty*—of losing a substantial amount of money: Vermont's magazine ban, if it is not enjoined, will force the retailers to *entirely shut down* a "substantial and profitable portion of [their] business[es]," Am. Compl. ¶¶ 44–45; SOF ¶¶ 29, 40,

directly causing substantial economic harm.

Other federal case law fortifies the retailers' standing in this case. The Sixth Circuit's decision in *National Rifle Association v. Magaw* is closely on point. In *Magaw*, a group of firearm manufacturers and dealers brought a pre-enforcement challenge against the Crime Control Act, which regulated the possession of certain semiautomatic firearms and magazines with a capacity greater than 10 rounds. 132 F.3d at 277. Absent pre-enforcement review, the Act would have required plaintiffs to "terminate a line of business . . . or willfully violate the statute and risk serious criminal penalties." *Id.* at 287. The Sixth Circuit held that the plaintiffs had standing. Indeed, because the Act would compel plaintiffs to "terminate a line of business," the court wrote that plaintiffs' case "present[ed] a classic example of when pre-enforcement review must be granted." *Id.* As in *Magaw*, so too here.

The State resists this conclusion, arguing that "[i]t is an open 'question . . . whether an economic injury, standing alone, can constitute an injury-in-fact for purposes of a pre-enforcement challenge to a criminal statute.' " Defs.' Mem. of Law in Supp. of Mot. to Dismiss Pls.' First Am. Compl. at 23 (July 10, 2018) ("MTD"). But that question, if it ever was open, was closed, locked, and sealed shut by the Supreme Court's decision in *American Booksellers*. Although the State points for support on this issue to *Colorado Outfitters Association v. Hickenlooper*, 823 F.3d 537 (10th Cir. 2016), the case provides them with none. The *Hickenlooper* court did not describe the status of economic injuries as an "open question;" it merely *declined to reach* the issue because the parties had not adequately briefed it. *See id.* at 545–46 (noting that "compelling arguments" supported standing, but that "the plaintiffs fail to make those arguments in their opening brief"). In any event, this Court must look to "the standing doctrine enunciated by the United States Supreme Court," not the Tenth Circuit. *Schievella*, 171 Vt. at 592.

2. Powderhorn and Locust Creek have third-party standing to vindicate their customers' constitutional rights.

Although both state and federal law "generally do not allow third-party standing," Vermont courts have recognized several, well-established exceptions. *See Baird v. City of Burlington*, 2016 VT 6, ¶ 15, 201 Vt. 112, 120, 136 A.3d 223, 229–30 (2016) (discussing *jus tertii* standing in *Craig v. Boren*, 429 U.S. 190 (1976) and *Griswold v. Connecticut*, 381 U.S. 479 (1965)); *see also Schievella*, 171 Vt. at 592 (Vermont law has adopted the "prudential components of the standing doctrine enunciated by the United States Supreme Court."). Plaintiffs fall neatly into one of these exceptions: the longstanding doctrine allowing vendors to vindicate the rights of their customers.

This doctrine is established by multiple Supreme Court cases. In *Eisenstadt v. Baird*, for instance, the Court held that a vendor of contraceptives had standing to assert the rights of unmarried persons who were denied access to contraceptives. 405 U.S. 438, 446 (1972); *see also Griswold*, 381 U.S. at 480–81. The Court employed the same principle in *Craig v. Boren*, where it held that a vendor of alcoholic beverages had third-party standing to assert its customers' constitutional claims. 429 U.S. 190, 196–97 (1976). Finally, in *Singleton v. Wulff*, the Court again explained that the general rule against third-party standing does not apply when "the enjoyment of the [third party's] right is inextricably bound up with the activity the litigant wishes to pursue" and when "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." 428 U.S. 106, 114–15 (1976) (citing *Griswold*, 381 U.S. 479, and *Eisenstadt*, 405 U.S. at 445–46).

Under these precedents, Powderhorn and Locust Creek clearly have third-party standing to vindicate their customers' rights. Like the vendors in *Eisenstadt* and *Boren*, Plaintiffs seek to vindicate the constitutional rights of their customers—in this case, the "right to bear arms for the defence of themselves and the State," VERMONT CONST. art. 16, and the corresponding right to

acquire the arms to be borne, *see Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (the "core Second Amendment right . . . wouldn't mean much without the ability to acquire arms." (quotation marks omitted)). And the vendors' interest also aligns fully with the interests of their customers: Powderhorn and Locust Creek wish to *sell* the very magazines their customers have a right to *buy*, and this common purpose makes the vendor "as effective a proponent of the right" as the customer. *Singleton*, 428 U.S. at 114–15. Lastly, it goes without saying that the act of selling magazines is "inextricably bound up" with the act of buying them. *Id.* at 114. Accordingly, Powderhorn and Locust Creek fall into the well-established category of vendors who have standing to sue on behalf of their customers. *See also Ezell v. City of Chicago*, 651 F.3d 684, 696 (7th Cir. 2011) (business that supplied firing-range facilities had standing to advance Second Amendment right of individuals to access them); *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152, 1155–57 (3d Cir. 1981) (holding that a firearm vendor had standing to advance the rights of firearm consumers).[1]

The State argues that Powderhorn and Locust Creek lack standing because they have not met the requirement of showing "that these customers face a 'barrier' to asserting their interests . . . or would otherwise be 'unable' to assert their Article 16 rights." MTD 27. No such requirement exists in the context of vendor standing. Although the Supreme Court has noted that the "ability of the third party to assert his own right" can be relevant to third-party standing as a general matter, *Singleton*, 428 U.S. at 115–16, it has also squarely held that such a barrier need not be shown when

[1] Vermont's argument that the retailers "have no legally protected right . . . to *sell* . . . magazines" thus misses the point. MTD 27; *see also id.* at 28 n.23 (erroneously suggesting that these plaintiffs "fail to meet the 'zone of interests' prudential standing requirement" because there is no right to sell magazines). Plaintiffs do not argue that Powderhorn and Locust Creek may sue to vindicate *their own* rights under Article 16; rather, they bring suit to protect *their customers'* constitutional rights.

"enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of [the] third parties' rights," *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (citing *Griswold*, 381 U.S. 479). Such a condition clearly applies here. Vermont's ban prohibits the retailers from selling standard capacity magazines, 13 V.S.A. § 4021(a), and enforcing this ban against the retailers would violate individuals' right to purchase such magazines.

This case is closely analogous to *Boren*, where the Court held a licensed vendor of alcohol had standing to challenge the enforcement of a liquor law that allegedly deprived the vendor's potential customers of equal protection. Notably, the Court found third-party standing in *Boren*, even though there was "no barrier whatever" to the customers bringing an independent claim. 429 U.S. at 216 (Burger, J., dissenting).

Defendants' only support for their supposed "barrier" requirement is the Second Circuit's statement that "a plaintiff may assert the legal rights of another as a 'next friend' when he or she establishes: '(1) a close relationship to the injured party, and (2) a barrier to the injured party's ability to assert its own interests.' " *American Psychiatric Ass'n v. Anthem Health Plans, Inc.*, 821 F.3d 352, 358 (2d Cir. 2016). But this merely states general principles governing third-party standing; it plainly does not overrule the Supreme Court's decisions in *Boren*, *Eisenstadt*, or *Kowalski* governing the specific issue of vendors suing to vindicate the rights of their customers. Indeed, the next sentence of the State's key citation notes that *Eisenstadt* presents an *alternative* path to third-party standing. *Id.*

In sum, retailers Powderhorn and Locust Creek have standing to vindicate the rights of their customers.

B. Leah Stewart, John Fogarty, and Samuel Frank have standing.

Plaintiffs Stewart, Fogarty, and Frank are law-abiding, adult citizens who wish to continue to acquire prohibited magazines after October 1 for purposes such as home defense and

competitive shooting. Am. Compl. ¶ 46; SOF ¶¶ 52, 58, 64. By preventing Plaintiffs from doing so, the ban violates their rights under the Vermont Constitution. This constitutional violation is an injury-in-fact, giving Plaintiffs direct standing to challenge the magazine ban. The State raises two objections to these Plaintiffs' standing: (1) that Plaintiffs have not alleged a "specific and imminent threat of prosecution," and (2) that Plaintiffs have not alleged sufficiently "detailed plans to acquire large-capacity magazines after October 1." MTD 29. Neither objection holds water.

1. Leah Stewart, John Fogarty, and Samuel Frank have a well-founded fear that Vermont's ban will be enforced against them.

"[I]t is not necessary that [plaintiffs] expose [themselves] to actual arrest or prosecution to be entitled to challenge a statute that [they] claim[ ] deters the exercise of [their] constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Instead, Plaintiffs need only allege "an actual and well-founded fear that the law will be enforced against them." *American Booksellers*, 484 U.S. at 393. Ms. Stewart, Mr. Fogarty, and Mr. Frank clear this bar because Section 4021 was "aimed directly at" magazine ownership and because the State has "not suggested that the newly enacted law will not be enforced." *Id.*

To be sure, Plaintiffs have not received a "specific warning" against purchasing prohibited magazines. MTD 18, 29. But the United States Supreme Court has repeatedly held that plaintiffs seeking pre-enforcement review of criminal statutes *are not required* to produce explicit threats of prosecution. Instead, the Court has held that, barring any contrary statements from law enforcement, courts should *presume* that governments will enforce their own laws. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (standing existed where plaintiffs alleged they would engage in prohibited conduct and "[t]he Government has not argued to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do"); *American Booksellers*, 484 U.S. at 393; *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979). The

Second Circuit has taken the same approach: in cases seeking pre-enforcement review, that court presumes that "the government will enforce the law as long as the relevant statute is 'recent and not moribund.' " *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). A statute passed in April 2018 cannot plausibly be labeled moribund. Accordingly, the law does not "place the burden" on Plaintiffs to show that Vermont's ban will be enforced against them. *Id.* Instead, it "presume[s] such intent in the absence of a disavowal by the government or another reason to conclude that no such intent existed." *Id.* Because there has been no such disavowal here, Plaintiffs have adequately demonstrated a threat of prosecution.

The State invokes (MTD 18) the Second Circuit's decision in *Cayuga Nation v. Tanner*, 824 F.3d 321 (2d Cir. 2016), but that case *supports* Plaintiffs' position on standing. In *Cayuga*, the Second Circuit *affirmed* that "a plaintiff has standing to make a pre-enforcement challenge 'when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative,' " emphasizing that this standard deliberately "sets a low threshold and is quite forgiving to plaintiffs seeking such pre-enforcement review" because "courts are generally 'willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund.' " 824 F.3d at 331 (quoting *Hedges*, 724 F.3d at 196, 197). Vermont also cites *Knife Rights, Inc. v. Vance*, but that case adheres to these principles too—explaining only that standing does not exist "where plaintiffs do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is *remotely possible*." 802 F.3d 377, 384 (2d Cir. 2015) (emphasis added) (quotation marks omitted). Here, there is every reason to believe that Plaintiffs will be targets of criminal prosecution because purchasing the magazines in question is "clearly prohibited" under Section 4021, *Cayuga*, 824 F.3d at 331, and the State has certainly not "disavowed any intention" of enforcing the ban, *Hedges*, 724 F.3d at 197; *see also Avitabile v.*

Beach, 277 F. Supp. 3d. 326, 331–32 (N.D.N.Y. 2017) (citing *Cayuga*, 824 F.3d at 331). In these circumstances, Plaintiffs' fear of prosecution for purchasing *the very magazines Section 4021 says they may not purchase* is certainly not "imaginary or speculative." *Knife Rights*, 802 F.3d at 384.

2. Leah Stewart, John Fogarty, and Samuel Frank face a concrete, imminent injury.

The State is also wrong to characterize Plaintiffs' injuries as based on insufficiently concrete "some day intentions" to buy the magazines that Vermont has banned. MTD 17. Vermont's ban injures Plaintiffs by preventing them from purchasing new magazines after October 1, as their existing magazines wear out and need to be replaced. Am. Compl. ¶ 46; SOF ¶¶ 52, 58, 64. Plaintiff Fogarty, for example, has explained that because of the wear and tear magazines endure through ordinary use, he regularly replaces his magazines—for some magazines, on an annual basis. SOF ¶¶ 44, 45. But for the ban, accordingly, it is certain that he would purchase replacement magazines (of a capacity illegal under the new law) after October 1. *Id.* ¶ 52. Indeed, he expects the magazines he uses with several of his firearms to wear out within the next 18 months, at which point he would certainly replace them, but for the ban. *Id.* ¶ 47. Similarly, Plaintiff Frank has historically replaced his magazines at least once each year, as they wear out, and there is no question that but for the ban, he would purchase additional magazines (of a now prohibited capacity) after October 1. *Id.* ¶ 52.

Nonetheless, the State contends that this injury is insufficiently concrete because Plaintiffs cannot identify the precise dates when they will need to purchase replacements. MTD 15. The State also contends that, because Plaintiffs can licitly purchase magazines during a six-month window, they "may not even need" to purchase them ever again. *Id.* at 17. These arguments are flatly contrary to numerous United States Supreme Court cases. In *Babbitt*, for instance, the Supreme Court upheld the standing of Arizona farmworkers who had previously engaged in

consumer publicity campaigns and expressed an intent to "continue to engage in [similar] activities in that State." 442 U.S. at 301. A state statute, however, imposed criminal penalties for "encourag[ing] the ultimate consumer of any agricultural product to refrain from purchasing [the product] . . . by the use of dishonest, untruthful and deceptive publicity." *Id.* (quoting ARIZ. REV. STAT. ANN. §§ 23-1385(B)(8), 23-1392). The *Babbitt* plaintiffs did not intend to "propagate untruths," 442 U.S. at 301, and the Court did not discuss or even identify specific boycott activity in the plaintiffs' future. Nonetheless, the Court found that the statute created a "realistic danger of sustaining a direct injury" and accordingly presented "a case or controversy." *Id.* at 298, 302.

The Supreme Court applied a similar approach to injury in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014). The plaintiffs in *Susan B. Anthony List* were advocacy organizations that had previously been charged with making false statements in contravention of an Ohio statute. When the initial charges were withdrawn, plaintiffs brought both facial and as applied challenges to the statute, noting that they intended to engage in activities that were "substantially similar" to their previous conduct. *Id.* at 2343. Plaintiffs did not tell the Court when they planned to engage in these activities; nor did they detail "concrete plans," MTD 17, for undertaking future advocacy arguably subject to the challenged law. Nonetheless, the Court held that plaintiffs' forward-looking intent was sufficient, when combined with a reasonable threat of the statute's enforcement, to establish Article III standing. *Susan B. Anthony List*, 134 S. Ct. at 2343; *see also Humanitarian Law Project*, 561 U.S. at 15–16 (plaintiffs had standing where they had engaged in newly-prohibited activity in the past and "would [do so] again if the statute's allegedly unconstitutional bar were lifted"); *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (holding that the "likelihood of enforcement" of a rent control ordinance, combined with the "concomitant probability that a landlord's rent will be reduced," was sufficient to constitute a

"realistic danger of sustaining a direct injury.").

Plaintiffs face a "realistic danger" analogous to those in *Babbitt* and *Susan B. Anthony List*. It is true that the ban will not take effect at once; the law allows Plaintiffs to retain their grandfathered magazines in the short term. 13 V.S.A. § 4021(c)(1). But as Plaintiffs have explained, magazines regularly require replacement. SOF ¶¶ 44, 59, 64. Indeed, the *entire operation* of the ban is *predicated* on the assumption that the prohibited magazines will not last forever—else the law would take a generation to have any effect. Accordingly, the Individual Plaintiffs have averred that they desire to *continue* to purchase new magazines *even after* October 1, as their existing magazines wear out. Am. Compl. ¶ 46; SOF ¶¶ 52, 58, 64. These averments are easily as concrete as the allegations that carried the day in *Babbitt* and *Susan B. Anthony List*.

The Supreme Court's decision in *Lujan v. Defenders of Wildlife* is not to the contrary. 504 U.S. 555 (1992). Defendants cite *Lujan* for the proposition that Plaintiffs lack standing because they do not have "concrete plans" that would result in an injury. MTD 17. But the allegations *Lujan* found insufficient were far more tentative and amorphous than the Plaintiffs' here. The plaintiffs there alleged indefinite "hope[s]" and "intentions" to engage in conduct leading to the injury they complained of, but when pressed for details they admitted they "had no current plans." *Lujan*, 504 U.S. at 564. *Lujan* concluded these statements were insufficient, because the plaintiffs had "allege[d] only an injury at some indefinite future time, and the acts necessary to make the injury happen [were] at least partly within the plaintiff[s'] own control." *Id.* at 564 n.2. Here, by contrast, Plaintiffs Stewart, Fogarty, and Frank have explained in detail (1) the types of magazines they wish to purchase and which firearms they wish to use them with, (2) how often they use them, and (3) why and when these magazines will likely need replacement. Indeed, Plaintiff Fogarty has *already* attempted to purchase the banned magazines in anticipation of the ban taking effect, but

has been unable to do so because of the operation of the new law. SOF ¶ 48. These are not "indefinite" " 'some day' intentions." *Lujan*, 504 U.S. at 564 & n.2.

For similar reasons, the lower-court cases Vermont cites are inapplicable here. *See Colorado Outfitters*, 823 F.3d at 550–51; *see also Magaw*, 132 F.3d at 293 (no standing based on conclusory allegations that the plaintiffs " 'wish' or 'intend' to engage in proscribed conduct"); *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996) (insufficient assertion that plaintiffs "wish and intend to engage in activities prohibited by [the challenged law]"). Indeed, in *Colorado Outfitters*, the Tenth Circuit declined to find standing because the plaintiff *did not even assert* that she "intended to acquire a[ ] [prohibited magazine] after July 1, 2013 [when the challenged ban went into effect]." 823 F.3d at 551. These cases have no relevance here.

Nor is the State correct that Plaintiffs' injury "lacks the immediacy necessary to give rise to a justiciable controversy." MTD 18; *see also id.* at 29 n.24 (arguing that "plaintiffs' Article 16 claims are not ripe"). While Plaintiffs may continue to purchase magazines until October 1, Section 4021 *inevitably will prevent* Plaintiffs from purchasing magazines they wish to acquire after that date. The only question is how long after October 1 their existing magazines will last before they wear out—and thus when, precisely, Plaintiffs' injury will occur. Such a question of timing is not a bar to justiciability. "The Supreme Court has long since held that where the enforcement of a statute is certain, a pre-enforcement challenge will not be rejected on ripeness grounds." *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008) (citing *Blanchette v. Connecticut Gen. Ins. Corps.*, 419 U.S. 102, 143 (1974)). Indeed, "even when the direct application of a statute is open to a charge of remoteness by reason of a lengthy, built-in time delay before the statute takes effect, ripeness may be found as long as the statute's operation

is inevitable (or nearly so)." *Riva v. Massachusetts*, 61 F.3d 1003, 1010 (1st Cir. 1995); *see also Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 329–34 (1999); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985).

C. VSRPA and VTFSC have standing.

Finally, the two Associational Plaintiffs—VSRPA and VTFSC—also have standing. The United States Supreme Court has recognized two separate ways in which an entity may have standing to sue. First, "an association may have standing in its own right to seek judicial relief from injury to itself," if it can satisfy the ordinary components of the standing analysis—so-called *organizational standing*. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Second, an association may have "standing solely as the representative of its members"—or *associational standing*—if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 342, 343 (1977).

Here, VSRPA and VTFSC have "organizational standing" on account of the direct economic injuries that Vermont's ban inflicts on them. And they also independently have "associational standing": (i) because they may vicariously assert the rights of their individual members (or members' members) who wish to purchase magazines; and (ii) in the case of VTFSC, because its member clubs have suffered direct economic injury.

1. VSRPA and VTFSC have organizational standing due to a direct economic injury.

Anticipated economic injury can provide standing in a pre-enforcement challenge to a criminal statute if there is a "substantial probability," *Zinke*, 854 F.3d at 5, that the plaintiff will lose "even a small amount of money," *Czyzewski*, 137 S. Ct. at 983. *See supra* Section I.A.1 The

injury VSRPA and VTFSC face clearly meets these criteria. Plaintiffs regularly hold events that involve or even require the use of magazines with a capacity above the legal limit. Am. Compl. ¶¶ 34, 43; SOF ¶¶ 4, 23. Vermont's ban, however, will decrease the number of such magazines in the State, Am. Compl. ¶¶ 33, 43; *supra* Section I.B.2, and there is at least a "substantial probability" that attendance at and participation in these events will go down as a result, Am. Compl. ¶¶ 34, 43; SOF ¶¶ 8, 24. Moreover, many people travel from other States to participate in some of these events, and starting on July 1, 2019, these out-of-state participants will no longer be able to bring their 11-plus and 16-plus-round magazines with them to the events, further curtailing attendance. SOF ¶¶ 10, 24. Because revenue generated by these events comprises a significant share of Plaintiffs' respective incomes, Plaintiffs are thus likely to experience at least a "small amount" of economic loss. Am. Compl. ¶¶ 34, 43; SOF ¶¶ 11, 25.

Vermont contests this conclusion, arguing that the Associations' fears of loss of income are based on a "speculative chain of possibilities." MTD 24. Not so. The first link in the chain—that the ban will cause the number of prohibited magazines possessed in the state to dwindle, MTD 25—is hardly "speculative"; it is *the very design and function of the ban.* And there is plainly a "substantial probability" that the growing inability to use these magazines will lead to a loss of participation in events *that require the use of these magazines. See* SOF ¶¶ 11, 24. Finally, VTFSC and VSRPA's claims that this declining participation will affect their bottom line are not speculative, either—after all, the organizations *charge for these events*, so if the number of people who sign up for them goes down, so will VTFSC's and VSRPA's revenue.[2]

[2] The State also argues that VTFSC and VSRPA do not have standing based on "Section 4021's alleged 'direct affront' to [their] purposes." MTD 23. But we do not claim to have standing on this basis; our allegations and affidavit testimony about these associations' purposes go to their associational standing under the *Hunt* test, *see infra* Part I.C.2.iii, not their standing to sue in their

2. VSRPA and VTFSC have associational standing on account of their members' injuries.

Both Associations also have associational standing to vindicate the injuries suffered by their members (or members' members).

i. The members of VSRPA suffer from the same kind of concrete, imminent injury as Ms. Stewart, Mr. Fogarty, and Mr. Frank, and they thus would have standing to sue in their own right for the reasons described above. *See supra* Section I.B. Indeed, Mr. Fogarty is one of VSRPA's members. Am. Compl. ¶ 16; SOF ¶ 26.[3]

On a similar basis, VTFSC can vindicate the rights of individuals who are members of its member groups. The United States Supreme Court has squarely held that associations can have standing to represent member associations that themselves have associational standing. *See New York State Club Ass'n v. City of New York*, 487 U.S. 1, 9–10 (1988). For the same reasons that VSRPA's members—and the Individual Plaintiffs—have standing, so do the individuals who are members of VTFSC's member clubs. Am. Compl. ¶ 12; SOF ¶ 16. Indeed, Individual Plaintiff Frank is one of those members. SOF ¶ 54.

To escape this conclusion, the State invents a pleading defect, arguing that VSRPA and VTFSC must identify specific members in the Complaint to have associational standing. MTD 14. But because a plaintiff's burden to establish standing "increases over the course of litigation," *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011), the Second Circuit has held that at the

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own right. For the same reason, Vermont's argument—in a footnote—that the associations are outside the "zone of interests" of Article 16, MTD 28 n.23, is also irrelevant.

[3] As alleged in the Amended Complaint, the Associational Plaintiffs also have members who currently do not have any of the banned magazines but who would like to purchase them after October 1, Am. Compl. ¶¶ 36, 40—for example, members who are currently underage but will turn 18 (or 21, in the case of handgun magazines) after October 1. These individuals plainly have standing to challenge the ban, and that suffices to defeat the State's motion to dismiss.

motion-to-dismiss stage, an association *need not* " 'name names' in a complaint in order to properly allege injury in fact to its members." *Building & Constr. Trades Council v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006). Defendants' motion to dismiss on this basis thus fails as a matter of law.

In any event, as the State is forced to concede, VSRPA *has* identified one of its members: John Fogarty, one of the Individual Plaintiffs. Am. Compl. ¶ 16. VSRPA has thus satisfied the requirement invented by Vermont. Moreover, in the affidavits submitted in support of Plaintiffs' cross-motion, VTFSC has also identified two members (of its member clubs) who are injured by the ban—Plaintiff Frank and Affiant Scott Chapman—mooting the State's argument as to that Associational Plaintiff as well. SOF ¶¶ 20, 58.

ii. VTFSC also has associational standing based on the injury suffered directly by its member clubs. It is well established that groups can invoke associational standing to represent member businesses or entities. *See, e.g., Ohio Ass'n of Indep. Schs. v. Goff*, 92 F.3d 419, 422 (6th Cir. 1996) (association of schools had standing to represent "member schools [who] clearly have standing in their own right"); *Hospital Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83, 86 (3d Cir. 1991); *see also New York State Club Association*, 487 U.S. at 9–10. Here, VTFSC's member clubs—like VSRPA and VTFSC itself—charge for participation in a wide variety of events involving magazines now above Vermont's legal limit, including competitions and shooting matches. Am. Compl. ¶ 33; SOF ¶¶ 4, 23. Because the ban decreases the number of eligible participants for these events, it is likely to cost the clubs at least "a small amount of money." *See supra* Section I.C.1. Under the case law, VTFSC may sue to vindicate this injury.

iii. Finally, VSRPA and VTFSC also satisfy *Hunt*'s germaneness and typicality requirements. See *Parker v. Town of Milton*, 169 Vt. 74, 78 (1998). Protecting the right to purchase

the prohibited magazines is germane to VSRPA's purpose because the group's animating mission is actively advancing competitive shooting in Vermont and because it holds events involving such magazines. Am. Compl. ¶¶ 13, 43; SOF ¶ 21. Similarly, the ban affects the organizing principles of VTFSC: promoting hunting, fishing, trapping, and competitive shooting, and educating the public and petitioning the government on these and related issues. Am. Compl. ¶ 12; SOF ¶ 1. Moreover, Plaintiffs' request for injunctive relief does not require the participation of individual members in the action. *See United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996) (noting that individual participation "is not normally necessary when an association seeks prospective or injunctive relief for its members"). For these reasons, both of these Plaintiffs have associational standing.

* * * * *

Multiple Plaintiffs before this Court have established constitutional standing to challenge Vermont's magazine ban. Because a single plaintiff with standing is sufficient to ensure jurisdiction, the Court should grant Plaintiffs summary judgment on the standing issue and reach the merits of their constitutional challenge. And even if the Court doubts that the Plaintiffs have established standing for purposes of summary judgment, it should nonetheless deny the State's motion to dismiss. The Supreme Court has emphasized that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to show standing. *Lujan*, 504 U.S. at 561 (1992). Plaintiffs have cleared this bar in multiple ways, so dismissal would be improper.

II. Vermont's magazine ban violates Article 16 of the Vermont Constitution.

Article 16 of Vermont's Constitution provides "[t]hat the people have a right to bear arms for the defence of themselves and the State." VT. CONST. art. 16. Because 13 V.S.A. § 4021 flatly prohibits the people of Vermont from purchasing, selling, bearing, or even possessing common

firearm magazines in their homes, it "is inconsistent with and repugnant to the Constitution . . . and it is therefore to that extent, void." *State v. Rosenthal*, 75 Vt. 295, 295 (1903).

The Vermont Courts have considered only a small number of constitutional challenges under Article 16, and they have not set out a systematic analytical framework governing such challenges. Most courts that have considered challenges under the federal Second Amendment, however, have proceeded in two steps: determining *first* whether the challenged law burdens conduct that falls within the scope of the constitutional guarantee, and *second*, if so, whether the challenged restriction passes constitutional muster under whatever form of scrutiny or analysis is appropriate. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 701–03 (7th Cir. 2011); *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1118 (S.D. Cal. 2017), *aff'd*, 2018 WL 3433828 (9th Cir. July 17, 2018). We apply a similar two-step framework here—showing first that the common magazines banned by Section 4021 are squarely protected by Article 16, and second that Vermont's flat ban on these magazines is unconstitutional by any measure.

A. The magazines banned by Section 4021 are protected by Article 16.

1. The "arms" protected by Article 16 include the common ammunition magazines banned by Vermont.

When interpreting a provision of the Vermont Constitution, the courts of this State "first look to the plain meaning of the constitutional language in question." *Turner v. Shumlin*, 2017 VT 2, ¶ 25, 204 Ct. 78, 95, 163 A.3d 1173, 1183 (brackets omitted). Where, as here, the relevant constitutional provision was adopted long ago, this inquiry into the plain meaning of the text must focus on the meaning of the constitutional language in "its historical context," *id.*—that is, the meaning borne by the constitution's text *when it was adopted. See State v. Kirchoff*, 156 Vt. 1, 4–5, 587 A.2d 988, 991 (1991) (examining historical source to determine ordinary meaning "at the time the Vermont Constitution was adopted"); *see also District of Columbia v. Heller*, 554 U.S.

570, 576–77 (2008); *Ezell*, 651 F.3d at 701 (analysis of Second Amendment's scope "requires a textual and historical inquiry into original meaning"). In this case, whether Section 4021 restricts conduct protected by Article 16 depends upon the meaning of a single word: "arms." For if the "arms" that Article 16 guarantees "the people . . . a right to bear" include the magazines banned by the challenged law, then the Court's inquiry into whether the ban restricts conduct protected by Article 16 is at an end.

In *Heller*, in the course of interpreting the right "to keep and bear arms" protected by the federal Second Amendment, the Supreme Court considered at length the meaning of the word "arms" when that provision was adopted in 1791. Although Article 16 was originally adopted a little over a decade before the Second Amendment, in 1777, the two provisions are contemporaries, and the Supreme Court's analysis of the same term in the Second Amendment is thus highly probative. Based on numerous dictionaries from the period, the *Heller* Court determined that "[t]he 18th-century meaning" of the term "arms" "is no different from the meaning today": then, as now, the term "arms" extends to all "weapons of offense" and instruments "that a man wears for his defence" that are "in common use at the time." *Heller*, 554 U.S. at 581, 627 (brackets omitted).

Samuel Johnson's influential dictionary, for instance, defined the term—only four years before Vermont's Constitution was adopted—as "Weapons of offence, or armour of defence." *Arms*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1773), SOF ¶ 72. The first edition of Webster's Dictionary similarly defined "arms" as "Weapons of offense, or armor for defense and protection of the body," noting further that "In *law*, arms are any thing which a man takes in his hand in anger, to strike or assault another." *Arms*, 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828), SOF ¶ 85. Legal dictionaries from the era provide similar definitions of the term. For example, Timothy Cunningham's

"important" law dictionary, *Heller*, 554 U.S. at 581, defined the word as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Arms*, 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (1764), SOF ¶ 88.

Of course, when the delegates met in Windsor in 1777 to frame a constitution for Vermont, bearing arms was not an abstract concept or an entry in a dictionary. "Keeping and bearing arms was not only an abstract right, but also a constant practice of Vermont's founding fathers." Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255, 288 (1985), SOF ¶ 65. For decades, the Green Mountain Boys had been successfully bearing arms in defense of their families and their lands from the efforts of New York land speculators to colonize the territory and evict them from it. *See* SOF ¶¶ 68–69; *infra*, pp. 45–49. Indeed, starting in 1779 nearly all adult males were automatically enrolled in the militia, expected to train at least twice a year, and required to muster for service *equipped with private arms and ammunition suitable for service*. SOF ¶ 75; *infra*, p. 48. By a 1792 Statute, that included the requirement that each militia member "provide himself with . . . a box . . . to contain not less than twenty-four cartridges." SOF ¶ 75. There is no reason to think that the understanding of the term "arms" in Vermont in 1777 was in any way narrower from the standard definition that prevailed throughout the rest of the country. When Ira Allen and the other delegates protected the people's "right to bear arms for the defense of themselves and the State," they likely had in mind the ordinary muskets, firelocks, bullets, and powder that their compatriots were at that very moment bearing in defense of themselves and their State against General Burgoyne. SOF ¶ 75; *infra*, p. 47.

By its text and historical context, then, Article 16 presumptively protects "all kinds of weapons," *Arms*, JAMES BARCLAY, COMPLETE AND UNIVERSAL ENGLISH DICTIONARY (1792), SOF

¶ 87, and "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 1 CUNNINGHAM, *supra*. That plainly encompasses the common magazines that Vermont has now banned. "[M]agazines and the rounds they contain are used to strike at another and inflict damage," *Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016), *on reh'g en banc*, 849 F.3d 114 (4th Cir. 2017), and they thus fall within the plain meaning of the term "arms." Moreover, as the federal courts have repeatedly held, the right to bear arms must protect magazines to the same extent as the firearms equipped with them, since "without bullets, the right to bear arms would be meaningless. A regulation eliminating a person's ability to obtain or use ammunition could thereby make it impossible to use firearms for their core purpose." *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014); *see also Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring); *Duncan*, 265 F. Supp. 3d at 1116–17; *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1276 (N.D. Cal. 2014).

2. The banned magazines are commonly used for lawful purposes.

Of course, like the federal Second Amendment, the right guaranteed by Article 16 likely does not protect the "right to keep and carry any weapon whatsoever." *Heller*, 554 U.S. at 626. As the Supreme Court explained in *Heller*, the right to keep and bear arms developed alongside a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " *Id.* at 627; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49 (going armed "with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land"); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135 (1716) (same); 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 79 (1804) (same). Accordingly, *Heller* interpreted the Second Amendment as protecting only those "arms in common use at the time for lawful purposes like self-defense," as opposed to "dangerous and unusual weapons." 554 U.S. at 624, 627 (quotation marks omitted). But even assuming that a similar limit cabins the scope of

Article 16, that is not enough to rescue Vermont's magazine ban.

The State does not dispute that the banned magazines are in common use for lawful purposes; and in any event, showing that these magazines are uncommon would be a hopeless task. These magazines are legal to own in 42 out of 50 states, setting aside the challenged law, SOF ¶ 95, and they are in fact owned by law-abiding citizens by the tens of millions. While there is no direct data available on the number of over-10-round and over-15-round long-gun and handgun magazines owned nationwide, according to a 1994 study, there were about 25 million magazines in private hands at the time that were either (1) long-gun magazines with a capacity of 10 or greater, or (2) handgun magazines with a capacity of 16 or greater. SOF ¶ 91. Extrapolating based on more-recent estimates of the total firearm stock, there are likely well over 50 million magazines in these capacities owned by law-abiding citizens today—including approximately 40 million long-gun magazines with a capacity of 10 or more (12 million of which are typically equipped with 16-plus-round magazines) and about 10 million 16-plus-round handgun magazines. SOF ¶ 93. Indeed, these estimates likely significantly understate the total number of these magazines nationwide, given that they (1) do not factor in the increasing popularity of semiautomatic pistols (which frequently come equipped with magazines capable of holding in excess of 15 rounds) versus revolvers (which do not use detachable magazines), (2) do not factor in the increasing popularity of modern sporting rifles such as the ArmaLite Rifle-15 ("AR-15"), which typically come standard with magazines in excess of 10 rounds, and (3) do not account for the fact that many gun-owners purchase *multiple* magazines, on an aftermarket basis, for each of their firearms. SOF ¶ 94.

No wonder that court after court has determined that "[e]ven accepting the most conservative estimates cited by the parties and by amici, . . . magazines [capable of holding more

than 10 rounds] are 'in common use.' " *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015); *see also Kolbe*, 813 F.3d at 174 ("[T]he record in this case shows unequivocally that [magazines holding more than 10 rounds] are commonly kept by American citizens . . . . [T]hese magazines are so common that they are standard."); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("There may well be some capacity above which magazines are not in common use but . . . that capacity surely is not ten."); *Duncan*, 265 F. Supp. 3d at 1118 ("Lawful in at least 43 states and under federal law, these magazines number in the millions.").

The ubiquity of these magazines can also be inferred from the popularity of firearms that are designed for and sold equipped with magazines in these capacities. For instance, even prior to 1995 "[a]pproximately 40 percent of the semiautomatic handgun models and a majority of the semiautomatic rifle models being manufactured and advertised prior to the ban were sold with [higher-than-ten round magazines] or had a variation that was sold with [them]." CHRISTOPHER S. KOPER, ET AL., AN UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN 6 (2004); SOF ¶ 96.

In the decades since, the popularity of these types of firearms has only increased. Nearly *two-thirds* of the distinct models of semiautomatic centerfire rifles listed in the 2018 edition of Gun Digest are normally sold with standard magazines that hold more than 10 rounds of ammunition. SOF ¶ 97. That includes the AR-15—first developed nearly 60 years ago, it is the most popular rifle in the nation, accounting for 60% of all civilian rifle sales and about 25% of *all* firearms sold—which comes standard with 20- or 30- round magazines. SOF ¶ 98, 99. The handgun magazines banned by Vermont are no different. In the 2018 Gun Digest, the standard-issue magazines for the most popular and most commonly owned semiautomatic handguns hold

more than 15 rounds. SOF ¶ 101. Those include many of the pistols manufactured by Glock—which are "hugely popular for . . . home and personal defense" and "dominate[ ] [the] market." SOF ¶ 102.

There is no reason to think that these magazines—owned by the tens or hundreds of millions nationwide—are any less common in Vermont. Indeed, levels of firearm ownership in the State are well above the national average. SOF ¶ 80. The prevalence of the magazines in Vermont is confirmed by the affidavit testimony of several of the Plaintiffs. According to Plaintiff Powderhorn, for example, sales of the now-banned magazines accounted for 78% of its revenue from sales of all magazines in the three most recent months; and they represented 57% of magazine sales in all of 2017. SOF ¶ 30, 32. And as VSRPA, VTFSC, and VTFSC's member clubs have all attested, sport-shooting events involving greater-than-ten-round long-gun magazines and greater-than-15-round handgun magazines are immensely popular. SOF ¶¶ 4, 6, 24.

The State's Amici, the Giffords Law Center to Prevent Gun Violence and two other gun-control advocacy groups, argue that even if these magazines are in common use, they are not "typically employed for, well suited to, or necessary for" self-defense. Amicus Brief of Giffords Law Center, et al. at 22 (July 24, 2018) ("Gun-Control Organizations' Amicus"). Wrong on all three scores. According to survey data, the two most important reasons given by individuals for owning an AR-15 or similar semi-automatic rifle—which come standard, and are overwhelmingly used, with 20- or 30-round magazines—are recreational shooting and *home defense*. SOF ¶ 111. Moreover, a 2017 Pew study found that 67% of gun owners cited "protection" as the major reason they owned a gun—providing further, if indirect, evidence of how these ubiquitous magazines are used. SOF ¶ 112. And again and again, Plaintiffs have explained that they wish to purchase the banned magazines for self-protection and home-defense. SOF ¶¶ 18, 52, 58.

The popularity of these magazines for self-defense purposes can come as no surprise. Using a magazine that holds more than a few rounds reduces the risk of running out of ammunition in the midst of defending against home-invaders—who may work in teams, may carry multiple firearms or multiple magazines, or may be using banned magazines they have obtained illegally. *See* SOF ¶ 117 (in 2008, 17.4% of all violent crimes involved multiple offenders); *id.* ¶ 127 (only 16% of criminals surveyed obtained firearms through conventional retail sources). After all, while criminals choose when and where to attempt a crime and can ensure that they are equipped with whatever weapons they deem necessary, it is implausible to expect law-abiding citizens to have multiple firearms available at all times in the event they are attacked. Indeed, by granting current and retired law-enforcement officers the right to continue using the banned standard-capacity magazines, Vermont has tacitly *recognized* that law-abiding citizens will often need to resort to more than the now-permissible number of rounds. 13 V.S.A. § 4021(d)(1)(B), (D).

Amici insist that they know better than Plaintiffs and the millions of other Americans who have chosen to purchase and keep these magazines in their homes for protection, and that they have determined Vermonters should be able to "adequately defend themselves using 10-round magazines." Gun-Control Organizations' Amicus 21; *see also* MTD 48. That is not how constitutional rights operate. The freedom of speech would not allow the Government to ban political speech online based on the theory that citizens may "adequately" communicate their political views in print. And in like manner, surely the promise of Article 16 is that Vermonters may decide *for themselves* which arms in common use are best suited to self-defense, rather than being confined to arms that the Government—much less a group of anti-gun advocacy organizations—has deemed "adequate." *Cf. Heller*, 554 U.S. at 628–29 (rejecting argument "that it is permissible to ban the possession of handguns so long as the possession of other firearms

(*i.e.*, long guns) is allowed" because "handguns are the most popular weapon chosen by Americans for self-defense in the home").

Finally, Amici argue that the banned magazines are outside the scope of Article 16 because they are "most useful in military service." Gun-Control Organizations' Amicus 19; *see also* MTD 52. That supposed exception to the right to bear arms appears nowhere in Article 16; instead, it is derived from a (deeply mistaken) reading of dicta from *Heller*'s interpretation of the federal Second Amendment. The notion that firearms "useful in military service" are unprotected by the Second Amendment is flawed even as a matter of federal constitutional law, since the language from *Heller* the argument relies on did not recognize a free-standing exception to the scope of the Second Amendment; rather, it was part of the Supreme Court's explanation of why its interpretation of the right to bear arms—as protecting firearms "in common use"—was not inconsistent with the Second Amendment's reference to the militia.

Even if Amici's tortured interpretation of *Heller* could be accepted in the context of the federal Constitution, they provide no persuasive reason for importing their artificial "useful in military service" exception into *Vermont*'s Constitution. Such a limit is flatly contrary to Article 16's text, history, and purpose. The plain text of the provision protects Vermonters' "right to bear arms for the defence of themselves *and the State*." VT. CONST. art. 16 (emphasis added). Concluding that firearms useful in military service are unprotected would effectively *strike out* the final phrase of the provision. Moreover, the citizens who served in Vermont's militia—including the Green Mountain Boys, who bore arms in "defense of . . . the State" on a voluntary basis and were only paid by Congress *after* their victory at Fort Ticonderoga—were required to *equip themselves* with private arms and ammunition *suitable for military service*. SOF ¶¶ 71. Ethan and Ira Allan would find strange indeed Amici's suggestion that the very firearms and ammunition the

law required citizens to bring with them into militia service were unprotected *because they were useful in militia service*. Indeed, Amici's exception would *gut* the right to bear arms in self-defense no less than the right to bear them in the militia; after all, "nearly all firearms can be useful in military service." *Kolbe*, 849 F.3d at 157 (Traxler, J., dissenting).

3. There is no longstanding tradition of banning the standard-capacity magazines in question.

Under *Heller*'s interpretation of the federal Second Amendment, certain restrictions on the right to keep and bear arms that are "longstanding" are "presumptively lawful." 554 U.S. at 626–27 & n.26. But again, even assuming that a similar limit applies to Article 16, it has no application here, since bans of the kind Vermont has enacted are not longstanding or supported by any historical tradition. And again, the federal courts have repeatedly rejected the argument—in the context of the Second Amendment—that restrictions on magazine capacity are longstanding, presumptively lawful measures. *See New York State Rifle & Pistol Association*, 804 F.3d at 257 n.73; *Heller II*, 670 F.3d at 1260; *Duncan*, 265 F. Supp. 3d at 1119.

The Government's Amici state that magazines capable of holding more than 10 or 15 rounds "are a relatively recent invention," Gun-Control Organizations' Amicus 21, but that is false. As early as 1580, a firearm had been developed that was capable of firing sixteen rounds; and a rifle with a twenty-two-round magazine was in common use by the end of the 18th century—indeed, Meriwether Lewis carried one on the Lewis and Clark expedition. SOF ¶¶ 103, 104. Over the next several decades, firearms and magazines holding more than 10 rounds became increasingly popular. For instance, a lever-action rifle fed by a 30-round magazine was in production by 1855; and the immensely popular Henry and Winchester repeating rifles—fed by multi-round tubular magazines generally holding between ten and seventeen rounds, depending on the model—sold by the hundreds of thousands during the second half of the nineteenth century.

SOF ¶ 105. And many of these firearms were manufactured *in Windsor, Vermont*. SOF ¶ 106. Yet through all this period, the sale and possession of these so-called "large capacity" firearms and magazines were entirely unrestricted. There were no laws restricting ammunition capacity when Article 16 was adopted in 1777, and that remained the case through all of the nineteenth century and the first quarter of the twentieth—even as firearms capable of firing more than 15 rounds proliferated. SOF ¶¶ 105, 107. Indeed, until the challenged ban Vermont has *never* imposed any restrictions on magazine capacity; whatever the traditions in other States are, there is certainly no longstanding tradition in *Vermont* that would place Section 4021 outside of Article 16's protections.

B. Vermont's ban is categorically unconstitutional under Article 16.

Because Section 4021 is a blanket ban on the sale, purchase, or possession of arms protected by Article 16, it is categorically unconstitutional. The State resists this conclusion, arguing instead for either the "intermediate scrutiny" that has been adopted in the Second Amendment context by some federal courts or a weak-tea "reasonableness" review. But those approaches cannot be squared with Article 16's text and history, with the Supreme Court case law enforcing it, or with Vermont's broader constitutional jurisprudence and traditions.

1. As shown above, Article 16 protects Vermont citizens' "right to bear" the 11-plus- and 16-plus-round magazines in question "for the defence of themselves and the State." Because Section 4021 flatly bans the acquisition and possession of these magazines by anyone (including law-abiding citizens), at any place or time (including in the home), and for any purpose (including self-defense), it is directly at odds with Article 16's guarantee, and it cannot stand under any form of scrutiny or analysis that could conceivably apply. If the Government enacted a law flatly forbidding all Catholics in the State from attending worship, such a law would plainly be invalid categorically, as directly contrary to the freedom of religion, no matter what kind of rationale the

Government offered for the ban. VT. CONST. art. 3. If the Government enacted a law banning Vermont citizens from voting for any candidate affiliated with the socialist party, such a law would plainly be struck down as unconstitutional *per se*, for directly repudiating the right to free elections. VT. CONST. art. 8. Vermont's law flatly forbidding the possession of protected arms for self-defense is no less a frontal assault on the core right protected by Article 16.

This is clear from the Vermont Supreme Court's decision in *Rosenthal*, 75 Vt. 295. That case dealt with a Rutland ordinance forbidding anyone from "carry[ing] any weapon concealed on his person, without permission of the mayor or chief of police." *Id.* at 295. Rosenthal was convicted under this law for carrying "a pistol loaded with powder and bullets, concealed on his person," and he defended by challenging that the ordinance, "is repugnant to and inconsistent with the Constitution and the laws of this state." *Id.* The Supreme Court agreed. Under Article 16, the court noted, "[t]he people of the state have a right to bear arms for the defense of themselves and the state;" and while State law regulated that right in certain ways—for example, by making it a crime to carry arms "with the intent or avowed purpose of injuring a fellow man"—as a general matter a law-abiding citizen "is at liberty . . . to carry such weapons" either "openly or concealed." *Id.* Because the challenged ordinance banned the carrying of a pistol "in any circumstances, [and] for any purpose," the court held that the ordinance "is inconsistent with and repugnant to the Constitution . . . of the state, and it is therefore to that extent, void." *Id.* The court did not ask whether the law was "reasonable," nor did it entertain any argument from the State that the ban on concealed carrying was justified by the State's interest in preventing crime and promoting public safety. No, because the ordinance was "inconsistent with and repugnant to the Constitution" the Supreme Court declared it "void" categorically, without any further analysis. *Id.*

The Vermont courts have taken a similar, categorical approach in the context of other

constitutional rights. For instance, when a program giving public funds to religious organizations is challenged under Article 3's demand that "no person ought to, or of right can be compelled to . . . erect or support any place of worship," VT. CONST. art. 3, the Supreme Court has held that "the critical question is whether the funds will support worship." *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 30, 178 A.3d 313, 323. If so, the program is unconstitutional, period—without any inquiry into whether the funding of worship is "reasonable." *See Chittenden Town Sch. Dist. v. Department of Educ.*, 169 Vt. 310, 343, 738 A.2d 539, 562 (1999). Likewise, while Article 2's requirement that "whenever any person's property is taken for the use of the public, the owner ought to receive an equivalent in money," VT. CONST. art. 2, is "not absolute," the limitations on the right are ones of scope, not "reasonableness": where "the State seeks to sustain regulation that deprives land of all economically beneficial use, it may refuse to compensate a property owner only if the regulation prohibits a use of the land that was not part of his title to begin with." *Alger v. Department of Labor & Indus.*, 2006 VT 115, ¶ 31, 181 Vt. 309, 325, 917 A.2d 508, 520 (quotation marks omitted). And the constitutional jury right, too, is largely enforced with categorical rules. *Compare also Vermont Supreme Court Admin. Directive No. 17 v. Vermont Supreme Court*, 154 Vt. 392, 399–402, 579 A.2d 1036, 1040–41 (1990), *and State v. Mercier*, 98 Vt. 368, 368, 127 A. 715, 716 (1925) (right to jury is subject to "reasonable laws regulating the mode in which the right shall be enjoyed"), *with Hodgdon v. Mt. Mansfield Co.*, 160 Vt. 150, 155, 624 A.2d 1122, 1125 (1992) (making clear that nonetheless the Constitution "guarantees a right to jury trial to the extent that it existed at common law at the time of the adoption of the constitution in 1793"), *and State v. Irving Oil Corp.*, 2008 VT 42, ¶¶ 6–7, 183 Vt. 386, 391–92, 955 A.2d 1098, 1101–02 (right depends on whether "the nature of the action" is "legal or equitable in nature").

The use of a categorical approach to enforce Article 16's protections is also supported by

the United States Supreme Court's decisions in *Heller*, *McDonald*, and *Caetano*. In *Heller*, the Supreme Court struck down the District of Columbia's ban on possessing handguns, even in the home, as categorically inconsistent with the federal Second Amendment right and thus unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." 554 U.S. at 628. The Court rejected the argument that "the possession of other firearms (*i.e.*, long guns) is allowed," concluding that D.C.'s law nonetheless "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for [self-defense]." *Id.* at 628, 629. And the Court likewise refused the plea—advanced by the District and by Justice Breyer in dissent—to apply an "interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests," reasoning:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. . . . We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. . . . The Second Amendment is no different. . . .

Id. at 634–35 (quotation marks omitted).

The Supreme Court's two subsequent encounters with the Second Amendment adopt a similar, categorical analysis. In *McDonald*, the Supreme Court described *Heller*'s holding as a simple syllogism: having "found that [the Second Amendment] right applies to handguns," the Court "concluded" that "citizens must be permitted to use handguns for the core lawful purpose of self-defense." *McDonald v. City of Chicago*, 561 U.S. 742, 767–68 (2010) (quotation marks and brackets omitted). Then, in *Caetano*, the Court summarily and unanimously reversed a decision of the Massachusetts Supreme Judicial Court that had departed from this approach in upholding a

ban on stun guns. *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1030–33 (2016). The Massachusetts court got the message: "Having received guidance from the Supreme Court in *Caetano II*, we now conclude that stun guns are 'arms' within the protection of the Second Amendment. Therefore, under the Second Amendment, the possession of stun guns may be regulated, but not absolutely banned." *Ramirez v. Commonwealth*, 94 N.E.3d 809, 815 (Mass. 2018); *see also Wrenn v. District of Columbia*, 864 F.3d 650, 665 (D.C. Cir. 2017) (striking restriction on public carry down as categorically unconstitutional); *see also Moore v. Madigan*, 702 F.3d 933, 942 (2012) (same); *Young v. Hawaii*, 896 F.3d 1044, 1070–71 (9th Cir. 2018) (same).

So too here. Section 4021 is an outright ban on possessing common, constitutionally protected arms—even in the home, and even for the core, textually enumerated purpose of self-defense. It thus flatly prohibits *anyone* from engaging in the very conduct Article 16's guarantee protects. To uphold such a law is, in effect, no different from amending the Constitution to *remove* the Article 16 right. The courts have no such power, and the legislature may only amend the Constitution pursuant to the procedures set forth in Chapter 2, § 72.

2. Rather than applying the analysis adopted by the Supreme Court in *Rosenthal*, the State asks this Court to weigh Section 4021's constitutionality under the "intermediate scrutiny" standard employed by some lower federal courts in the Second Amendment context, which asks whether a challenged law is "substantially related to the achievement of an important government interest." MTD 53. This Court should decline the invitation.

This Court is bound to reject Defendants' proposed "intermediate scrutiny" analysis at the threshold, because that approach is inconsistent with the Supreme Court's decision in *Rosenthal*. There, as discussed above, the court struck down a ban on the unlicensed carrying of concealed firearms as unconstitutional *per se*, without engaging in *any analysis* of whether the ban was

related to an important State interest. There is simply no suggestion in the Court's opinion that the Ordinance there would have been any less "inconsistent with and repugnant to the Constitution" had the Government come forward with evidence of its necessity as a crime-prevention measure; nor did the Court confine itself to asking whether there was a "reasonable fit" between the ban and the Government's interest in public safety. *Compare* MTD 53–55, *with Rosenthal*, 75 Vt. at 295.

That is not because such interest-balancing arguments had not been thought of. To the contrary, while carrying firearms openly was generally freely allowed in the late nineteenth and early twentieth centuries, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues," *Heller*, 554 U.S. at 626, based on the theory that restricting concealed carrying (so long as open carry was permitted) was "absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons," *State v. Chandler*, 5 La. Ann. 489, 489–90 (1850); *see also, e.g.*, *State v. Reid*, 1 Ala. 612, 617 (1840) (upholding concealed carry ban as "intended merely to promote personal security, and to put down lawless aggression and violence"). And the Government pressed precisely these arguments in *Rosenthal*, urging that "[i]n cities, it is quite apparent, there is a necessity of regulating the use and carrying of dangerous weapons, more especially concealed ones," and that the challenged ban was "reasonable, not oppressive and is for the well-being of the city." Plaintiff's Brief at 3, *State v. Rosenthal* (May 1903), SOF ¶ 77. Indeed, the Government emphasized that the ordinance left open the option of openly carrying a firearm, and even allowed concealed carry with government permission. *Id.* at 2. The Vermont Supreme Court's decision not to uphold the ban based on this line of reasoning was thus a conscious rejection of the very type of interest-balancing approach advocated by the State today.

The State suggests that the Supreme Court's later decision in *State v. Duranleau*, 128 Vt. 206, 260 A.2d 383 (1969), supports an interest-balancing inquiry, but that is not so. In *Duranleau*, the court considered a fish-and-game law making it unlawful "to carry a loaded rifle or shotgun in a vehicle on a public highway without a special permit." *Id.* at 207. The court held that this law did not violate Article 16, reasoning that although it "somewhat conditions the unrestrained carrying and operation of firearms, . . . [t]o require that two particular kinds of weapons, at certain specific places and under limited circumstances, be carried unloaded rather than loaded, is not such an infringement on the constitutional right to bear arms as to make the statute invalid." *Id.* at 210. The marginal restriction at issue in *Duranleau* was nothing like the ban on concealed carrying at issue in *Rosenthal*, and it is incomparable to the magazine ban in this case, which affects the possession of popular ammunition magazines in all places and under all circumstances. *Duranleau* contains nothing that can be read as repudiating the categorical analysis adopted in *Rosenthal* for such broad bans.

The State disagrees, contending *Duranleau* holds that the Article 16 right "may be restricted if 'the statutory purpose is reasonable.' " MTD 47 (quoting *Duranleau*, 128 Vt. at 210). It has badly misread the case. *Duranleau* looked to whether "the statutory purpose [was] reasonable" *only after* concluding that the restriction was so insignificant that it did not impermissibly infringe the right to bear arms. 128 Vt. at 210. Determining that "the statutory purpose [was] reasonable," *id.*, was thus a *necessary* condition for the law's constitutionality: even though the impingement on the right to bear arms was marginal, if its purpose was not reasonable, the court indicated it would have struck the law down. *See id.* ("This conclusion [i.e., that the restriction was merely marginal] *is conditioned upon* the presumption that the statutory purpose is reasonable . . . ." (emphasis added)). Contrary to Vermont's argument, *Duranleau* does *not* suggest

that the law's "reasonableness" was *sufficient* to uphold it—that is, it *did not* say that even if the law *was* a significant "infringement on the constitutional right to bear arms," *id.*, it would nonetheless be constitutional "if the statutory purpose is reasonable," MTD 47 (quotation marks omitted). The State is wrong to read *Duranleau* as adopting an interest-balancing inquiry.

Moreover, even setting the Vermont Supreme Court's case law to the side, this Court should decline to rely on the federal lower-court decisions adopting intermediate scrutiny for independent reasons. As an initial matter, as shown above, the Supreme Court's decision in *Heller* plainly requires the categorical approach we have advocated and *specifically rejects* the interest-balancing test proposed by Vermont. *See Heller*, 554 U.S. at 634–35; *see also supra*, pp. 39–40. To the extent this Court concludes that Article 16 should be interpreted as imposing a form of scrutiny parallel to that required by the Second Amendment, it should look to the Supreme Court's articulation of the proper Second Amendment analysis, not the misguided approach adopted by some lower federal courts.

In any event, the State's premise that Article 16 and the federal Second Amendment must be interpreted in lock-step is flawed. The Vermont Supreme Court has cautioned against "legal argument [that] consists of a litany of federal buzz words memorized like baseball cards," insisting instead on an independent development of "a state constitutional jurisprudence that will protect the rights and liberties of our people, however the philosophy of the United States Supreme Court may ebb and flow." *State v. Jewett*, 146 Vt. 221, 223–24, 500 A.2d 233, 235 (1985). As Defendants acknowledge, to determine whether a state constitutional right is broader than a similar federal right, Vermont courts look to any "textual differences" between the two rights, inquire whether "historical considerations" call for broader state protections, and also examine any relevant "policy considerations." *State v. Rheaume*, 2004 VT 35, ¶ 16, 176 Vt. 413, 421, 853 A.2d 1259, 1264.

Based on these considerations, Vermont courts have not hesitated to interpret the Vermont Constitution as providing greater protection of individual liberty. *See, e.g.*, *Selectmen of Windsor v. Jacob*, 2 Tyler 192 (1802) (holding slavery unconstitutional under the Vermont Constitution, notwithstanding its constitutionality under the U.S. Constitution). Here, too, these factors show that the Court should not parrot the lower-federal-court cases upholding bans similar to Vermont's.

Begin with the text. While Article 16 expressly protects Vermont citizens' "right to bear arms for the defence of themselves," VT. CONST. art. 16, the Second Amendment does not specify that "the right of the people to keep and bear Arms" that it protects extends specifically to individual self-defense, U.S. CONST. amend. II. Accordingly, for much of the Nation's history the federal Second Amendment was widely read by the lower courts as protecting only the collective right to bear arms in the militia setting. *See, e.g.*, *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942); *see also United States v. Miller*, 307 U.S. 174, 178 (1939). To be sure, in *Heller* the United States Supreme Court conclusively interpreted the Second Amendment as also protecting "the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. But that holding does not erase the clear "textual differences" between the two constitutional provisions, *Rheaume*, 2004 VT 35, at ¶ 16—textual differences that precluded any argument that Article 16's right was purely militia-based from the very beginning.

The "social and political setting in which [Article 16] originated," *Jewett*, 146 Vt. at 226, also augers against reflexively adopting the lower federal courts' approach. Vermont's tradition of bearing arms for defense of self and state is unique, and it dates back to the origins of the State. Vermont achieved independence only after decades of struggle not just against the British but against land speculators from New York, who sought to colonize the land in the "New Hampshire

grants" that would later become Vermont. SOF ¶ 66. The New York speculators' efforts to displace the existing settlers of the land, as Vermont later described its early history in a 1777 letter to Congress, "reduced [the Vermonters] to the disagreeable necessity of taking up arms, as the only means left for the security of their possessions." SOF ¶ 67.

In one famous incident, for example, officials from New York sought multiple times over a series of several months to survey and occupy the Breakenridge Farm in Vermont but were prevented from doing so by the Green Mountain Boys, who resisted each effort by gathering with arms to prevent the New Yorkers from entering the land. *See* SOF ¶ 68 ("The survey party, intimidated by the presence of so many armed men, returned to Albany."); *id.* ("On September 26 [of 1770] a band of armed men gathered at Breakenridge's farm and forcibly prevented another attempt by New York commissioners to survey this land. . . ."); *id.* ("On January 5, 1771, Sheriff Ten Eyck attempted to serve writs of possession on Breakenridge . . . . When he arrived at Breakenridge's farm, the sheriff found a determined group of men who threatened 'to blow his brains out' if he proceeded."). The altercation culminated in June 1771, when an Albany sheriff, accompanied by 750 armed men, sought to evict the inhabitants of the farm but was outmaneuvered by a company of about 300 Green Mountain Boys, who managed to surround the "Yorkers" and catch them by surprise, forcing them to retreat without firing a shot. SOF ¶ 69.

It was this same voluntary militia, under Ethan Allen's leadership, that boldly seized Fort Ticonderoga on May 10, 1775—a mere three weeks after the "shot heard 'round the world" was fired at Lexington and Concord. After the militia procured "a quantity of powder and ball," Allen raised "all the men that he could find" and advanced to Lake Champlain, where he and his men entered the fort unopposed in the early hours of the 10th and demanded the surrender of the fort. The British Captain in charge, still unaware that hostilities had broken out, surrendered the garrison

and their valuable stores of cannon, ammunition, and military stores without bloodshed. SOF ¶ 71. The Continental Congress was so impressed by the Green Mountain Boys' initiative in seizing the Fort that they voted to pay them, in gratitude for their service to the cause. *Id.*

The early Vermonters were bearing arms in defense of themselves and the State *even as they drafted the 1777 Constitution and Article 16* (then numbered as Article 15). In June 1777, Ira Allen and a number of other delegates met in convention to take the first steps towards forming a formal government and framing a constitution. SOF ¶ 72. The convention, among other actions, appointed a committee to examine the defenses at Ticonderoga, and then adjourned until early July. *Id.* While the Committee was at Ticonderoga, however, General Burgoyne appeared with a British army, and the Committee members paused their official business to muster men to the militia for defense of the Fort. *Id.* At the beginning of July, those militia leaders who were also delegates to the constitutional convention temporarily left the defense of Ticonderoga to travel to Windsor for the meeting of the convention. *Id.* At the very outset of their meeting, the convention received a dispatch from the Colonel defending the fort stating that General Burgoyne was poised to attack. *Id.* Over the next seven days, the convention drafted Vermont's first constitution, including the protection for the right to bear arms. On July 8th they received word that Fort Ticonderoga had been lost to the British. *Id.* Because "[t]he families of many of the members . . . were within the very line of march of the triumphant enemy," the convention was anxious to finish their business "and fly to the defense of their homes," and the convention adjourned a short while later. *Id.*

The Vermont militia continued to "bear[ ] arms in defense of American liberty" throughout the rest of the war. Declaration and Petition to Congress, SOF ¶ 73; *see also id.* (Letter from Continental General Wooster: "You, sir, and the valiant Green Mountain corps, are in our

neighborhood. You all have arms, and I am confident ever stand ready to lend a helping hand to your brethren in distress, therefore let me beg you to raise as many men as you can, and somehow get into the country and stay with us till we can have relief from the colonies."). As a Vermont convention explained in 1776, "the principle which induced us [before the war] to take arms in defence of our possessions and properties, is that which now induces us to take arms and voluntarily join our friends and brethren in the several *United States*, for the defence of the liberties of the whole." SOF ¶ 74.

Both before and after the war, the members of Vermont's militia were required to provide their own firearms *and their own ammunition.* A 1776 resolution regulating the militia, for example, provided "that each non-commissioned officer and soldier immediately furnish himself with a good gun with a Bayonet, . . . one pound of powder, [and] four pound bullets, suitable for his gun." SOF ¶ 75. Vermont's 1779 militia statute likewise required all members of the militia to "have in constant readiness[ ] a well-fixed firelock . . . or other good firearms" and "a cartouch box or powder and bullet pouch; one pound of good powder, four pounds of bullets for his gun, and six good flints." *Id.* Similarly, the federal militia act enacted in 1792 required each citizen enrolled in the militia to "provide himself with a good musket or firelock . . . and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock." *Id.* There can be no doubt that, had they been in existence at the time, Vermont's citizens would have been required to muster for militia service *armed with the very magazines the State has now banned.*

Vermont's unique historical traditions continued into the nineteenth and twentieth centuries. As already discussed, in *Rosenthal* the Vermont Supreme Court adopted a robust interpretation of Article 16, striking down limits on carrying concealed firearms that were enacted

and upheld in much of the rest of the Nation. *See Heller*, 554 U.S. at 626.

This history has endured to the modern day. The State has long been known for the extent to which it entrusts its law-abiding citizens to possess and use firearms responsibly, *see* Giffords Law Center to Prevent Gun Violence, *Annual Gun Law Scorecard* (giving Vermont an "F" for failing to adopt "any significant gun legislation"), SOF ¶ 78. In the late 1960s, when a variety of state and federal gun-control measures were first imposed, "the issue was a nonstarter in the Green Mountain State." Eric Benson, *Vermont's Long, Strange Trip to Gun-Rights Paradise*, THE TRACE (Aug. 15, 2018), SOF ¶ 79. The State early on adopted a firearm preemption law, forbidding local regulation of "hunting, fishing, and trapping or the possession, ownership, transportation, transfer, sale, purchase, carrying, licensing, or registration of . . . firearms." 24 V.S.A. § 2295. In 1994, a bill providing for reporting of firearm sales died in committee. Benson, THE TRACE, *supra*, SOF ¶ 79. In 2000, the State Legislature vetoed a proposed Montpelier measure regulating the carrying of firearms in public; and in 2013, it blocked a similar measure from Burlington that would have banned certain semi-automatic rifles in response to the Newtown shooting. *Id.*

Finally, the "policy considerations," *Rheaume*, 176 Vt. at 421, that partially underlie Vermont's unique history of robust, responsible gun ownership also favor interpreting Article 16 in a way that may be more protective than its federal cousin. Vermont has many areas that are rural and sparsely populated, where police presence is spotty and emergency-response times are lengthy. Orange County, for example, has a total area of 692 square miles and a population of fewer than 30,000 people. SOF ¶ 119. For many hours during the middle of the night there are no police officers on duty in the County, and response times during these hours can be an hour or longer, depending on weather conditions. SOF ¶ 119. In Orange County and the many similar parts of the State, law-abiding citizens' need for effective means of self-defense is particularly acute.

3. Alternatively, Vermont argues that this Court should adopt "a reasonableness test under which the State may permissibly regulate firearms, so long as any infringement on an individual's right to use a firearm in self-defense is reasonable in light of the State's public safety interests." MTD 46. It is unclear how (or even whether) this "reasonableness test" differs from the intermediate scrutiny adopted in the federal context. But it is just as plainly contrary to Article 16's text, history, and purpose—and the Supreme Court's decision in *Rosenthal*.

As already shown at length, the approach adopted by the Supreme Court in *Rosenthal* is directly antithetical to any "reasonableness" test. Defendants dispute this, maintaining that *Rosenthal* "makes clear that Article 16 allows the Legislature to enact reasonable gun control legislation" because the court noted "that the Legislature permissibly had placed a number of reasonable limitations on [the Article 16] right in the interest of public safety." *Id.* at 39, 41. Presumably, the "reasonable limitations" to which the State refers are the laws *Rosenthal* mentions prohibiting carrying firearms "with the intent or avowed purpose of injuring a fellow man," maliciously "pointing a firearm toward another person, and . . . discharging such firearm so pointed," and carrying arms while "in attendance upon a school." 75 Vt. at 295. Describing these as "reasonable limitations" on the right to bear arms for self-defense is rather like describing laws prohibiting voter identity theft and ballot-stuffing as "reasonable limitations" on the right to vote. Plainly, a person *maliciously shooting* a firearm at someone is not exercising the right to bear arms for self-defense *at all*; a law prohibiting such conduct is not a "reasonable limitation" on the Article 16 right, it is a ban on conduct that is not constitutionally protected to begin with. *See also Heller*, 554 U.S. at 626 (noting that Second Amendment does not protect "the carrying of firearms in sensitive places such as schools").

In addition to *Rosenthal* and *Duranleau* (which the State misreads for the reasons explained

above), Defendants also cite several Vermont Supreme Court cases interpreting other state-constitutional guarantees, suggesting that court "uses reasonableness as a touchstone" throughout the body of state constitutional law. MTD 42–43. But the Vermont Supreme Court's constitutional jurisprudence is not nearly as homogenous as the Government suggests. While it looks at the "reasonableness" of legislation in some contexts, in others, as discussed above, it hews to a more categorical approach. *See supra*, pp. 38–39. Moreover, where the Supreme Court has used some form of "reasonableness" analysis, it is generally in the context of rights that either by their text or history *expressly call for* an inquiry into reasonableness. *See In re Prop. of One Church St. City of Burlington*, 152 Vt. 260, 265 (1989) (Article 9's Proportional Contribution Clause only forbids tax schemes that are not "proportional"); *State v. Record*, 150 Vt. 84, 85 (1988) (Article 11 implicitly limited to right against "unreasonable" searches and seizures"). That type of inquiry has no place in the context of Article 16's unambiguous right.

The State next points to a number of historical laws "regulating firearms in the interest of public safety" that, it says, support "an interpretation of Article 16 that permits reasonable regulations." MTD 37. But for the most part, like the laws against assault mentioned in *Rosenthal*, the restrictions Defendants identify are not limitations on the right to bear arms *at all*. Under no plausible interpretation would the people's "right to bear arms in defense of themselves" extend to such conduct as dueling or "robbery with intent to kill or maim." MTD 39. Likewise, regulations governing where and how gunpowder may be stored, MTD 39, plainly do not meaningfully infringe the right of armed self-defense. *See Heller*, 554 U.S. at 632 ("Nothing about [gunpowder-storage] laws undermines our analysis; they do not remotely burden the right of self-defense as much as an absolute ban on handguns."). And the Vermont law regulating "silencers" that

Defendants point to in fact *allows* their lawful use on the firing range. 13 V.S.A. § 4010(c)(4).[4]

Finally, Defendants cite cases from New Hampshire and Colorado in support of the proposition that "most other States apply a deferential reasonable regulation standard to gun safety laws challenged on state constitutional grounds." MTD 43 (quotation marks omitted). But the case-law in other states is not as uniform as the State would have it. *See, e.g.*, *State v. Clay*, 481 S.W.3d 531, 534 (Mo. 2016) (because "the right to bear arms is a fundamental right, strict scrutiny must be used in analyzing the constitutionality of any regulation of that right"); *State ex rel. J.M.*, 144 So. 3d 853, 860 (La. 2014). And in any event, this Court should not reflexively adopt whatever standards prevail in these other jurisdictions for the reasons already discussed.

C. Vermont's ban fails reasonableness review.

Even if this Court concludes that Vermont's magazine ban is subject to some form of interest-balancing review, rather than *Rosenthal*'s categorical approach, the ban is still unconstitutional. That is so whether the inquiry is framed as the "intermediate scrutiny" that the federal cases the State cites purport to apply, or the "reasonableness review" that, according to Defendants, is applied in the context of some other state constitutional rights.

Under either analysis, this Court must do more than merely rubber-stamp "the Legislature's policy judgment that S.-55's ban . . . protects public health and safety" in the way Vermont's Amici ask. Gun-Control Organizations' Amicus 30. Under intermediate scrutiny, the Government must meet the "demanding" burden of showing that its restriction "serves important governmental

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[4] The State cites a handful of similar laws from Pennsylvania, but these scattered restrictions do nothing to advance the ball. Laws disarming loyalists during the Revolutionary War, banning illegally hunting on someone else's land, or negligently discharging firearms within the city, MTD 37–38, cannot seriously be put forward as analogous to the ban on magazines at issue in this case. Plaintiffs are not loyal to a foreign power at war with the United States; nor do they wish to use the magazines in question on someone else's property or by negligently firing rounds into the sky on New Year's Eve. *See* MTD 38.

objectives and that the . . . means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quotation marks omitted). "Intermediate scrutiny requires the State to demonstrate a reasonable fit. A reasonable fit cannot be just any fit." *Duncan*, 265 F. Supp. 3d at 1123. Similarly, under the state-law "reasonableness" approach employed in some contexts, while the court is "broadly deferential to the legislative prerogative to define and advance governmental *ends*," it must "vigorously ensur[e] that the *means* chosen bear a just and reasonable relation to the governmental objective"—engaging in "a more stringent reasonableness inquiry than . . . generally associated with rational basis review under the federal constitution." *Baker v. State*, 170 Vt. 194, 203–04, 744 A.2d 864, 871 (1999) (quotation marks omitted).

1. Section 4021 fails either type of interest-balancing scrutiny, first, as a matter of law. By design and effect, Vermont's ban will reduce gun violence *only by reducing the quantity of the banned magazines*. Under Article 16, that is "not a permissible strategy"—even if used as a means to the further end of increasing public safety. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 148 (D.D.C. 2016), *aff'd sub nom. Wrenn v. District of Columbia*, 864 F.3d 650. "Disarming . . . law-abiding citizenry is not a constitutionally-permissible policy choice." *Duncan*, 265 F. Supp. 3d at 1128. For instance, in *Heller v. District of Columbia* ("*Heller III*"), the D.C. Circuit struck down the District of Columbia's prohibition on registering more than one pistol per month, which was designed to "promote public safety by limiting the number of guns in circulation." 801 F.3d 264, 280 (D.C. Cir. 2015). The court rejected that simplistic syllogism, explaining that "taken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home," and so it simply cannot be right. *Id.*; *see also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 449 (2002) (Kennedy, J., concurring) (government may not attempt to reduce free speech's

negative "secondary effects by reducing speech in the same proportion"). In other words, the Government may not adopt a law with the design and direct effect of limiting the quantity of conduct protected by the right to bear arms.

Section 4021 plainly violates this principle. That law does not regulate the *manner* of bearing arms or impose reasonable training and safety requirements. No, its purpose and effect is to *limit the number of arms borne by private citizens*, and to the extent this leads to a reduction of gun crime, that is only byproduct of the law's central design and function: reducing the quantity of lawfully-possessed magazines. That line of reasoning is impermissible.

2. Even setting these threshold objections aside, the State's ban still fails any meaningful constitutional scrutiny. To show that its ban is reasonably related to the objective of reducing gun crime, Vermont must prove that three propositions are sufficiently plausible: first, that its restriction will in fact reduce the number of banned magazines in criminal hands; second, that any such reduction will result in a decrease in the amount or lethality of crime; and third, that any reduction in crime traceable to the ban will not be cancelled out by an *increase* in crime due to the impediment the ban creates to self-defense. Vermont's evidence fails on each score.

Vermont's law is unlikely to have any appreciable effect on the number of banned magazines in criminal hands. For starters, the magazine ban is inherently difficult to enforce, given the numerous exceptions it includes—for grandfathered magazines, current and retired law-enforcement officers, and the like, *see* 13 V.S.A. § 4021(d)—and given the ubiquity of these magazines in other States. Because magazines do not contain serial numbers or other identifying marks, it is impossible to tell whether any given magazine was lawfully sold before the ban or to an exempt individual, rather than acquired illegally. SOF ¶ 121. Indeed, it was precisely because of these inherent obstacles to enforcement that the Attorney General's office initially *opposed* the

magazine ban. Because "it will be extremely difficult to tell the difference between magazines" lawfully possessed under the ban and those acquired illegally, Assistant Attorney General David Scherr testified before the Senate Judiciary Committee, the Attorney General had "serious concerns about the practical enforceability" of the ban, and he thus did *not support it*. David Scherr, Assistant Attorney General, Vermont Office of the Attorney General, *Testimony on S. 55 before the Senate Committee on the Judiciary* (Mar. 28, 2018), SOF ¶ 121. While Defendant Attorney General Donovan apparently supports the ban now, this Court should give great weight to the legislative testimony, on his behalf, raising these serious concerns about its "practical enforceability." *Id.*

These difficulties with enforcement are compounded by the ease with which magazines acquired legally out-of-state may be brought into Vermont. Magazines of any capacity remain freely available for sale across the border in New Hampshire—a short drive away from even the most remote corner of the State. SOF ¶ 123. It blinks reality to suggest that the number of so-called "high capacity" magazines in criminal hands will be appreciably reduced by effectively requiring criminals to drive across the Connecticut river into New Hampshire to obtain them. Indeed, even pro-gun-control social-scientist Christopher Koper has acknowledged that the effectiveness of "state-level" bans like Vermont's "is likely undermined to some degree by the influx of [prohibited arms] from other states." KOPER, *supra*, at 81 n.95, SOF ¶ 124.

While law-abiding citizens by definition will be deterred by the ban from acquiring magazines illegally, there is thus nothing to stop those bent on violent crime from obtaining the banned magazines illegally. After all, "most of the methods through which criminals acquire guns and virtually everything they ever do with those guns are *already* against the law." JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS xxxv (2d ed. 2008), SOF ¶ 125.

Accordingly, empirical studies "show fairly consistently that many guns [used by criminals] are stolen or borrowed, rather than purchased in the primary market" from licensed retailers like Powderhorn and Locust Creek. NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 88 (Charles F. Wellford, John V. Pepper & Carol V. Petrie eds. 2005), SOF ¶ 114. For example, according to one survey of hundreds of criminals incarcerated in prisons through the country, over 80% of criminals obtain the firearms they use through means other than purchase from a conventional retail outlet. WRIGHT & ROSSI, *supra*, at 185. SOF ¶ 127.

This is not a novel proposition. In a passage Thomas Jefferson copied into his personal quotation book, the influential Italian criminologist Cesare Beccaria reasoned that bans on the

> wear[ing] of arms . . . disarm[ ] those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? . . . [Such a law] certainly makes the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder.

See Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right To Bear Arms*, 49 LAW & CONTEMP. PROBS. 151, 154 (1986), SOF ¶ 129.

The ban's likely lack of effect is further supported by the results of the now-defunct *federal* ban on magazines with a capacity of more than ten rounds, which was in place from 1994 until 2004. In 2004, the Department of Justice commissioned a study of the federal ban's effects, and the study's author, Christopher Koper, was forced to conclude that the ban had "[f]ail[ed] to reduce" criminal use of the magazines, which were actually used in "steady or rising" numbers in the jurisdictions studied. Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994–2004*, *in* REDUCING GUN VIOLENCE IN AMERICA 157, 164 (Daniel W. Webster & Jon S. Vernick eds., 2013), SOF ¶ 130; *see* KOPER, *supra*, at 68–79, SOF ¶ 130.

Even if the State's ban *were* likely to reduce the number of disfavored magazines in

criminal hands, Vermont cannot show that this would have any appreciable effect on the rate or severity of violent crime. That is so, as an initial matter, because magazines that hold more than ten rounds are so rarely *used* in gun crime. According to Koper's research, for instance, *three quarters or more* of violent gun crimes do not involve the use of these magazines *at all*. KOPER, *supra*, at 18, SOF ¶ 131. The Vermont gun crimes identified by Defendants' Amici, for example (at pp. 14–15), do not appear to have involved so-called "high-capacity" magazines; indeed, one of the shootings was committed with a bolt-action hunting rifle. Zach Despart, *Police: Woman laughed after killing social worker*, USA TODAY (Aug. 10, 2015), https://goo.gl/oTgCNa.

Moreover, even if criminals *did* routinely use the banned magazines, the ban would have no effect on violent crime because for the vast majority of crimes, the ability to fire more than ten rounds is utterly irrelevant. Criminals rarely fire more than ten rounds. In fact, in many crimes the perpetrators do not fire their weapons *at all*; according to one study, in nearly one-third of gun crimes the offender did not fire a single shot. D.C. Reedy & C.S. Koper, *Impact of Handgun Types on Gun Assault Outcomes*, 9 INJURY PREVENTION 151, 153 figs.1 & 2 (2003), SOF ¶ 132. And for all the violent crimes in the study in which handguns *were* fired, the average number of rounds fired was around two or three. *Id.* at 152. More than ten rounds were fired in *less than three percent* of these crimes (between 6 and 7 out of 236 crimes), and more than 15 rounds were fired in only around *one percent* (2 or 3 crimes). *Id.* at 154 tbl.1.

Governor Scott has recognized this fact. In a recent forum, when asked about the ban challenged here, Governor Scott stated: "I don't think [the magazine ban] was necessary." Gov. Phil Scott, *Primary Forum: Republican Candidates for Vermont Governor* (July 25, 2018), SOF ¶ 134. Governor Scott is correct; because the banned magazines are so rarely used in gun crime—and are irrelevant even when they are used—Vermont's ban is utterly unnecessary and ineffective.

Unsurprisingly, when Professor Koper studied the effects of the ten-year federal ban on so-called "high capacity" magazines, his initial 1997 report "found no statistical evidence of post-ban decreases in either the number of victims per gun homicide incident, the number of gunshot wounds per victim, or the proportion of gunshot victims with multiple wounds." JEFFREY A. ROTH & CHRISTOPHER S. KOPER, IMPACT EVALUATION OF THE PUBLIC SAFETY AND RECREATIONAL FIREARMS USE PROTECTION ACT OF 1994 6 (1997), SOF ¶ 135. His final, 2004 report similarly concluded that the ban could not be "clearly credit[ed] . . . with any of the nation's recent drop in gun violence" and that "[s]hould it be renewed, the ban's effects on gun violence are likely to be small at best and perhaps too small for reliable measurement." KOPER, *supra*, at 2–3, SOF ¶ 136.

The State's (and its amici's) efforts to justify the ban revolve, in the main, around the argument it will reduce the likelihood or lethality of mass shootings. MTD 47; *see also* Gun-Control Organizations' Amicus 6–10, 13–18. But the magazine ban fails any meaningful scrutiny even if the Court focuses solely on its likely effects on these tragic—but highly rare—events. There is no rigorous, systematic study showing how frequently magazines with an 11-plus or 16-plus-round capacity are actually used in mass shootings, but what research there is suggests that most mass shootings *do not* involve these magazines. A 2015 study by the anti-gun group Everytown for Gun Safety, for example, found that *89%* of mass shootings between 2009 and 2015 *did not involve* the magazines in question. EVERYTOWN FOR GUN SAFETY, ANALYSIS OF RECENT MASS SHOOTINGS 4 (2015), SOF ¶ 138. Another study found that in 2013, *none* of the 22 mass-shooting events that took place in 2013 were known to have involved the use of magazines with a capacity greater than ten rounds; and only 23 mass shootings involving these magazines occurred in the period between 1994 and 2013—on average, one per year. Gary Kleck, *Large-Capacity Magazines and the Casualty Counts in Mass Shootings: The Plausibility of Linkages*, 17 J. RES. & POL'Y 28,

38–39 (2016), SOF ¶ 139. Indeed, the Parkland shooting that was one of the principal motivations for Vermont's ban *did not involve* magazines with a capacity illegal under Vermont's new law. SOF ¶ 140. Neither did the tragic Virginia Tech and Charleston shootings identified by the State. MTD 3; *see* SOF ¶ 141.

Even with respect to those mass-shooting events that *did* involve the standard-capacity magazines banned by Vermont, the size of the magazine has been shown to be *irrelevant* to the number of victims. Obviously, a shooter with two 10-round magazines can fire the same number of rounds as one with a single 20-round magazine. And in *every single one* of the mass-shooting events between 1994 and 2013 known to have involved an 11-plus-round magazine, the shooter "possess[ed] either multiple guns or multiple detachable magazines" and thus "could have continued firing without significant interruption by either switching loaded guns or changing smaller loaded magazines." Kleck, *supra*, at 28, 42, SOF ¶ 142.

To be sure, changing from one 10-round magazine to another involves some delay; both Vermont and its Amici, seizing on this fact, suggest that the ban will reduce the severity of a potential mass shooting because of "the possibility of interruption while shooters reload." Gun-Control Organizations' Amicus 3; *see also* MTD 50. But "[s]killed shooters can change detachable magazines in 2 seconds or less, and even relatively unskilled persons can, with minimal practice, do so in 4 seconds." Kleck, *supra*, at 30, SOF ¶ 145. The justification for Vermont's ban thus reduces to the argument that this two-to-four second pause while changing magazines will meaningfully increase the likelihood that a bystander will intervene and successfully stop the shooter. That is utterly implausible. Mass shooters almost never maintain a rate of fire fast enough that a two-to-four second delay would appreciably slow them down. *See id.* at 43–44, SOF ¶ 145. Confirming the point, there was only *a single* arguable instance, between 1994 and 2013, in which

a mass shooter was supposedly disarmed while reloading—and even there, some accounts suggest that the shooter paused because his gun malfunctioned, not because he was reloading. *Id.* at 39–40, SOF ¶ 146.[5] Vermont's Amici point to a handful of other incidents in which, they say, "rampages were cut short while shooters reloaded," Gun-Control Organizations' Amicus 4; *see also id.* at 10 n.15, but each of the episodes they point to are irrelevant to an assessment of the challenged ban's effectiveness, since they each involved firearms that *remain entirely legal* under Vermont law.[6]

What is more, the above analysis assumes that criminals who plan to carry out a mass shooting would actually be deterred by Vermont's ban from obtaining magazines of an unlawful capacity. Given the ease with which criminals will continue to be able to unlawfully obtain these magazines, as discussed above, that is an extraordinarily unlikely assumption. Indeed, it is *especially* unlikely with respect to mass-shooters—who typically spend a great deal of time and effort meticulously planning and preparing for their attacks. *See* Kleck, *supra*, at 31–32, SOF

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[5] The 2018 shooting at a Tennessee Waffle House may provide a second example, though here too it is unclear whether the shooter in that incident was reloading or whether his gun jammed. *See* Kristine Phillips, *Suspect in Tennessee Waffle House shooting had guns seized after arrest near White House last year*, CHI. TRIBUNE (Apr. 23, 2018), https://goo.gl/mZQo68.

[6] Eva Knott, *Construction Worker Testifies Against Brendan Liam O'Rourke*, SAN DIEGO READER (Feb. 28, 2012), https://goo.gl/okq9tc (2010 San Diego shooter was armed with a six-shot revolver); Catherine Tsai & P. Solomon Banda, *Colorado school shooting suspect's father says son talked to himself, had imaginary friends*, CLEVELAND PLAIN DEALER (Feb. 25, 2010), https://goo.gl/p2A3dS (2010 Deer Creek school shooting used a single-shot, bolt-action hunting rifle); Shaila Dewan, *Hatred Said to Motivate Tenn. Shooter*, N.Y. TIMES (July 28, 2008), goo.gl/wJPG9v (2008 church shooting in Knoxville, Tennessee, was perpetrated with a 12-guage shotgun); METROPOLITAN POLICE DEP'T, AFTER ACTION REPORT, WASHINGTON NAVY YARD, SEPTEMBER 16, 2013 9 (2014), https://goo.gl/1hhMsY (Washington Navy Yard shooter used an ordinary shotgun); Mike Carter, *Dramatic video shows hero disarming shooter at Seattle Pacific University in 2014*, SEATTLE TIMES (June 14, 2016), https://goo.gl/EDvoue (shooter in the 2014 Seattle Pacific University shooting used ordinary shotgun).

¶ 143.

The available social-science evidence strongly confirms that bans like Vermont's have *no demonstrable effect* on the rate of mass shootings. After the federal ban on 11-plus-round magazines expired in 2004, for instance, mass shootings *did not* "increase[ ] in number or in overall death toll." James Alan Fox & Monica J. DeLateur, *Mass Shootings in America: Moving Beyond Newtown*, 18 HOMICIDE STUD. 125, 128 (2014), SOF ¶ 148. Accordingly, if the goal behind Section 4021 is to reduce the likelihood or lethality of mass shootings, the ban is "a haphazard solution likely to have no effect on an exceedingly rare problem." *Duncan*, 265 F. Supp. 3d at 1124.

Defendants' Amici point to a handful of competing studies that they say support the ban, but they do not bear scrutiny. For example, while the analysis by the anti-gun group Everytown for Gun Safety found that use of "high capacity" magazines was associated with higher death rates, that does not show that the use of these magazines *caused* any increase in the number of deaths. *See* EVERYTOWN FOR GUN SAFETY, *supra*, at 4, SOF ¶ 138; *see also* LOUIS KLAREVAS, RAMPAGE NATION 257 (2016) (finding use of magazines holding more than ten rounds to be "associated with high death tolls"); Sam Petulla, *Here is 1 correlation between state gun laws and mass shootings*, CNN (Oct. 5, 2017), https://goo.gl/WnCZVG (finding "correlation" between magazine bans and the number of shooting events but emphasizing that this "is not a causal explanation"). Instead, it is likely that the causality flows in *the other direction*—after all, "people who intend to shoot many people are not only more likely to end up doing so but also prepare for doing so by acquiring equipment that they believe is better suited to this task," such as larger-capacity magazines. Kleck, *supra*, at 32.

In the end, neither the State nor its Amici have pointed to a single plausible, causal mechanism by which its magazine ban would prevent or mitigate crime. Indeed—despite its high

rates of firearm ownership and unrestrictive gun policies—Vermont is tied for *the lowest homicide rate in the nation.* Centers for Disease Control & Prevention, *Homicide Mortality by State*, SOF ¶ 81.

Vermont asks the Court to essentially defer to the federal lower-court opinions that have upheld similar bans on the theory that they reasonably advance public safety. But the courts in these cases did not provide any meaningful scrutiny of the Government's supposed public-safety justifications, instead upholding the bans after little more than a rote recitation of the Government's own self-serving assertions that they would have public-safety benefits. *E.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 139–40 (4th Cir. 2017). By contrast, the court in *Duncan*—which *did* meaningfully scrutinize California's justifications for its similar magazine ban—concluded that the ban *did not pass intermediate scrutiny. Duncan*, 265 F. Supp. 3d at 1121; *see also id.* at 1125 (concluding, after examining evidence similar to that offered by Vermont and its amici, that a magazine ban would have "little or no discernable good effect" in advancing public safety).

Finally, even if Vermont could show (1) that Section 4021 would reduce the number of banned magazines in criminal hands, and (2) that this reduction will meaningfully impact violent crime, it *still* could not show (3) that any such positive public-safety impact would *outweigh* the public-safety *harm* caused by preventing law-abiding citizens from effectively defending themselves. Although the number of defensive gun uses is difficult to measure, the leading study on the issue, the National Self-Defense Survey, "indicate[s] that each year in the U.S. there are about 2.2 to 2.5 million [defensive uses of guns] of all types by civilians against humans." Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995), SOF ¶ 113. "At least 19 other surveys have resulted in [similar] estimated numbers of defensive gun uses," NATIONAL RESEARCH

COUNCIL, *supra*, at 103, SOF ¶ 114, and the estimates are also strongly supported by several studies conducted by the Centers for Disease Control, SOF ¶ 115. As already discussed, the magazines banned by Vermont are commonly-owned by law-abiding citizens for defensive use and they are in fact integral to self-defense in many cases. *See* SOF ¶ 113; *see also supra*, pp. 33–34. According to data from the Bureau of Justice Statistics, in 2008, 797,139 violent crime incidents occurred in which the victims faced multiple offenders—17.4% of all violent crimes. BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES tbl.37 (2010), SOF ¶ 117. In 247,388 of these violent crimes the victim faced *four or more* offenders. *Id.* And according to a study published in 2005, multiple attackers were involved in 52% of cases where an armed citizen used his or her firearm in self-defense. Kleck & Gertz, *supra*, at 186 tbl.3, SOF ¶ 117. Even if Vermont's ban did yield some public safety benefits, Vermont still has not demonstrated that these benefits outweigh the cost of impeding effective self-defense.

3. Vermont's ban independently fails any meaningful "reasonableness" scrutiny because it is over-inclusive, burdening more constitutionally-protected conduct than necessary. *See Baker*, 170 Vt. at 214 (reasonableness analysis includes inquiry into whether challenged restriction "is significantly underinclusive or overinclusive"); *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) ("Even though [a statute] is [analyzed under intermediate scrutiny], it still must be narrowly tailored to serve a significant governmental interest." (quotation marks omitted)).

Vermont's failure to properly tailor its ban is apparent from the fact that it applies *in the home*. At a minimum, Vermont should have experimented with less intrusive measures—such as restricting only the public carriage of the magazines in question, imposing more stringent background-check requirements on their purchase, or designing a separate licensing regime tailored particularly to these magazines—before imposing a flat ban on their possession that

applies even in the home. While Plaintiffs do not suggest that these or other measures Vermont might have imposed instead are *themselves* necessarily free from constitutional doubt, the *very existence* of such alternative, less onerous restrictions—untried by Vermont—demonstrates that the State "has too readily foregone options that could serve its interest just as well, without substantially burdening the kind of [constitutionally protected conduct] in which [the plaintiffs] wish to engage." *Id.* at 2537, 2538 n.8.

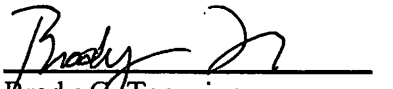
CONCLUSION

For these reasons, this Court should deny Defendants' motion to dismiss and grant judgment to Plaintiffs declaring Vermont's magazine ban unconstitutional and enjoining its continued enforcement.

Plaintiffs respectfully submit that oral argument in this matter is appropriate and would benefit the Court. Plaintiffs request that their opposition and motion for summary judgment be set for oral argument.

August 27, 2018

Respectfully submitted,



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Certificate of Service

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