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November 19, 2018

Richard Perra, COM
Windham County Superior Court
Civil Division
7 Court Street
Newfane, VT 05345

Re: *Gun Owners of Vermont v. Birmingham, et al.*
Docket No. 315-8-18 Wmcv

Dear Mr. Perra:

Enclosed please find *Defendants' Motion to Dismiss Plaintiff's Complaint, Defendants' Memorandum of Law in Support of Motion to Dismiss Plaintiff's Complaint, (iii) Notices of Appearance for David Boyd, Jon Alexander and Eleanor Spottswood* and a *Certificate of Service* in the above-referenced matter.

Please contact me with any questions or concerns.

Sincerely,

Jessica Mishaan
Paralegal

Enclosure

cc: Michael K. Shane, Esq. (via regular mail and email)
Robert D. Lees, Esq. (via regular mail and email)

STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 315-8-18 Wmcv

GUN OWNERS OF VERMONT, INC.,
Plaintiff,

v.

MATTHEW BIRMINGHAM,
Director of State Police;
T.J. DONOVAN,
Attorney General; and
TRACEY KELLY SHRIVER
State's Attorney for Windham County,
Defendants.

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendants—the Director of the Vermont State Police, the Vermont Attorney General, and the State's Attorney for Windham County—hereby move to dismiss plaintiff's complaint in its entirety pursuant to Rules 12(b)(1) and 12(b)(6) of the Vermont Rules of Civil Procedure. In support of their motion, defendants submit the accompanying memorandum of law.

DATED at Montpelier, Vermont this 19th day of November, 2018.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
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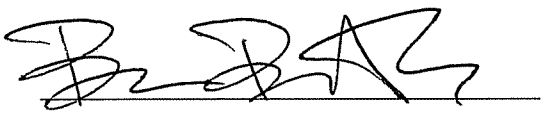
By: 

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STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 315-8-18 Wmcv

GUN OWNERS OF VERMONT, INC.,
Plaintiff,

v.

MATTHEW BIRMINGHAM,
Director of State Police;
T.J. DONOVAN,
Attorney General; and
TRACEY KELLY SHRIVER
State's Attorney for Windham County,
Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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INTRODUCTION

Plaintiff Gun Owners of Vermont, Inc. is a Vermont non-profit whose primary mission is "to actively oppose all proposed gun control bills." Compl. ¶ 10; *see also* Gun Owners of Vermont, www.gunownersofvermont.org ("Dedicated to a no-compromise position against gun control"). Pursuant to that mission, plaintiff seeks in this case to invalidate three Vermont laws that were recently enacted with broad support and signed by the Governor following a vigorous and open public debate. Each provision was part of the bill S.55 and represents a modest and common-sense public safety regulation.

Section 6, codified at 13 V.S.A. § 4019, closes a significant loophole in federal law by imposing a universal background check requirement on all firearms transfers. This ensures that individuals who cannot legally buy a gun from a licensed dealer—for example, convicted felons and those who have been involuntarily hospitalized for mental illness—cannot acquire a gun through a private transfer.

Section 7, codified at 13 V.S.A. § 4020, prohibits the sale of firearms to a person under 21 years of age unless that person is a law enforcement officer, a member of the military, or has completed an approved hunter safety course. The law does not prohibit the possession of firearms by a person under 21 years of age. Rather, it merely ensures that a person who is too young to walk into a store and buy alcohol has a minimum level of safety training before he or she can walk into a store and buy a gun.

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Section 9, codified at 13 V.S.A. § 4022, prohibits the possession of a "bump-fire stock" or "bump stock," which is a device that allows a semi-automatic firearm to function like a fully automatic firearm. Fully automatic firearms—*i.e*, machine guns—are not protected by the constitutional right to bear arms under either federal or state law and have been restricted nationwide for decades.

Plaintiff argues that each of these provisions violates the people's "right to bear arms for defence of themselves and the State" under Chapter 1, Article 16 of the Vermont Constitution, and that the age-limit restriction on the sale of firearms also violates the Common Benefits Clause of Chapter 1, Article 7 of the Vermont Constitution.

Plaintiff is mistaken, and all of the claims in the complaint fail as a matter of law. First, plaintiff lacks standing to mount a pre-enforcement challenge to any of the challenged provisions in S.55. Second, to the extent any of these provisions implicate the Article 16 right, they survive constitutional review because they are justified by the State's compelling interest in protecting Vermonters from gun violence and impose, at most, an incidental burden on the right to use a firearm in self-defense. And finally, plaintiff's Common Benefits claim fails because young people under the age of 21 do not have a fundamental right to purchase retail firearms under Article 16, and in any event, requiring them to complete an approved safety course before doing so advances and is substantially related to the State's obligation to protect the public safety of Vermonters.

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BACKGROUND

A. The Legislature enacted S.55 in response to continued mass shootings in the United States and a threatened school shooting in Fair Haven, Vermont.

Mass shootings occur frequently in this country. The victims are often young people. Columbine, Virginia Tech, Fort Hood, Tucson, Aurora, Sandy Hook, Charleston, San Bernardino, Orlando, Sutherland Springs, Las Vegas, Parkland, Pittsburgh, Thousand Oaks—the list goes on. On February 15, 2018, the day after 17 people were murdered in a high school by a mass shooter in Parkland, Florida, the Vermont State Police arrested a Vermont teenager based on evidence he intended to commit a mass shooting at Fair Haven Union High School. *See State v. Sawyer*, 2018 VT 43, ¶¶ 5-10, 187 A.3d 377 (discussing the facts of the Fair Haven case). The next day, Governor Phil Scott announced his willingness to consider new gun safety legislation, despite his previous opposition.[1] Other elected officials added their voices in support of new gun safety legislation.[2] The Legislature went to work on several gun safety bills, including S.55.

The Senate passed a version of the bill that addressed how government agencies dispose of abandoned or unlawful firearms, required universal

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[1] John Walters, *Scott Shifts Gun Stance Following Fair Haven Threat*, Seven Days (Feb. 16, 2018), *available at* https://www.sevendaysvt.com/OffMessage/archives/2018/02/16/walters-scott-shifts-gun-stance-following-fair-haven-threat.

[2] Alan J. Keays, *Scott says 'everything's on the table' as pressure builds for gun measures*, VTDigger (Feb. 22, 2018), https://vtdigger.org/2018/02/22/updated-scott-says-everythings-on-the-table-as-pressure-builds-for-gun-measures/.

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background checks for all gun sales in Vermont, and generally outlawed the sale of firearms to persons under 21 years of age. S.55 (as passed by Senate) (2018).[3] After extended debate in the House Judiciary Committee and on the floor, the House approved the Senate bill, adding amendments that: (i) banned large-capacity magazines; (ii) banned bump-fire stocks; and (iii) required a study on alternative ways to conduct background checks. S.55 (House proposal of amendment) (2018).[4] The Senate agreed to the House's proposal of amendment, and Governor Scott signed the bill on April 11, 2018, *see* Act 94 (2018), along with two other gun safety measures, in a contentious public ceremony on the Statehouse steps.[5]

Before passing S.55, the Legislature considered testimony from dozens of witnesses, both for and against the legislation, and an extensive documentary record.[6] This record included school board resolutions explaining that "Vermont school children" now spend more time "in lock-down and active shooter drills" than on "fire drills," which understandably invokes "significant anxiety and fear."

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[3] *Available at* https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/S-0055/S-0055%20As%20Passed%20by%20the%20Senate%20Unofficial.pdf.

[4] *Available at* https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/S-0055/S-0055%20House%20proposal%20of%20amendment%20Official.pdf.

[5] The other measures enacted were S.221 (Act 97), which establishes a procedure for prosecutors to obtain an "Extreme Risk Protection Order" that prohibits a person from possessing a firearm or explosive for up to six months if the court funds that the person's possession of the weapon poses an extreme risk of harm to the person or to other people, and H.422 (Act 92), which authorizes law enforcement to remove firearms in certain domestic violence situations.

[6] *See generally* S.55 (Act 94), Bill Status, https://legislature.vermont.gov/bill/status/2018/S.55.

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Letter from Addison Cent. Sch. Bd. to Gov. Phil Scott (Feb. 18, 2018);[7] Letter from Essex-Westford Sch. Bd. to Gov. Phil Scott (Mar. 8, 2018).[8]

The legislative record included testimony specifically addressed to the provisions that plaintiff now challenges. For example, the House Judiciary Committee considered a variety of evidence setting forth the compelling need for universal background checks to close a loophole left by federal law. One document in the record explains:

> Federal law requires licensed gun dealers—that is, those whose primary business is firearms—to run checks on all gun sales. This only accounts for 60% of transactions. The remaining 40% represents 6.7 million guns sold in 2012. In the 20-plus years that the National Instant Check System (NICS) has existed, more than two million potential buyers were denied due to criminal histories. Typically a check takes less than five minutes, and some 95% of buyers pass; it's those 5% who have sketchy backgrounds that stall. Some say the bad apples will just go to the black market. Does that mean we should allow any felon or violent domestic abuser to be able to purchase a gun legally?
>
> Even in Vermont, violent people know how to navigate a flawed system. Consider convicted felon Timothy O'Keefe who, during a phone call from jail to his son Alex, instructed his son to purchase a gun for him when he was released. Do it "...privately," O'Keefe said, "not at a gun store, and not to register it so no one will know" (Source: Affidavit, Sergeant Mark Carnignan, Brattleboro Police Dept., July 1, 2014). O'Keefe's intent came later on in that same phone call: "There are going to be no more warnings and I'm just going to start shooting people when I get out of jail". Fortunately, police monitored that call, and the sale never happened.

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[7] *Available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Ruth%20Harvey~Addison%20Central%20School%20Board%20Resolution~3-14-2018.pdf.

[8] *Available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Liz%20Subin~Essex-Westford%20School%20Board%20Resolution~3-13-2018.pdf.

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> Consider how easily Paul Heinz, the SEVEN DAYS reporter, bought an assault rifle legally through a private seller just hours after the Orlando nightclub tragedy, the largest mass shooting in U.S. history at that time (49 were killed and 53 wounded) until the Las Vegas blood bath. Heinz purchased this firearm, identical to the one used in Orlando, in a South Burlington parking lot, and then later that day surrendered it to the Burlington Police. In the hands of a determined felon like Tim O'Keefe, that simple and legal transaction turns fatal and tragic.

E-mail from Robert Williamson to H. Judiciary Comm. (Mar. 14, 2018).[9]

Other testimony indicated that, in the 19 states that had enacted universal background check laws, there were 47% fewer women shot to death by an intimate partner, 47% fewer suicides, and 53% fewer law enforcement officers shot and killed in the line of duty than in those states that had not enacted universal background checks. Testimony of Clai Lasher-Sommers, Executive Director of Gun Sense Vermont, H. Judiciary Comm. (Mar. 14, 2018);[10] *see also* Testimony of Madison Koop, H. Judiciary Comm. (March 14, 2018) (noting that Vermont has the "8th highest rate of women dying by domestic abuse in the nation, and two thirds of the death[s] are by firearm").[11]

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[9] *Available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Robert%20Williamson~E-mail%20to%20Committee~3-14-2018.pdf; *see also* Paul Heintz, *How I Bought an AR-15 in a Five Guys Parking Lot*, Seven Days (Jun. 15, 2016), *available at* https://www.sevendaysvt.com/vermont/the-gun-how-i-bought-an-ar-15-in-a-five-guys-parking-lot/Content?oid=3421127.

[10] *Available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Clai%20Lasher-Sommers~Gun%20Sense%20Vermont%20Testimony~3-14-2018.pdf.

[11] *Available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Madison%20Knoop~Madison%20Knoop%20Testimony~3-14-2018.pdf.

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In addition, the Legislature considered materials showing firearm-related deaths (suicides and homicides) by age in Vermont,[12] suicides by age in Vermont,[13] a policy statement by the American Association for Pediatrics advocating for, among other things, decreased access to guns by children and adolescents,[14] and a public health study advocating for age-based restrictions on guns as a way of reducing gun violence.[15] The Legislature also considered a study on the use of guns in suicide attempts among individuals aged 13 through 34.[16]

Dr. Rebecca Bell, a physician in Pediatric Critical Care unit of the UVM Children's Hospital, testified on behalf of the Vermont Chapter of the American

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[12] Vermont Dept. of Health, *Firearm-Related Deaths Among Vermont Residents*, (Nov. 2017), *available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Martin%20LaLonde~VDH%20Firearms-Related%20Deaths%20Among%20Vermont%20Residents~3-21-2018.pdf.

[13] Vermont Dept. of Health, Vermont Injury Prevention Program, *Suicide Mortality—Data Brief*, (Dec. 2017), *available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Martin%20LaLonde~VDH%20Suicide%20Mortality%20Data%20Brief~3-21-2018.pdf.

[14] Am. Acad. of Pediatrics, *Firearm-Related Injuries Affecting the Pediatric Population*, 130 Pediatrics e1416 (Nov. 2012), *available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Rebecca%20Bell~Firearm-related%20injuries%20in%20children%20-%20AAP~3-15-2018.pdf.

[15] David Hemenway, *Reducing Firearm Violence*, (Nov. 4, 2016), *available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Martin%20LaLonde~U%20of%20Chicago%20David%20Heminway-%20Reducing%20Firearms%20Violence~3-21-2018.pdf.

[16] Thomas R. Simon et al., *Characteristics of Impulsive Suicide Attempts and Attempters*, 32 Suicide and Life-Threatening Behaviors 49 (2001), *available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Rebecca%20Bell~Characteristics%20of%20impulsive%20suicide%20attempts~3-15-2018.pdf.

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Academy of Pediatrics about her experience treating teenagers who have attempted suicide and expressed her expert opinion that "[i]mpulsivity . . . is an especially prominent component in adolescent suicide attempts," and that accordingly, "[f]ormalizing a way to prevent teenagers from using firearms on themselves or others is crucial." Rebecca Bell, Testimony in support S.55, H. Judiciary Comm. (Mar. 14, 2018).[17] Dr. Bell noted that suicide attempts result in death significantly more often when a firearm is involved, and that the "vast majority" of those who survive a suicide attempt "not only survive but fully recover." *Id.* "The idea that people will 'find another way' just isn't borne out in the literature. We know that 90% of people who attempt suicide do not go on to die by suicide later." *Id.*; *see also* Simon et al., *above* at note 17.

The Legislature incorporated into the bill a legal method of purchasing a gun for any person younger than 21, if that person first passes a free, state-approved hunter safety course. *See* 13 V.S.A. § 4020(b)(3). The Legislature received a variety of evidence concerning state-approved hunter safety courses. *See, e.g.*, Louis Porter, Comm'r of Dep't of Fish & Wildlife, IHEA-USA Hunter Education Standards, H. Judiciary Comm. (Mar. 16, 2018);[18] Louis Porter, Comm'r of Dep't

[17] *Available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Rebecca%20Bell~Rebecca%20Bell%20Testimony~3-14-2018.pdf.

[18] *Available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/House%20Judiciary/Bills/S.55/S.55~Louis%20Porter~IHEA-USA%20Hunter%20Education%20Standards~3-16-2018.pdf.

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of Fish & Wildlife, Info. on Hunter Education, S. Judiciary Comm. (Mar. 28, 2018).[19]

With respect to banning bump stocks, nearly all the witnesses who testified before or submitted correspondence to the Legislature supported this common-sense public safety provision, even those who opposed other aspects of S.55. *See, e.g.*, Testimony of William Bohnyak, Vt. Sheriff's Ass'n (Mar. 29, 2019) (supporting the ban on bump stocks but opposing universal background checks and magazine limits).[20]

In his official signing statement for S.55, Governor Scott echoed the public safety concerns that permeate the legislative record. Governor Phil Scott, Official Statement on S.55, S.221 & H.422 (Mar. 30, 2018).[21] The Governor explained that although "Vermont is currently one of the healthiest and safest states in America," recent "tragedies in Florida, Las Vegas, Newtown and elsewhere—as well as the averted plot to shoot up Fair Haven High School—have demonstrated [that] no state is immune to the risk of extreme violence." *Id.* The statement continues:

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[19] *Available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Judiciary/Bills/S.55/S.55~Lois%20Porter~Information%20on%20Hunter%20Education~3-28-2018.pdf.

[20] *Available at* https://legislature.vermont.gov/assets/Documents/2018/WorkGroups/Senate%20Judiciary/Bills/S.55/S.55~William%20Bohnyak~Testimony%20freom%20VT%20highway%20Safety%20Alliance~3-29-2018.pdf.

[21] *Available at* http://governor.vermont.gov/press-release/official-statement-s55-s221-h422.

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> As Governor, I have a moral and legal obligation and responsibility to provide for the safety of our citizens. If we are at a point when our kids are afraid to go to school and parents are afraid to put their kids on a bus, who are we?
>
> That's why I put forward an action plan last month with steps to better ensure the safety and well-being of all Vermonters. My proposals included enhancing school safety, identifying and addressing root causes of violence and developing avenues for open conversations about gun safety, while preserving our Constitutional rights.

Id. The Governor thanked "the Legislature for responding to [his] request to act" by passing S.55 and other gun safety legislation, and he reiterated his strong support for constitutional rights, including the right to bear arms. *Id.* He then stated his belief that new laws "uphold these rights, while taking reasonable steps to reduce the risk of violence." *Id.*

B. To protect public safety, S.55 restricts the transfer of firearms and bans bump stocks.

As enacted, S.55 contains five sections related to gun safety, in addition to the provisions for disposing of unlawful and abandoned firearms. Three sections are relevant here: the universal background check requirement, the prohibition on the sale of firearms to some individuals under 21 years of age, and the ban on the possession of bump stocks.

The universal background check provision requires that individuals who are not federally licensed to transfer firearms cannot make such a transfer unless they appear before a federally licensed firearms dealer who agrees to facilitate the transfer. 13 V.S.A. § 4019(b)(1). The licensed dealer must comply with all requirements of state and federal law and conduct the transfer just as the dealer

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would if selling the firearm from his or her own inventory. 13 V.S.A. § 4019(c)(1). If the transferee is prohibited by law from purchasing or possessing the firearm the licensed dealer must return the firearm to the transferor. 13 V.S.A. § 4019(c)(2). Individuals attempting to transfer firearms pursuant to the law may not knowingly make false statements or exhibit false identification intended to deceive a licensed dealer with respect to any fact material to the transfer. 13 V.S.A. § 4019(b)(2). Any person who does is subject to a penalty of up to one year in jail, or a fine of not more than $500, or both. 13 V.S.A. § 4019(d)(2). Any person who ignores the law entirely and transfers a firearm without appearing in front of a licensed firearms dealer is subject to the same penalty. 13 V.S.A. § 4019(d)(1). There are several exceptions to the law. It does not apply to firearms transferred by or to law enforcement agencies, by or to law enforcement officers or U.S. Armed Forces members acting within the course of their duties, between immediate family members, or between people in order to prevent imminent harm to any person while the risk of imminent harm exists. 13 V.S.A. § 4019(e).

The age-limit provision restricts the sale of firearms to persons under 21 years of age (13 V.S.A. § 4020(a)) but includes several exceptions. It does not apply to law enforcement officers, an active or veteran member of the U.S. Armed Forces or any state's National Guard, or a person who has completed a hunter safety course that is approved by the Commissioner of Fish and Wildlife. 13 V.S.A. §

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4020(b). A violation of this law carries a penalty of up to one year in jail, or a fine of up to $1,000, or both. 13 V.S.A. § 4020(a).

The bump stock provision bans the possession of "bump-fire stocks." 13 V.S.A. § 4022(b). Bump-fire stocks are defined as "a butt stock designed to be attached to a semiautomatic firearm and intended to increase the rate of fire achievable with the firearm to that of a fully automatic firearm by using the energy from the recoil of the firearm to generate a reciprocating action that facilitates the repeated activation of the trigger." 13 V.S.A. § 4022(a). A violation of the law carries a penalty of up to one year in jail, or a fine of up to $1,000, or both. 13 V.S.A. § 4022(b).

C. Plaintiff sues state officials and challenges the constitutionality of 13 V.S.A. §§ 4019, 4020, and 4022.

In furtherance of its mission is "to actively oppose all proposed gun control bills," plaintiff actively opposed S.55 in the Legislature. *See* Compl. ¶ 10; S.55 (Act 94), Bill Status/Witnesses (noting plaintiff's testimony before both the House and Senate).[22] After the Legislature passed and the Governor signed S.55, plaintiff filed this lawsuit on August 21, 2018, challenging the background check, age limit, and bump stock provisions under Articles 7 and 16 of the Vermont Constitution. Plaintiff seeks a declaration that the challenged provisions of S.55

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[22] https://legislature.vermont.gov/bill/status/2018/S.55 (last visited Nov. 18, 2018).

are unconstitutional, an injunction preventing defendants from enforcing them, and costs and attorneys' fees. Compl. ¶ 31.[23]

ARGUMENT

The complaint should be dismissed under Rule 12(b) of the Vermont Rules of Civil Procedure, both for lack of jurisdiction and for failure to state a claim. A motion to dismiss on these grounds should be granted when, assuming as true the facts pleaded in the complaint and drawing all reasonable inferences in favor of the non-moving party, "there exist no facts or circumstances that would entitle the plaintiff to relief." *Heffernan v. State*, 2018 VT 47, ¶ 7, 187 A.3d 1149 (quotation omitted); *Brod v. Agency of Nat. Resources*, 2007 VT 87, ¶ 2, 182 Vt. 234, 936 A.2d 1286.

First, plaintiff has not alleged facts indicating that it has standing to bring a claim under Article 7 or Article 16. Accordingly, the Court lacks subject matter jurisdiction. *See* Section I.

[23] This case is one of two pending cases that together challenge nearly every aspect of S.55. Despite being represented by longtime outside counsel for the National Rifle Association, the plaintiffs in the other case chose *not* to challenge S.55's universal background check, safety course, and bump stock elements, highlighting the extremity of plaintiff's mission-driven position here. *See Vermont Federation of Sportsmen's Clubs v. Birmingham*, No. 224–4–18 Wncv (plaintiffs are represented by counsel including Cooper & Kirk PLLC attorneys and challenge S.55's restriction on large capacity magazines only); *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 187 (5th Cir. 2012) (NRA represented by Cooper & Kirk attorneys in unsuccessful challenge to federal prohibition on under 21 handgun sales by licensed dealers); *New York State Rifle & Pistol Association v. City of New York*, 883 F.3d 45, 51-52 (2d Cir. 2018) (NRA represented by Cooper & Kirk attorneys in unsuccessful challenge to New York City licensing scheme); *Kolbe v. Hogan*, 849 F.3d 114, 117, 121 (4th Cir. 2017) (NRA represented by Cooper & Kirk attorneys in unsuccessful challenge to assault weapon and large capacity magazine restrictions).

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Second, plaintiff has not stated a claim that any of the challenged provisions violates "the right to bear arms" under Article 16. Article 16 protects an individual right to possess a firearm for self-defense, but this right—like the parallel rights codified by the federal constitution's Second Amendment and more than forty other state constitutions—is limited and may be regulated to protect public safety. To the extent any of the challenged provisions even implicate the Article 16 right, they survive constitutional scrutiny. The people of Vermont, through their elected representatives, enacted these provisions to protect Vermonters from gun violence. The challenged provisions further the State's public safety goals and impose, at most, an incidental burden on the right to bear arms in self-defense. Accordingly, plaintiff's Article 16 claims fail as a matter of law and should be dismissed. *See* Section II.A.

Third, plaintiff has not stated a claim under the Common Benefits Clause. Persons younger than 21 years of age do not have a fundamental right to purchase retail firearms under Article 16, and in any event, requiring them to complete an approved safety course before doing so advances the State's compelling interest in public safety. *See* Section II.B.

I. Plaintiff lacks standing to bring the claims in its complaint.

As a threshold matter, the Complaint should be dismissed because plaintiff lacks standing to bring an Article 16 or Article 7 claim. "Vermont courts are vested with subject matter jurisdiction only over actual cases or controversies involving litigants with adverse interests." *Brod*, 2007 VT 87, ¶ 8. "To have a case

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or controversy subject to the jurisdiction of the court, the plaintiffs must have standing. In the absence of standing, any judicial decision would be merely advisory, and Vermont courts are without constitutional authority to issue advisory opinions." *Id.* "[S]tanding is to be determined as of the commencement of suit." *U.S. Bank Nat'l Ass'n v. Kimball*, 2011 VT 81 ¶ 12, 190 Vt. 210, 27 A.3d 1087 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.5 (1992)).

The Vermont Supreme Court "has adopted the constitutional and prudential components of the standing doctrine enunciated by the United States Supreme Court." *Schievella v. Dep't of Taxes*, 171 Vt. 591, 592, 765 A.2d 479, 481 (2000). There are three constitutional elements of standing: (i) the plaintiff must have suffered an actual injury, *i.e.*, "an invasion of a legally protected interest," which is both "concrete and particularized" and "actual and imminent"; (ii) the defendants' alleged conduct must have caused the injury; and (iii) the injury must be likely to be redressed by a favorable decision. *Turner v. Shumlin*, 2017 VT 2, ¶ 11, 163 A.3d 1173 (quotation omitted). "The prudential elements of standing include the general prohibition on a litigant's raising another person's legal rights, the rule against adjudication of generalized grievances, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337, 341, 693 A.2d 1045, 1048 (1997) (quotation omitted). A court must examine the substance of a plaintiff's claim to determine both whether a legally protected interest has

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been invaded and whether the "zone-of-interests test" is satisfied. *Id.* at 341-42, 693 A.2d at 1048.

The standing requirement applies to both organizations and individuals. *Parker v. Town of Milton*, 169 Vt. 74, 78, 726 A.2d 477, 480 (1998). "Ordinarily, an organizational plaintiff may attempt to show standing in one of two ways. First, under the theory of 'organizational standing,' an organization may sue on its own behalf in order to protect its own interests." *Common Purpose USA, Inc. v. Obama*, 227 F. Supp. 3d 21, 26 (D.D.C. 2016). "Alternatively, under the theory of 'associational standing,'" an association has standing to sue on its members' behalf "when (1) its members have standing individually; (2) the interests it asserts are germane to the organization's purpose; and (3) the claim and relief requested do not require the participation of individual members in the action." *Id.*; *Parker*, 169 Vt. at 78, 726 A.2d at 480 (citing *Hunt v. Wash. State Apple Advert. Comm'n,* 432 U.S. 333, 343 (1977)).

A. Plaintiff's associational standing allegations.

Plaintiff alleges that it is a Vermont non-profit association with "approximately 7,000 members, most of whom reside in Vermont." Compl. ¶ 10. Plaintiff alleges that its mission, *inter alia*, is to "uphold the second amendment

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to The Constitution of the United States and Article 16 of The Vermont State Constitution; [and] to actively oppose all proposed gun control bills." *Id.*

Plaintiff, however, does not allege any basis for organizational standing, that is, the right to sue on its own behalf to protect its own interests.[24] Specifically, plaintiff does not allege that the enactment or enforcement of 13 V.S.A. §§ 4019, 4020 or 4022 have actually injured, or imminently threaten injury to any of its legally protected interests. Rather, plaintiff's standing allegations in Paragraph 11 of its Complaint all concern purported threats or burdens posed by 13 V.S.A. §§ 4019, 4020 and 4022 to plaintiff's unnamed individual members. Plaintiff apparently seeks to represent these members' interests in this action on a theory of associational standing.

To that end, plaintiff alleges that it "has members who own bump-fire stocks," the possession of which is now banned by 13 V.S.A. § 4022. Compl. ¶ 11. However, plaintiff does not allege that any of its members will retain possession

[24] Federal case law construing the Second Amendment holds that associations, corporations and other non-natural persons, like plaintiff, have no legally protected interests themselves under the Second Amendment—and, by analogy, the same reasoning indicates that plaintiff likely lacks any protected interests under Article 16. *See Leo Combat, LLC v. U.S. Dep't of State*, No. 15-cv-02323, 2016 WL 6436653, at *8-10 (D. Colo. Aug. 29, 2016) (declining to infer "that a corporate entity, in and of itself, enjoys Second Amendment rights" because "the text and historical context of the Second Amendment shows that it confers *individual* rights, and that any rights extended to a corporation . . . are dependent upon the entity's ability to assert *individual* rights of third-parties on their behalf"); *cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (1978) ("Certain "purely personal" guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the "historic function" of the particular guarantee has been limited to the protection of individuals." (quotation omitted)).

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of their bump-stocks in defiance of the ban. *See* 13 V.S.A. § 4022(c) (directing creation of "collection process that permits persons to voluntarily and anonymously relinquish bump-fire stocks prior to" ban's effective date).[25]

Plaintiff further alleges that it has "members who regularly sell firearms and otherwise transfer firearms to other persons." Compl. ¶ 11. Plaintiff imprecisely claims that all "[s]uch action is now illegal" by operation of 13 V.S.A. § 4019, but does not allege that any of its members are actually affected by the firearms transfer requirements of Section 4019. Compl. ¶ 11. Specifically, plaintiff does not allege that it has any members who are "unlicensed person[s]" currently wishing to sell or transfer firearms to another "unlicensed person" who is not an "immediate family member," "law enforcement officer," or "member of the U.S. Armed Forces," but who are unwilling or unable to "request that [a] licensed dealer facilitate the [firearms] transfer" to the other "unlicensed person." *See* 13 V.S.A. § 4019.

Likewise, plaintiff alleges that it "has members under the age of 21 who will be unable to purchase or possess firearms without first completing an approved hunter safety course," as required by 13 V.S.A. § 4020. Compl. ¶ 11. But plaintiff does not allege that it has members under the age of 21 who are currently impacted by Section 4020. In particular, plaintiff does not allege that it has under-21 members who (a) are not "law enforcement officer[s]," or "active or

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[25] Although the statute's effective date, October 1, 2018, is now past, plaintiff filed its complaint on August 21, 2018.

veteran member[s]" of the National Guard or U.S. Armed Forces; (b) who currently wish to purchase or possess firearms; but (c) who are unwilling or unable to satisfactorily complete an approved hunter safety course. *See id.*

Plaintiff does not allege that any of its members have received a specific, or even general threat of prosecution for violating, or planning to violate Sections 4019, 4020 or 4022. Plaintiff does not allege that any of its members have an objectively well-founded fear of prosecution in the near future for violating, or planning to violate, Sections 4019, 4020 or 4022.

B. Plaintiff lacks associational standing on behalf of its members.

An organizational plaintiff like this one cannot allege associational standing unless it identifies at least one of its members and alleges specific facts establishing that this member would have standing in his or her own right. *See Parker*, 169 Vt. at 78, 726 A.2d at 480 (citing *Hunt,* 432 U.S. at 343)*; see also Common Purpose USA*, 227 F. Supp. 3d at 27 (anti-gun violence non-profit challenging District of Columbia's concealed carry handgun laws could not establish associational standing under *Hunt* because the complaint failed "to identify a single member whatsoever, and failed to allege facts that would establish that any identifiable member has standing in her own right").

Here, plaintiff has not identified even one of its "approximately 7,000" members whose interests under Articles 16 and 7 have been injured (or, imminently will be injured) by the enactment or enforcement of 13 V.S.A. §§ 4019, 4020, or 4022. Plaintiff has also failed to allege specific facts showing that

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any one of these unidentified members would have individual standing to bring the claims asserted in this action. Accordingly, on the face of its complaint, plaintiff is not entitled to associational standing. *See Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 251 (S.D.N.Y. 2011) (plaintiff gun rights organization that challenged New York's handgun licensing scheme could not establish associational standing when it had "neither identified particular members who have standing, nor specified how they would have standing to sue in their own right"), *aff'd sub nom. Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *see also Montana Shooting Sports Ass'n v. Holder*, No. CV-09-147, 2010 WL 3926029, at *14 (D. Mont. Aug. 31, 2010) ("[T]he Second Amendment Foundation lacks standing because it has not identified any member of its organization that might have standing in his or her own right"), *report and recommendation adopted*, 2010 WL 3909431 (D. Mont. Sept. 29, 2010), *aff'd on other grounds*, 727 F.3d 975 (9th Cir. 2013).[26]

Even if plaintiff had sufficiently identified specific individual members, its general allegations about these members' vague and indefinite plans to purchase or sell firearms in violation of Sections 4019 or 4020, as well as the complaint's complete absence of any allegations concerning threatened prosecution, preclude

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[26] *See also Jimmo v. Sebelius*, No. 11-CV-17, 2011 WL 5104355, at *18 n.9 (D. Vt. Oct. 25, 2011) (noting that organizational plaintiff American Academy of Physical Medicine and Rehabilitation "could not independently assert standing, because it makes no allegation that one of its members would have standing to sue other than the conclusory statement that 'Members of AAPM & R would have standing to sue in their own right'").

any reasonable inference of imminent injury sufficient to confer standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (To establish an injury-in-fact for standing purposes based on a future injury, the complaint must allege that "the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." (quotation omitted)); *Brod*, 2007 VT 87, ¶¶ 9, 12 ("In a suit for declaratory judgment, an injury in fact must be reasonably expected and not based on fear or anticipation" and "[w]hile the alleged injury need only be threatened to establish standing, the threat must be real and apparent" (citation omitted)).

First, a plaintiff must allege "'concrete plans' to perform, in the near future, the conduct that would subject him to the threatened injury." *Brady Campaign to Prevent Gun Violence v. Brownback*, 110 F. Supp. 3d 1086, 1097 (D. Kan. 2015) (quoting *Lujan*, 504 U.S. at 564 & n.2). "A general intent to violate a statute at some unknown date in the future does not rise to the level of an articulated, concrete plan." *Nichols v. Brown*, 859 F. Supp. 2d 1118, 1128 (C.D. Cal. 2012) (quotation omitted).

Here, plaintiff alleges that it has unidentified "members who regularly sell firearms and otherwise transfer firearms to other persons" and suggests that "[s]uch action is now illegal" by operation of 13 V.S.A. § 4019. Compl. ¶ 11. But plaintiff does not allege that any of its members have "'concrete plans' to perform, in the near future" any firearms transfer that would violate 13 V.S.A. § 4019. *Jones*, 101 F. Supp. 3d at 291. Likewise, plaintiff alleges that it has under-21

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members "who will be unable to purchase or possess firearms" as a result of 13 V.S.A. § 4020. Compl. ¶ 11. Yet plaintiff does not allege when, how, where or even whether any of these under-21 members will attempt to purchase a firearm in violation of 13 V.S.A. § 4020. Much like the plaintiffs in *Thomas v. Anchorage Equal Rights Commission*, Gun Owners of Vermont "cannot say when, [from] whom, where, or under what circumstances" their members will violate Sections 4019 and 4020. 220 F.3d at 1139.

Second, a plaintiff seeking pre-enforcement review of a statute, as plaintiff does on behalf of its members, "must do more than allege a potential risk of prosecution. A plaintiff must show that there is a 'genuine threat of imminent prosecution.'" *Calif. Sea Urchin Comm'n v. Bean*, 883 F.3d 1173, 1180 (9th Cir. 2018) (citation omitted), *cert. granted sub nom. Calif. Sea Urchin Comm'n v. Combs*, No. 17-636 (U.S. June 4, 2018).[27] Accordingly, "pre-enforcement review" of a challenged law is only permissible "under circumstances that render the threatened enforcement sufficiently imminent." *Driehaus*, 134 S. Ct. at 2342. Stated differently, "the threat of future enforcement" should be "substantial," as demonstrated by a specific threat of prosecution or "history of past enforcement . . . against the same conduct." *Id.* at 2345.

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[27] *See also Crawford v. U.S. Dep't of Treasury*, 868 F.3d 438, 454 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018) ("The mere *possibility* of prosecution, however—no matter how strong the plaintiff's intent to engage in forbidden conduct may be—does not amount to a 'credible threat' of prosecution. Instead, the threat of prosecution 'must be certainly impending to constitute injury in fact'" (citations omitted)).

Relatedly, a plaintiff must also allege an imminent threat of prosecution that targets "the plaintiff's planned conduct with some degree of specificity." *Brady Campaign*, 110 F. Supp. 3d at 1097 (quotation omitted). A general threat of prosecution is insufficient because it lacks the immediacy necessary to give rise to a justiciable controversy. *See San Diego Cty. Gun Rights Comm.*, 98 F.3d at 1127; *Montana Shooting Sports Ass'n*, 2010 WL 3926029, at *11. Instead, a "specific warning of an intent to prosecute under a criminal statute" is needed by a plaintiff "to show imminent injury and confer standing." *San Diego Cty. Gun Rights Comm.*, 98 F.3d at 1127; *see also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (2000) (rejecting proposition that "the mere existence of a statute can create a constitutionally sufficient direct injury" because "there must be a 'genuine threat of imminent prosecution'" such as "a specific warning or threat to initiate proceedings." (quoting *San Diego Cty. Gun Rights Comm.*, 98 F.3d at 1126)).[28]

In this case, plaintiff also does not allege that any of its members have received a "specific warning" or even a "general threat of prosecution" in the near future if they transfer a firearm in violation of 13 V.S.A. § 4019, purchase a

[28] *Cf. Cayuga Nation v. Tanner*, 824 F.3d 321, 331-32 (2d Cir. 2016) (tribal officers had standing to challenge application of local anti-gambling ordinance since they had "plausibly alleged that they have been directly threatened with prosecution" in the form of letters and notices from the town warning the tribe of enforcement action and potential penalties); *Knife Rights, Inc. v. Vance*, 802 F.3d 377, 385-87 (2d Cir. 2015) (knife retailer and purchasers had standing to challenge constitutionality of state law banning possession of "gravity knives" since district attorney had "recently identified [retailer] as a [gravity knife ban] violator and pursued enforcement action against it" and individual plaintiffs had "already been charged with a [gravity knife ban] violation").

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firearm while under the age of 21, contrary to 13 V.S.A. § 4020, or continue to possess a bump-stock banned by 13 V.S.A. § 4022. *San Diego County Gun Rights Comm.*, 98 F.3d at 1127. Thus, there is no specific "reason to believe" that plaintiff's members "will be targets of criminal prosecution," *Cayuga Nation*, 824 F.3d at 331–32, and any "fear of prosecution" harbored by plaintiff members is therefore "conjectural or hypothetical" at this point. *Knife Rights*, 802 F.3d at 385-87.

Indeed, plaintiff's vague allegations concerning its members' possible future liabilities under the challenged statutes mirror those of plaintiffs in other cases who brought pre-enforcement challenges to state and federal gun control measures on Second Amendment and other constitutional grounds. These plaintiffs were found to lack standing because they failed to allege or establish that they had sufficiently concrete plans to violate the challenged restrictions.

For instance, in *Colorado Outfitters Association v. Hickenlooper*, the Tenth Circuit dismissed on standing grounds a Second Amendment challenge to Colorado's statutory ban on the transfer and possession of large-capacity magazines, as well as expanded mandatory background checks for firearm sales. 823 F.3d 537, 541-42, 554-55 (10th Cir. 2016). The court found lacking the testimony of an individual member of an organizational plaintiff, Women for Concealed Carry, who already owned 5 legally grandfathered large-capacity magazines but claimed that the ban on future magazine purchases would nonetheless harm her "because '*eventually*,' her [magazines] will wear out and

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because it would be '*possible*' to lose her [magazines] (or lose continuous possession of them) in the meantime." *Id.* at 550-51 (emphasis in original). The court concluded that such "some day" speculation failed to establish an Article III injury, and that consequently her organization lacked standing to sue on her behalf. *Id.* at 551.

Courts in other gun rights cases have similarly dismissed complaints that fail, as plaintiff's complaint does here, to allege a concrete injury. *See Nat'l Rifle Ass'n of America v. Magaw,* 132 F.3d 272, 276-78 (6th Cir. 1997) (individual gun and magazine owners challenging 1994 federal Crime Control Act "failed to demonstrate a cognizable injury-in-fact sufficient to confer standing prior to enforcement of the Act against them" given their lack of any concrete plan or credible intent to violate the Act and thereby face imminent threat of prosecution); *San Diego Cty. Gun Rights Comm.*, 98 F.3d at 1127 (gun rights associations and individual gun owners lacked standing to challenge Crime Control Act's ban on assault weapons and large-capacity magazines because plaintiffs did not articulate "concrete plans to violate" the law but instead merely asserted their intentions to engage in prohibited activities); *Nichols*, 859 F. Supp. 2d at 1127 (individual plaintiff lacked standing to bring a pre-enforcement challenge to a California statute barring the carrying of loaded firearms in public places based on mere allegation that he "would openly carry a loaded and functional handgun in public for the purpose of self-defense," but for his fear of arrest and prosecution).

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In this case, plaintiff has not alleged "a concrete plan [with] sufficient detail to convey the timing and circumstances of" any future firearms transactions in violation of Sections 4019 and 4020, *Nichols* at 1128-29, such as "when, [from] whom, where, or under what circumstances" its members will buy or sell firearms. *Thomas*, 220 F.3d at 1139. Plaintiff has also not alleged that any one of its members face a specific and imminent threat of prosecution for illegal firearms transactions, or for continued possession of a bump-stock in violation of Section 4022. Accordingly, plaintiff has not demonstrated that any of its members have suffered an injury-in-fact sufficient to confer individual standing on them, or associational standing on plaintiff.[29]

II. Plaintiff's claims fail on the merits as a matter of law.

If the Court reaches the merits of the complaint, it should dismiss all of plaintiff's claims as a matter of law.

The complaint asserts that 13 V.S.A. §§ 4019, 4020, and 4022 violate the Vermont Constitution and are thus unenforceable. The Vermont Supreme Court has emphasized repeatedly "that statutes are presumed to be constitutional and are presumed to be reasonable" and that the courts "must accord deference to the policy choices made by the Legislature." *Badgley v. Walton*, 2010 VT 68, ¶¶ 20,

[29] For the same reasons, any Article 16 claims of plaintiff's individual members are not ripe and therefore do not present a justiciable case-or-controversy. "A claim is not constitutionally ripe if the claimed injury is conjectural or hypothetical rather than actual or imminent." *Turner*, 2017 VT 2, ¶ 9. "[I]n many cases, ripeness coincides squarely with standing's injury in fact prong . . . . [a]nd, in 'measuring whether the litigant has asserted an injury that is real and concrete rather than speculative and hypothetical, the ripeness inquiry merges almost completely with standing.'" *Thomas*, 220 F.3d at 1138-39 (quotation omitted).

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38, 188 Vt. 367, 10 A.3d 469; *see State v. Curley-Egan*, 2006 VT 95, ¶ 11, 180 Vt. 305, 910 A.2d 200 (explaining that, under the Vermont Constitution, the Legislature is authorized "to pass measures for the general welfare of the people" and is "itself the judge of the necessity or expediency of the means adopted" (citations omitted)). Accordingly, "the proponent of a constitutional challenge has a very weighty burden to overcome." *Badgley*, 2010 VT 68, ¶ 20.

A plaintiff's burden is heightened where, as here, it argues that a state constitutional provision restricts the Legislature in a way that an analogous provision of the federal constitution does not. Although the Vermont Supreme Court has "on occasion found that the Vermont Constitution affords greater rights than the federal constitution," the proponent of such an interpretation "bears the burden of providing an explanation of how or why" this is the case. *State v. Porter*, 164 Vt. 515, 518, 671 A.2d 1280, 1282 (1996) (quotation omitted). Plaintiff cannot meet this burden.

A. The complaint fails to state any viable claims under Article 16 of the Vermont Constitution.

All of plaintiff's Article 16 claims should be dismissed. Plaintiff argues that Article 16 precludes: (i) the background check requirement codified at 13 V.S.A. § 4019 (Count 1), (ii) the safety course requirement for gun buyers younger than 21 codified at 13 V.S.A. § 4020 (Count 2), and (iii) the bump stock ban codified at 13 V.S.A. § 4022 (Count 3). Plaintiff does not challenge these provisions under the Second Amendment to the United States Constitution. No doubt this is because any such claim would be doomed to fail based on established federal case law.

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Plaintiff's Article 16 claims likewise fail because plaintiff cannot carry its "burden of providing an explanation of how or why" the Vermont Constitution "affords greater rights than the federal constitution" in this context. *See State v. Porter*, 164 Vt. 515, 518, 671 A.2d 1280, 1282 (1996) (quotations omitted).

1. Plaintiff's claims would fail had they been brought under the Second Amendment.

In *District of Columbia v. Heller*, the U.S. Supreme Court held for the first time that the Second Amendment protects an individual right to possess firearms, and that this right is not tied to military service. 554 U.S. 570 (2008).[30] Accordingly, the Court ruled that the Second Amendment barred the District of Columbia from "totally ban[ning] handgun possession in the home" and from "requir[ing] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.* at 628-35.

The Court struck down the District's restrictions because they impermissibly infringed the plaintiffs' right to self-defense. The Court described self-defense as "central to the Second Amendment right" and "the *central component* of the right itself." *Id.* at 599, 628 (emphasis in original). Because the handgun is "the quintessential self-defense weapon" and "the most popular weapon chosen by Americans for self-defense in the home," the Court concluded that "a complete prohibition of their use is invalid" under the Second Amendment. *Id.* at 629.

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[30] The Second Amendment provides: "A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II.

Moreover, the Court was particularly concerned about prohibiting handguns in "the home, where the need for defense of self, family, and property is most acute." *Id.* at 628. The Court explained that, although the Constitution leaves the District "a variety of tools" for combating the problem of gun violence, "including some measures regulating handguns," the Second Amendment precludes "the absolute prohibition of handguns held and used for self-defense in the home." *Id.* at 636.

Heller was also quite clear that the Second Amendment right to keep and bear arms is limited and subject to regulation. The Court explained, in a list that expressly did "not purport to be exhaustive," that nothing in its ruling "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27 & n.26. And although the right to keep and carry arms covers weapons "not in existence at the time of the founding," it protects only "the sorts of weapons . . . in common use" and does not extend to "dangerous and unusual weapons" or to modern "weapons that are most useful in military service—M-16 rifles and the like," which constitutionally "may be banned." *Id.* at 582, 627 (quotation omitted).[31]

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[31] Following *Heller*, the U.S. Supreme Court held in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), that the Second Amendment right was incorporated against the States through the Fourteenth Amendment's Due Process Clause.

A facial Second Amendment challenge to S.55's background check, safety course, and bump stock provisions would fail under *Heller* and subsequent federal case law. A background check challenge would fail because "conditions and qualifications on the commercial sale of arms," like background checks, to prevent "possession of firearms by felons and the mentally ill" are "presumptively lawful regulatory measures." *Heller,* 554 U.S. at 626-27 & n. 26. A safety course challenge would fail because States can impose safety conditions on firearm sales to those who would have been considered "minors" or "infants" under the law in colonial times. *See Horsley v. Trame*, 808 F.3d 1126, 1130 (7th Cir. 2015) (quoting *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 202 (5th Cir. 2012)). And a bump stock challenge would fail because the Second Amendment allows banning machine guns, and a bump stock's sole function is to enable a semi-automatic weapon to function like a machine gun. *See Heller*, 554 U.S. at 627-28. Indeed, even the NRA has recognized that the Second Amendment does not prohibit the regulation of "devices designed to allow semiautomatic rifles to function like fully automatic rifles." Wayne LaPierre and Chris Cox, Nat'l Rifle Ass'n, Joint Statement (Oct. 5, 2017).[32]

2. Article 16 does not prevent the Legislature from passing reasonable gun safety legislation.

The people's "right to bear arms for the defence of themselves and the State" under Article 16 of the Vermont Constitution, like "the right of the people to keep

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[32] *Available at* https://home.nra.org/joint-statement.

and bear arms" under the Second Amendment of the U.S. Constitution, protects a limited individual right to use a firearm for self-defense that is subject to reasonable regulation.

To determine whether the Vermont Constitution provides greater individual rights—and thus binds the Legislature to a greater extent—than its federal counterpart, the Court may examine a variety of sources, including: Article 16's text and any textual differences between Article 16 and the Second Amendment; historical considerations; Vermont Supreme Court case law interpreting Article 16; sibling state authority; and policy considerations. *See, e.g.*, *State v. Rheaume*, 2004 VT 35, ¶ 16, 176 Vt. 413, 853 A.2d 1259 (citing *State v. Jewett*, 146 Vt. 221, 225-27, 500 A.2d 233, 236-37 (1985)); *State v. Morris*, 165 Vt. 111, 128, 680 A.2d 90, 101-02 (1996); *State v. Benning*, 161 Vt. 472, 476, 641 A.2d 757, 759 (1994). As discussed below, these sources suggest that Article 16 permits reasonable legislation like the provisions of S.55 that plaintiff challenges.

a. The text of Article 16 parallels the U.S. Supreme Court's interpretation of the Second Amendment in *Heller*.

Although the text of the Second Amendment differs from that of Article 16, the U.S. Supreme Court has concluded that both provisions codify the same individual right to possess firearms for self-defense. *Heller*, 554 U.S. at 600-03 (discussing the meaning of Article 16 and other contemporaneous state constitutional arms provisions). This Court should reach the same conclusion. *See Jewett*, 146 Vt. at 226-27, 500 A.2d at 237 ("[P]rovisions of the Vermont Constitution contain[ing] wording substantially different from the parallel

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clauses in the Federal Charter . . . may be given the same interpretation even though the language differs.").

Article 16 of the Vermont Constitution provides:

> That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.

Vt. Const. ch. I, art. 16.

Although the Second Amendment, unlike Article 16, does not explicitly mention a right to bear arms for *self-defense*, the U.S. Supreme Court in *Heller* interpreted the federal provision as codifying an existing right "inherited from our English ancestors" that was analogous to the right codified in contemporaneous state constitutions, including Vermont's, which did explicitly mention self-defense. *See* 554 U.S. at 599 (quotation omitted); *see also id.* at 605 (noting Court's "longstanding view that the Bill of Rights codified venerable, widely understood liberties"). The Court expressly considered Article 16 of the Vermont Constitution—as well as parallel provisions in the early Pennsylvania, North Carolina, and Massachusetts Constitutions—and opined "that the most likely reading of all four of these pre-Second Amendment state constitutional provisions is that they secured an individual right to bear arms for defensive purposes" that was analogous to the right codified by the Second Amendment in 1789. *Id.* at 600-03.

Accordingly, the text of Article 16 suggests that the people's "right to bear arms for the defence of themselves and the State" under the Vermont

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Constitution is analogous to the "right of the people to keep and bear arms" under the federal constitution, as set forth in *Heller*. As *Heller* and subsequent federal case law make clear, that right does not preclude States from enacting reasonable firearms regulations. *See above* Section II.A.1.

b. Historical sources support interpreting Article 16 to permit reasonable gun safety legislation.

Consideration of historical sources also supports an interpretation of Article 16 that permits reasonable regulations like the challenged provisions of S.55.

Little evidence exists concerning the original intent of Article 16's framers.[33] Nonetheless, one may look to Pennsylvania to gain insight into the Article's scope. *See Morris*, 165 Vt. 111, 127, 680 A.2d 90, 101-02 (1996) (recognizing "that the Vermont Constitution was adopted with little recorded debate" and noting that where certain provisions were "copied practically verbatim from other jurisdictions," those provisions could be analyzed in part by looking to the historical record from other jurisdictions). The first Vermont Constitution drew heavily from the first Pennsylvania Constitution; Article 16, in fact, was copied verbatim. *See id.*; Vt. Const. art. I, § 15 (1777); Pa. Dec. of Rights art. XIII (1776).

[33] Article 16 was originally adopted in 1777 as the 15th provision of the first Vermont Constitution. *See* Vt. Const. art. I, § 15 (1777). "Unfortunately, no record exists of any discussion or debate over the adoption of the Vermont Constitution." *Shields v. Gerhart*, 163 Vt. 219, 225, 658 A.2d 924, 929 (1995); *see also* Matt Bushnell Jones, Vermont in the Making 1750-1777 at 387 (Archon Books 1968). This is perhaps not surprising given that the convention was held over only six days in July 1777 in Windsor while a British army was less than 100 miles away at the gates of Fort Ticonderoga. *Id.* at 386. The convention adjourned shortly after Ticonderoga was evacuated. *Id.* at 388; *see* Daniel Chipman, A Memoir of Thomas Chittenden, the First Governor of Vermont, 26 (Middlebury 1849).

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Pennsylvania has long interpreted its constitutional right-to-bear arms provision as permitting reasonable firearms regulations. As of 1776, when Pennsylvania's provision was first enacted, the Commonwealth had in place a number of laws regulating firearms in the interest of public safety. For example, a special license was required to "fire any gun or other fire arms . . . within the city of Philadelphia." Act of Aug. 26, 1721, *reprinted in* An Abridgment of the Laws of Pennsylvania, 1700–1811 at 173 (Philadelphia 1811).[34] Later, in 1779, Pennsylvania passed a significantly more invasive law, which provided that anyone who refused to swear allegiance to Pennsylvania could be disarmed. Act of April 2, 1779, *in* Acts of the General Assembly of the Commonwealth of Pennsylvania (1775–1781) 193 (Philadelphia 1782).[35]

Vermont has also long regulated firearms in the interest of public safety. Since the 1800s, Vermont has barred doing many things while in possession of a deadly weapon, including dueling, attending duels, robbery with intent to kill or maim if resisted, and assault with intent to steal or rob. *See* 23 Vt. Rev. Stat. §§ 7, 8, 16, 17 (1840) (current version at 13 V.S.A. § 608(b) (2018)).[36] Vermont has also regulated gunpowder storage near buildings inhabited by others, 34 Vt. Gen.

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[34] *Available at* https://catalog.hathitrust.org/Record/008596142 (last visited Nov. 18, 2018).

[35] *Available at* https://catalog.hathitrust.org/Record/010447961 (last visited Nov. 18 2018).

[36] *Available at* https://catalog.hathitrust.org/Record/008596003 (last visited Nov. 18, 2018).

Stat. § 28 (1863),[37] pointing firearms towards other persons, 31 Vt. Rev. Laws. §§ 4122, 4123 (1880) (current version at 13 V.S.A. § 4011 (2018)),[38] and the manufacture, sale, and possession of silencers, 1912 Vt. Acts & Resolves 310, § 1 (current version at 13 V.S.A. § 4010 (2018)).

c. Vermont case law supports interpreting Article 16 to permit reasonable gun safety legislation.

The Vermont Supreme Court has twice discussed Article 16. Though limited, this precedent makes clear that Article 16 allows reasonable firearm legislation.

First, in *State v. Rosenthal*, the Court considered a challenge to a Rutland ordinance barring carrying pistols and certain other weapons without written permission of the mayor or chief of police. 75 Vt. 295, 295, 55 A. 610, 610 (1903). The Court observed that: (i) under Article 16, "[t]he people of the state have a right to bear arms for the defense of themselves and the state"; (ii) state law restricted carrying deadly weapons in several specific contexts; and (iii) as a matter of common law, a landowner could lawfully arm himself with a pistol when attempting to expel a trespasser so long as the landowner only intended to use the pistol to defend himself against death or great bodily harm. *Id.* at 295, 55 A. at 610-11.[39]

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[37] *Available at* https://catalog.hathitrust.org/Record/010476522 (last visited Nov. 18, 2018).

[38] *Available at* https://catalog.hathitrust.org/Record/008596010 (last visited Nov. 18, 2018).

[39] In *State v. Carlton*, the Court reversed a manslaughter conviction where the landowner claimed he tried to drive two trespassers away with a cane and accidentally shot one of them with a pistol held in his left hand after being thrown to the ground. 48

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Rosenthal found the ordinance inconsistent with state law because it barred carrying weapons without permission when state law would allow doing so but allowed carrying them with permission when doing so would be criminal, for example, in a school. *Id.* The Court therefore found that the ordinance conflicted with Article 16, and several cited provisions of state law, and exceeded the legislative power of the Rutland city council. *Id.*

In reaching that holding, the Court suggested both that Article 16 protects an individual right to possess firearms for self-defense and that the Legislature permissibly had placed a number of reasonable limitations on that right in the interest of public safety. *Id.* Indeed, the Rutland ordinance's fatal flaw was that it allowed local officials unlimited discretion to both prohibit what state law allowed (carrying a pistol for self-defense) and to allow what state law prohibited (carrying firearms in situations that, in the Legislature's view, unreasonably threatened public safety). *Id.* The law thus conditioned the right to bear arms in self-defense on the whims of the permitting authority. *Compare Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012) (suggesting New York handgun permitting law would violate Second Amendment if "licensing officials have unbridled discretion" to grant or deny permits, but noting New York followed an "established standard").

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Vt. 636, 641, 644 (1876). Without specifically discussing Article 16, the Court held that the jury should have been instructed that if the landowner was carrying the pistol "for a lawful purpose" and accidentally discharged it without fault, he was not guilty of manslaughter. *Id.*

The Vermont Supreme Court most recently addressed Article 16 when a criminal defendant claimed that a statute barring possession of a loaded rifle in a motor vehicle on a public highway violated his right to bear arms. *State v. Duranleau*, 128 Vt. 206, 209-10, 260 A.2d 383, 386 (1969) (citing 10 V.S.A. § 4705(b) (1969)).

The Court disagreed, noting that the statute "does not literally prohibit the 'bearing' of any arms" and required only that rifles and shotguns in vehicles on the highway be unloaded. *Id.* at 210. It acknowledged that the statute "somewhat conditions the unrestrained carrying" of firearms but found that Article 16 "does not suggest that the right to bear arms is unlimited and undefinable." *Id.*

Accordingly, requiring that two types of weapons be unloaded in specified circumstances was "not such an infringement on the constitutional right to bear arms as to make the statute invalid." *Id.* This conclusion was "conditioned upon the presumption that the statutory purpose is reasonable, as it must be assumed to be" and "on the necessary circumstance" that no facts demonstrating an unconstitutional operation of the statute were before the Court. *Id. Duranleau* makes clear that the legislature may place reasonable conditions on the Article 16 right consistent with its constitutional "power to deal with matters of public . . . health, safety, and welfare." *Id.* at 211.

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The Vermont Supreme Court uses reasonableness as a touchstone for evaluating challenges relying on many articles of the Vermont Constitution and Article 16 should be treated no differently. *See, e.g., Baker v. State*, 170

Vt. 194, 214, 744, A.2d 864, 878-79 (1999) (Article 7 requires courts to evaluate whether a challenged provision "bears a reasonable and just relation to the governmental purpose"); *In re Vt. Supreme Court Admin. Dir. No. 17*, 154 Vt. 392, 399, 579 A.2d 1036, 1040 (1990) (rejecting an "absolutist view of the jury trial right" under Article 12 and finding it was not violated by delaying most civil jury trials for budgetary reasons); *In re One Church St.*, 152 Vt. 260, 266, 565 A.2d 1349, 1352 (1989) (under Article 9, taxpayer classifications must "bear a reasonable relation" to their purpose); *State v. Morse*, 84 Vt. 387, 80 A. 189, 192 (1911) ("When the Legislature, in a matter affecting the public health, adopts means and methods which are reasonable and appropriate, not oppressive or discriminatory, constitutional limitations are not transgressed." (citations omitted)); *cf. State v. Kirchoff*, 156 Vt. 1, 10, 587 A.2d 988, 994 (1991) (applying a "reasonable expectation of privacy" standard to determine whether Article 11 protects "open fields" against warrantless government intrusion).

This approach is also consistent with the Vermont Supreme Court's longstanding guidance concerning constitutional interpretation. The Court has stressed the "great importance" of remembering that "the purpose of any constitutional enactment is to delineate the framework of government." *Turner*, 2017 VT 2, ¶ 24 (quoting *Peck v. Douglas*, 148 Vt. 128, 132, 530 A.2d 551, 554 (1987)). Accordingly, the Court has instructed that constitutional interpretation must "not be so narrow as to present an obstacle to" the

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Legislature's ability to define the "working details" of government, more than one pattern of which "may well be possible and constitutional." *Id.* Interpreting Article 16 to permit reasonable regulation ensures that the Legislature retains its own constitutional authority to craft laws that both respect the individual right to bear arms and protect public safety in the face of a national epidemic of mass shootings.

d. Case law from other States supports interpreting Article 16 to permit reasonable gun safety legislation.

Like Vermont, most other states apply "a deferential 'reasonable regulation' standard" to gun safety laws challenged on state constitutional grounds. *See* Adam Winkler, *The Reasonable Right to Bear Arms*, 17 Stan. L. & Pol'y Rev. 597, 598 (2006) (surveying cases decided under forty-two state constitutional provisions guaranteeing an individual right to bear arms and concluding that "[t]he most prominent feature of the state law in this area is the uniform application of a deferential 'reasonable regulation' standard to laws infringing on the arms right"). According to Professor Winkler, the Missouri Supreme Court first espoused the "reasonable regulation" standard in 1886, and thereafter, "every state's judiciary in which the question has been adjudicated holds that the

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same standard of review applies." *Id.* at 600-01 (citing *State v. Shelby*, 2 S.W. 468 (Mo. 1886)).[40]

Indeed, the Colorado courts recently applied a reasonableness standard to reject challenges to Colorado laws that, like S.55, expanded mandatory background checks to private firearm transfers and restricted large capacity ammunition magazines. *See Rocky Mountain Gun Owners v. Hickenlooper* (*Rocky Mountain I*), 371 P.3d 768, 771–72, 774-77 (Colo. Ct. App. 2016) (affirming the constitutionality of background checks and remanding for fact-finding about magazines); *Rocky Mountain Gun Owners v. Hickenlooper* (*Rocky Mountain II*), 2018 WL 5074555, at *1 (Colo. Ct. App. Oct. 18, 2018) (finding that large capacity magazine restrictions "are a reasonable exercise of the state's police power"). The level of scrutiny was hotly contested, with plaintiffs arguing that *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) together establish "that the right to bear arms is 'fundamental' in nature" and that strict scrutiny therefore applied. *Rocky Mountain I*, 371 P.3d at 772. The Colorado Court of Appeals rejected this argument and held that a "reasonable exercise of police power test" applied, observing that neither *Heller* nor *McDonald* applied strict scrutiny and

[40] Professor Winkler wrote his article in 2006, shortly before *Heller* was decided. Since then, some state courts have found persuasive the analysis of federal courts applying intermediate scrutiny to Second Amendment challenges. Pennsylvania, for example, recently applied intermediate scrutiny to reject a challenge to a licensing statute brought under both the Second Amendment and the Pennsylvania Constitution. *See Commonwealth v. McKown*, 79 A.3d 678, 689–91 (Pa. Super. Ct. 2013). Plaintiffs' Article 16 claim fails as a matter of law regardless of what level of scrutiny applies. *See below* Sections II.B.3.

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other states, including states who believe their arms right is fundamental, apply a reasonableness test. *Id.* at 773 (quotations omitted).

The New Hampshire Supreme Court similarly held that its State arms right was subject to reasonable regulation "[i]n light of the compelling state interest in protecting the public from the hazards involved with guns," even assuming it was fundamental. *Bleiler v. Chief, Dover Police Dep't*, 927 A.2d 1216, 1221-23 (N.H. 2007) (rejecting state constitutional challenge to concealed carry permit law). Accordingly, the court "agree[d] with numerous courts from other jurisdictions that the reasonableness test is the correct test for evaluating a [constitutional] challenge to gun control legislation," and that this test asks "whether the statute at issue is a 'reasonable' limitation upon the right to bear arms" in light of "the balance of the interests at stake." *Id.* at 1223 (quotations omitted).

* * *

As set forth above, the text of Article 16, historical sources, Vermont Supreme Court precedent, and case law from other jurisdictions all support interpreting Article 16 to permit reasonable gun safety legislation.

3. Counts 1 through 3 should be dismissed for failure to state a claim.

a. The background check requirement does not violate Article 16.

Plaintiff's challenge in Count 1 to the universal background check requirement codified at 13 V.S.A. § 4019 should be rejected.

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Federal law prohibits many Vermonters, including felons and domestic abusers, from owning firearms. *See* 18 U.S.C. § 922(g); *see also* 13 V.S.A. § 4017(a) ("A person shall not possess a firearm if the person has been convicted of a violent crime."). Licensed dealers must conduct background checks accordingly. *See* 18 U.S.C. § 922(t). Plaintiff's complaint does not challenge these common-sense federal public safety prohibitions, which repeatedly have been found constitutional. *See, e.g.*, *Hertz v. Bennett*, 751 S.E.2d 90, 93–96 (Ga. 2013) (collecting cases); *United States v. Torres–Rosario,* 658 F.3d 110, 113 (1st Cir. 2011) (same). Federal law, however, does not require background checks for firearms sold by unlicensed individuals. The record before the Legislature indicated that millions of firearms exchange hands pursuant to this private transfer loophole, posing a significant risk to public safety. *See above* Background, Section A. By enacting S.55, Vermont joined 19 other States in seeking to close or narrow this loophole at the state level. *See id.*

As noted above, S.55 specifically requires background checks for firearm transfers by unlicensed persons. Subject to listed exceptions, "an unlicensed person shall not transfer a firearm to another unlicensed person" unless both appear with the firearm before a licensed dealer and the dealer conducts the transfer as they would if selling from their own inventory. 13 V.S.A. § 4019(b)(1), (c)(1). A licensed dealer "may charge a reasonable fee to facilitate the transfer." 13 V.S.A. § 4019(c)(3).

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Plaintiff makes no factual allegations that would be relevant to an as applied challenge to this requirement. Plaintiff does not allege that any Vermonter eligible to own a firearm has ever been prevented from doing so by S.55. Nor does plaintiff allege that licensed dealers are unavailable or charging unreasonable fees. Rather, plaintiff raises a facial challenge, asserting that the "costs, inconvenience, and invasion of privacy" associated with S.55's background check requirement "are a significant and unjustified burden" on a fundamental right. Compl. ¶ 25. These allegations fail to state a cognizable facial claim.

Plaintiff's facial challenge should be rejected because imposing a background check requirement on private transfers of firearms does not implicate the right to bear arms in self-defense under Article 16, much less impermissibly infringe upon it. Imposing "conditions and qualifications on the commercial sale of arms" like background checks to prevent "possession of firearms by felons and the mentally ill" are "presumptively lawful." *Heller,* 554 U.S. at 626-27 & n.26. The state constitution does not protect private sales more than commercial sales. Requiring background checks for private sales "does not implicate a fundamental right." *Rocky Mountain I,* 371 P.3d at 776. This is so because "certain groups of persons fall outside the protections of the Second Amendment and there is little reason to suggest that the application" of analogous state arms rights "is any different in this regard." *Id.* Individuals barred "from possessing firearms based on a history of violence, criminal prosecution, or mental condition" have "no fundamental right to possess a firearm." *Id.* And, background checks are simply

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"a reasonable regulation" for determining whether an individual seeking to acquire a firearm is lawfully prohibited from doing so. *Id.*; *see also People's Rights Org., Inc. v. Montgomery*, 756 N.E.2d 127, 172-73 (Ohio Ct. App. 2001) (background checks "protect the public from handgun violence by ensuring that prohibited classes of persons do not purchase handguns" and they do "not, in themselves, impermissibly infringe upon buyers' right to bear arms" under the Ohio Constitution").[41]

Even if this Court were to find that 13 V.S.A. § 4019 restricts the Article 16 right to some degree, any restriction is minimal and is sufficiently justified by the State's interest in keeping firearms out of the hands of dangerous individuals. Indeed, Vermont's background check requirement imposes a comparatively light burden. The District of Columbia, for example, requires individuals to appear in person at a government facility, and be fingerprinted and photographed, to register a firearm. This requirement has been upheld because biometric requirements, while more invasive and less convenient, can make background checks "more reliable than background checks conducted without fingerprints." *Heller v. Dist. of Columbia*, 801 F.3d 264, 276 (D.C. Cir. 2015). Plaintiff's allegation that appearing before a dealer so it can contact the national instant criminal background check system is a "significant and unjustified burden" and

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[41] Earlier in its opinion, the *Montgomery* court indicated that the Second Amendment only applied to the federal government. *Id.* at 163 (relying on *United States v. Miller*, 307 U.S. 174, 178 (1939)). This portion of the opinion is no longer good law in light of the U.S. Supreme Court's 2010 decision in *McDonald*. *See* 561 U.S. 742.

invasion of privacy is meritless. *See* Compl. ¶ 25. The law should be upheld regardless of what level of constitutional scrutiny is applied.

b. The bump stock ban does not violate Article 16.

Plaintiff's challenge in Count 3 to the bump stock ban codified at 13 V.S.A. § 4022 should also be rejected. Bump stocks—which are designed to convert semi-automatic firearms into fully automatic firearms, *i.e.*, machine guns—fall outside the scope of Article 16's protection.

"[T]he Second Amendment does not protect the possession of machine guns." *U.S. v. One Palmetto State Armory PA–15 Machine Gun*, 822 F.3d 136, 142 (3d Cir. 2016) *accord, e.g. Hollis v. Lynch* 827 F.3d 436, 451 (5th Cir. 2016) ("Machine guns . . . do not receive Second Amendment protection"); *see also* 26 U.S.C. § 5845(b) (defining "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger," including "any part designed and intended [to] convert[] a weapon into a machinegun"). With limited exceptions, they have been banned nationwide since the 1980s. *See Kolbe v. Hogan*, 849 F.3d 114, 126 (4th Cir. 2017) (en banc). As the Supreme Court observed in *Heller*, the Second Amendment "'extends only to certain types of weapons.'" *Kolbe*, 849 F.3d at 131 (quoting *Heller*, 554 U.S. at 623, 627). It "'does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes,' including . . . 'machine guns.'" *Id.* (quoting *Heller*, 554 U.S. at 624-25). Rifles that were not originally machine guns, but have been converted

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into machine guns, are similarly not protected. *See U.S. v. Henry*, 688 F.3d 637, 639-40 (9th Cir. 2012).

On October 1, 2017, 58 people were murdered at an outdoor concert in Las Vegas. The shooter used bump stock modified rifles, which allowed him to fire at a rate approaching nine rounds per second.[42] Eleven states now ban bump stocks, with ten of the bans, including Vermont's, added in the year after the Las Vegas massacre.[43] The Bureau of Alcohol, Tobacco, Firearms, and Explosives also responded to the Las Vegas shooting by proposing a rule that would ban bump stocks nationwide. *See* Bump-Stock-Type Devices, 83 Fed. Reg. 13442, 13442-57 (proposed Mar. 29, 2018).

13 V.S.A. § 4022(a) defines a "bump-fire stock" as "a butt stock designed to be attached to a semiautomatic firearm and intended to increase the rate of fire achievable with the firearm to that of a fully automatic firearm by using the energy from the recoil of the firearm to generate a reciprocating action that

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[42] Larry Buchanan, et. al, *What Is a Bump Stock and How Does It Work?*, N.Y. Times (Oct. 4, 2017, updated Feb. 20, 2018), https://www.nytimes.com/interactive/2017/10/04/us/bump-stock-las-vegas-gun.html

[43] *See* Cal. Penal Code § 32900 (barring multiburst trigger activators); Conn. Gen. Stat. P.A. 18–29 § 1(a) (banning "any rate of fire enhancement"); § 1(c) (defining "rate of fire enhancement" to include "a bump stock"); Del. Code Ann. tit. 11, § 1444(a)(6) (possession of bump stocks is a felony); Fla. Stat. § 790.222 (possession of bump stocks is a felony); Haw. Rev. Stat. 134–8.5(a) (possession of bump stocks is a felony); Mass. Gen. Laws ch. 140, § 131(o) ("No person shall be issued a license to carry or possess a machine gun"); Mass. Gen. Laws ch. 140, § 121 (defining the term "machine gun" to include bump stocks); Md. Code Ann., Criminal Law § 4–305.1 (barring rapid fire trigger activators); Md. Code Ann., Criminal Law § 4–301(m)(2) (defining rapid fire trigger activator as including bump stocks); N.J. Stat. Ann. § 2C:39–3l (criminalizing bump stock possession); R.I. Gen. Laws § 11–47-8(d) (criminalizing bump stock possession); 13 V.S.A. §4022(b) (barring possession of bump stocks); Wash. Rev. Code § 9.41.220 (bump stocks are seizable contraband).

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facilitates the repeated activation of the trigger." 13 V.S.A. § 4022(a). In plain English, when a shooter pulls the trigger of a rifle with a bump stock, the gun fires and recoils, or is pushed back by the force of the shot. The bump stock absorbs this energy as a spring would, and quickly pushes the rifle forward against the shooter's trigger finger, allowing the shooter to maintain a rapid rate of fire.

There is no constitutional right to possess automatic weapons. *See, e.g., Palmetto*, 822 F.3d at 142; *Hollis*, 827 F.3d at 451. This is well-established as a matter of federal law and there is no basis to create a different rule under Article 16. *See above* Section II.A.2. For the same reason that there is no constitutional right to possess automatic weapons, there is no right to modify rifles so that they operate as automatic weapons. *Henry*, 688 F.3d at 639–40. Indeed, even the NRA believes that "devices designed to allow semiautomatic rifles to function like fully automatic rifles should be" regulated.[44]

And even if Section 4022 implicated the right to bear arms in self-defense under Article 16, the law survives any level of constitutional scrutiny that might apply. Plaintiff's sparse complaint makes no allegation that automatic firing capacity is necessary for self-defense. And any possible infringement on the self-defense right is more than justified by the State's paramount interest in reducing the likelihood and harm of a mass shooting.

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[44] *See* Wayne LaPierre and Chris Cox, NRA Joint Statement (Oct. 5, 2017), *available at* https://home.nra.org/joint-statement.

c. Requiring that potential gun buyers under the age of 21 complete a safety course does not violate Article 16.

Plaintiff's challenge in Count 2 to the safety course requirement codified at 13 V.S.A. § 4020 should also be rejected.

When Article 16 and the Second Amendment were adopted, individuals under the age of 21 were considered minors. *See Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 201 (5th Cir. 2012); *Horsley v. Trame*, 808 F.3d 1126, 1130 (7th Cir. 2015). The common law rule that individuals under 21 were minors continued uninterrupted for roughly 200 years after Article 16 was adopted in 1777. It was not until the 1970s that states began enacting "legislation to lower the age of majority to 18." *Nat'l Rifle Ass'n*, 700 F.3d at 201 (citing Black's Law Dictionary 847 (9th ed. 2009) ("An infant in the eyes of the law is a person under the age of twenty-one years") (quoting John Indermaur, *Principles of the Common Law*, 195 (Edmund H. Bennett, ed., 1st Am. ed. 1878).

For this reason, the Illinois Supreme Court has previously found that that the possession of handguns by individuals under 21 "falls outside the scope of the second amendment's protection" entirely. *People v. Mosley*, 33 N.E.3d 137, 155 (Ill. 2015) (quotations omitted). It did so in part based on the extensive historical analysis conducted by the Fifth Circuit in *Nat'l Rifle Ass'n*, which according to the Fifth Circuit, "suggests" that restricting the ability of persons under 21 to purchase handguns "falls outside the Second Amendment's protection." 700 F.3d at 203. The Seventh Circuit similarly found this historical analysis compelling,

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but ultimately found that it "need not decide . . . whether 18–, 19–, and 20–year–olds are within the scope of the Second Amendment" because even if they were, an Illinois restriction on firearm possession by such individuals would be constitutional. *Horsley*, 808 F.3d at 1131, 1132–34.

Consistent with the historical and common-law understanding that persons under 21 were minors, the federal government and many states have long restricted the ability of persons under 21 to purchase or use particular firearms. *Nat'l Rifle Ass'n,* 700 F.3d at 199, 202. By the end of the 19th century, 19 states and the District of Columbia restricted "the ability of persons under 21 to purchase or use particular firearms" or "restrict[ed] the ability of 'minors' to purchase or use particular firearms while the state age of majority was set at 21." *Id.* at 202 & n.14 (collecting statutes so providing).

After a multiyear inquiry into violent crime, Congress began restricting the ability of persons under 21 to purchase handguns in the Omnibus Crime Control and Safe Streets Act in 1968. *Id.* at 198. Among other things, Congress found that "'the ease with which any person can acquire firearms other than a rifle or shotgun (including . . . juveniles without the knowledge or consent of their parents or guardians . . .) is a significant factor in the prevalence of lawlessness and violent crime in the United States.'" *Id.* at 198-99 (quoting Pub. L. No. 90–351, § 901(a)(2), 82 Stat. 197, 225 (1968). Throughout the Act and accompanying legislative materials, "the term 'minor' refers to a person under the age of 21, while the term 'juvenile' refers to a person under the age of 18." *Id.* at 199, n.11.

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The Senate report explained that the Act "'would provide a uniform and effective means . . . for preventing the acquisition of the specified firearms by persons under such ages.'" *Id.* at 199 (quoting S. Rep. No. 90–1097, at 79 (1968), 1968 U.S.C.C.A.N. 2112, 2167). At the same time, to the extent permitted by state law, Congress did not restrict "'a minor or juvenile . . . from owning, or learning the proper usage of the firearm, since any firearm which his parent or guardian desired him to have could be obtained for the minor or juvenile by the parent or guardian.'" *Id.* Current federal law restricts licensed dealers from selling handguns to individuals under 21 and long guns to individuals under 18. *See* 18 U.S.C. § 922(b)(1), (c)(1).

In addition to the federal government, 15 states and the District of Columbia currently have age-based restrictions on firearm possession or purchase by those under 21.[45] The approach taken by Vermont is similar to that taken by Congress in many respects. Vermont specifically does not prohibit either the possession of firearms by individuals under 21, or the purchase of firearms by such individuals. Rather, Vermont by statute provides that a "person shall not sell a firearm to a person under 21 years of age" unless the buyer is a law enforcement officer, a

[45] *See* 18 U.S.C. § 922(b)(1), (c)(1); Cal. Penal Code § 27505(a); Conn. Gen. Stat. § 29–36f; Del. Code Ann. tit. 24 § 903; D.C. Code Ann. § 7–2502.03; Fla. Stat. § 790.065(13); Haw. Rev. Stat. Ann. § 134-2; Iowa Code § 724.22; Md. Code Ann., Pub. Safety § 5–133(d); Mass. Gen. Laws ch. 140, § 131; Neb. Rev. Stat. §§ 69–2403, 69–2404 (requiring that individuals seeking to purchase a handgun from an unlicensed seller obtain a handgun purchase certificate available only to those 21 or older); N.J. Stat. Ann. § 2C:58–6.1; N.Y. Penal Law § 400.00; Ohio Rev. Code Ann. § 2923.21; R.I. Gen. Laws §§ 11–47–30, 11–47–35; 13 V.S.A. § 4020; Wyo. Stat. § 6–8-404(d)(i)(A).

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member of the armed services, or "provides the seller with a certificate of satisfactory completion" of a hunter safety course. 13 V.S.A. § 4020(a), (b).[46]

Plaintiff's Article 16 challenge to 13 V.S.A. § 4020 fails as a matter of law for at least three reasons.

First, as noted above, individuals under the age of 21 were considered minors when Article 16 was adopted. *See Nat'l Rifle Ass'n*, 700 F.3d at 201; *Horsley*, 808 F.3d at 1130; *Mosley*, 33 N.E.3d at 155. It would be inconsistent with this historical fact to hold that Article 16 enshrined the right of 18-, 19-, and 20-year olds to purchase their own firearms.

Second, even if Article 16 could be said to apply, laws "lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified." *Horsley*, 808 F.3d at 1131 (quotations omitted). To the extent Article 16 applies, 13 V.S.A. § 4020 lies "closer to the margins" of Article 16. The law "regulate[s] rather than restrict[s]" because it allows firearm purchases by 18- to 20-year-olds provided they complete a hunter safety course. And finally, any burden imposed by § 4020 is modest, because it does not restrict possession of firearms by 18- to 20-year-olds at all and requires only completion of a safety course to purchase firearms.

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[46] There are two primary differences for 18- to 20-year-olds between 18 U.S.C. § 922 and 13 V.S.A. § 4020. First, the federal statute only applies a 21-year minimum age to handgun sales by licensed dealers, while the Vermont statute applies to firearms generally and both licensed and unlicensed sellers. *See* 18 U.S.C. § 922(b)(1), (c)(1); 13 V.S.A. § 4020(a). Second, the Vermont statute contains a hunter safety course exception that the federal statute does not. 13 V.S.A. § 4020(b)(3), (4).

Finally, there is no question that Vermont has a compelling interest in the safety of its citizens. 13 V.S.A. § 4020 advances Vermont's public safety interest because individuals under 21 are less mature, more impulsive, and at greater risk of gun-related violence and suicide. *Horsley*, 808 F.3d at 1132–33. The Legislature considered this evidence when it decided that 18-, 19-, and 20- year olds should be required to have some degree of safety training before they can independently purchase a firearm. *See above* Background, Section A; *see also below* Section II.B.

As the Seventh Circuit observed when upholding a broader Illinois restriction, the "goal of protecting public safety is supported by studies and data regarding persons under 21 and violent and gun crimes." *Horsley*, 808 F.3d at 1133. An FBI "analysis of crime in 2014 reflects that 18- to 20-year-olds were responsible for more than 15.8% of all charges issued for murder and nonnegligent manslaughter" despite representing only 4.1% of the country's total population. *Id.* Requiring individuals under 21 to obtain firearms from guardians familiar with their maturity level, or to demonstrate maturity by completing a safety course, provides for an individualized assessment of prospective purchasers that is well-suited to pursuing Vermont's safety goals. *Id.*

B. The complaint fails to state a viable claim under Article 7 of the Vermont Constitution.

In Count 4, plaintiff also challenges the age restrictions in 13 V.S.A. § 4020 under the Common Benefits Clause of Chapter 1, Article 7 of the Vermont Constitution. *See* Compl. ¶¶ 29-30. Specifically, plaintiff argues that this

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provision violates the Common Benefits Clause because it singles out young people and "curtail[s] their fundamental rights" for "no legitimate government interest." Compl. ¶ 30. Plaintiff is mistaken. As discussed above, 18- to 20- year olds do not have a fundamental right to purchase a firearm. Moreover, because the age restriction in Section 4020 bears a reasonable and just relation to the governmental purpose of public safety, it is not unconstitutional under the Common Benefits Clause.

The Common Benefits Clause "is intended to ensure that the benefits and protections conferred by the state are for the common benefit of the community and are not for the advantage of persons 'who are a part only of that community.'" *Baker v. State*, 170 Vt. 194, 212, 744 A.2d 864, 878 (1999) (quoting Vt. Const. Ch. I, art. 7).[47] Prior to *Baker*, courts interpreted the Common Benefits Clause as "generally coextensive with the equivalent guarantee in the United States Constitution," the Equal Protection Clause, with "similar methods of analysis." *Brigham v. State*, 166 Vt. 246, 265, 692 A.2d 384, 395 (1997). Equal Protection Clause challenges "are reviewed by the rational basis test" unless "a statutory scheme affects fundamental constitutional rights or involves suspect

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[47] The Common Benefits Clause reads in full:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

Vt. Const. Ch. I, art. 7.

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classifications," in which case "proper equal protection analysis necessitates a more searching scrutiny." *Id.* at 265, 692 A.2d at 395-96. Under the Equal Protection Clause, "an age classification is presumptively rational" and is subject to rational basis review. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000). In *Baker*, however, the Vermont Supreme Court "rejected the rigid, multi-tiered analysis of the federal Equal Protection Clause analysis in favor of 'a relatively uniform standard, reflective of the inclusionary principle at [the Common Benefits Clause's] core.'" *Badgley*, 2010 VT 68, ¶ 21 (quoting *Baker*, 170 Vt. at 212, 744 A.2d at 878).

To determine whether a statute violates the Common Benefits Clause, Vermont courts now apply the following test:

> [W]e first define that "part of the community" disadvantaged by the law. . .
>
> We next look to the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others. Consistent with Article 7's guiding principle of affording the protection and benefit of the law to all members of the Vermont community, we examine the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives.
>
> We must ultimately ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose. Consistent with the core presumption of inclusion, factors to be considered in this determination may include: (1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals; and (3) whether the classification is significantly underinclusive or overinclusive.

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Badgley, 2010 VT 68, ¶ 21 (quoting *Baker*, 170 Vt. at 212-14, 744 A.2d at 878-79). At minimum, "[t]he purpose of the preferential legislation must be to further a goal independent of the preference awarded." *State v. Ludlow Supermarkets, Inc.*, 141 Vt. 261, 269, 448 A.2d 791, 796 (1982).

Although 13 V.S.A. § 4020 singles out people under the age of 21 for special treatment, it does so out of concern for public safety. Specifically, as described above, the Legislature and the Governor were concerned about the increasing frequency of mass shootings, especially at schools. These shootings are often carried out by young people. This includes the recent attempted mass shooting in Fair Haven, Vermont, in which the alleged perpetrator was only eighteen years old. *See Sawyer*, 2018 VT 43; Jess Bidgood, *He Wrote Disturbing Plans for a School Shooting. But Was That a Crime?*, N.Y. Times (May 4, 2018).[48] In addition, the Legislature considered materials showing firearm-related deaths (suicides and homicides) by age in Vermont, suicides by age in Vermont, a policy statement by the American Association for Pediatrics advocating for, among other things, decreased access to guns by children and adolescents, and public health studies and excerpt testimony concerning gun-related violence and suicide among young people. *See above* Background, Section A.

The purpose of the age restriction "bears a reasonable and just relation to the governmental purpose." *Baker*, 170 Vt. at 214, 744 A.2d at 879. This law has

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[48] *Available at* https://www.nytimes.com/2018/05/04/us/mass-shooters-law-enforcement-vermont.html.

many public safety benefits. By imposing the requirement of a certified hunter safety course (or law enforcement or military experience) on gun buyers under age 21, the statute mandates that a young gun buyer be familiar with responsible gun use and ownership.[49] The safety class requirement also imposes a de facto waiting period on a young person who might otherwise purchase and use a gun impulsively. *See Horsley*, 808 F.3d at 1133 (upholding law requiring parental consent for firearm permit for under-21-year-old in part based on research indicating "that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable."). And, the requirement creates a logistical hurdle to a young person who is only interested in guns for illegal reasons, as that person must now pass a course on a subject that they may not be interested in. As noted by the American Academy of Pediatrics, in materials relied on by the Vermont Legislature: "Adolescents are at a relatively high risk of attempting suicide as a consequence of their often impulsive behavior. . . . Thus, easy access to firearms contributes to an increased risk of suicide among youth this age." *See* Am. Acad. of Pediatrics, 130 Pediatrics at e1418, *above* at note 14.

Next, creating additional requirements for young people to purchase guns advances the government's interest in public safety. *Badgley* is instructive here.

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[49] In crafting this statute, the Legislature considered the subject matter of a Vermont hunter safety course. *See* Background, Section A.

In that case, the Vermont Supreme Court upheld a law that created a mandatory retirement age of 55 for state police officers. The Court noted that "the risk that an officer stays on the force when he or she cannot capably perform the duties required 'clearly grows with age[.]'" *Badgley*, 2010 VT 68, ¶ 30. Similarly, the risk that a person will carry out an act of gun violence diminishes after age 21. *See, e.g.*, *Nat'l Rifle Ass'n*, 700 F.3d at 209-10 (summarizing data on violent, gun-related crime committed by 18-to-20-year-olds and upholding restriction on sale of handguns to this age group); *Horsley*, 808 F.3d at 1133 (summarizing similar data and upholding youth permit requirements); *Powell v. Tompkins*, 926 F. Supp. 2d 367, 392-93 (D. Mass. 2013) (summarizing similar data and upholding prohibition on gun permits before age 21); *see also* Am. Acad. of Pediatrics, 130 Pediatrics at e1418, *above* at note 14. The additional restrictions on firearms purchases for young people are directly related to public safety.

Finally, the classification is not significantly underinclusive or overinclusive. First, the law is not overinclusive because it is not particularly onerous on a young person's ability to purchase or own a gun. For instance, Vermont already offers free hunter safety classes, which a first-time hunter of any age must take in order to receive a Vermont hunting license.[50] In addition, the law does not prohibit young people from purchasing guns outright. Nor does it prohibit them from owning a firearm purchased for them by an immediate family member. 13

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[50] *See* Vt. Agency of Nat. Resources, *Hunter Ed FAQs*, (2018) https://vtfishandwildlife.com/node/133.

V.S.A. § 4019(e) (allowing for private transfer of firearms between immediate family members); *see Horsley*, 808 F.3d at 1132 (upholding, under Second Amendment challenge, a law requiring parental consent for firearm permit for under-21-year-old and distinguishing that requirement from a "categorical ban" on possession); *cf. Fotoudis v. City and County of Honolulu*, 54 F. Supp. 3d 1136 (D. Haw. 2014) (finding that a complete, categorical prohibition against long-term permanent residents owning firearms violates both the Second Amendment and the Equal Protection Clause). *But see Powell*, 926 F. Supp. 2d at 393-94 (upholding categorical ban on firearms permits before age 21 under Second Amendment and Equal Protection Clause challenges).

The age-restrictions law is also not underinclusive. While it is possible that the Legislature could have tried to impose more restrictions on gun purchases, they are under no obligation to do so. Federal courts hold that "a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Buckley v. Valeo*, 424 U.S. 1, 105 (1976) (citations omitted). This restriction on gun purchases for young buyers is one of several discrete measures the Vermont Legislature chose in order to tackle the problem of gun violence at a politically tense moment. This provision targeting young gun purchasers is well tailored to address some of the problems of gun violence under consideration by the Legislature—particularly the problem

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of impulse control by young people who may be inclined toward violence against themselves or other people.

Because the restrictions on young gun purchasers bear a reasonable and just relation to governmental purposes, they are constitutional under the Common Benefits Clause. As a result, count 4 of plaintiff's complaint must be dismissed.

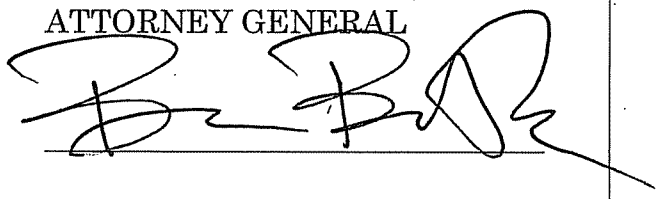
CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court dismiss plaintiff's complaint.

DATED at Montpelier, Vermont this 19th day of November, 2018.

STATE OF VERMONT

THOMAS J. DONOVAN, JR.
ATTORNEY GENERAL

By: 

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STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 315-8-18 Wmcv

GUN OWNERS OF VERMONT,
Plaintiff

v.

MATTHEW BIRMINGHAM,
Director of State Police;
T.J. DONOVAN, Attorney General; and
TRACY KELLY SHRIVER,
State's Attorney for Windham County,
Defendants,

NOTICE OF APPEARANCE

NOW COMES Jon. T. Alexander, Assistant Attorney General for the State of Vermont, and hereby enters his appearance as counsel on behalf of Defendants Matthew Birmingham, Director of State Police; T.J. Donovan, Attorney General; and Tracy Shriver, State's Attorney for Windham County (in their official capacities only), in the above-entitled matter, and requests that a copy of all papers in this action be served upon him at the following address: Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609-1001.

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DATED at Montpelier, Vermont this 19th Day of November, 2018.

STATE OF VERMONT

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STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 315-8-18 Wmcv

GUN OWNERS OF VERMONT,
Plaintiff

v.

MATTHEW BIRMINGHAM,
Director of State Police;
T.J. DONOVAN, Attorney General; and
TRACY KELLY SHRIVER,
State's Attorney for Windham County,
Defendants,

NOTICE OF APPEARANCE

NOW COMES David Boyd, Assistant Attorney General for the State of Vermont, and hereby enters his appearance as counsel on behalf of Defendants Matthew Birmingham, Director of State Police; T.J. Donovan, Attorney General; and Tracy Shriver, State's Attorney for Windham County (in their official capacities only), in the above-entitled matter, and requests that a copy of all papers in this action be served upon him at the following address: Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609-1001.

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STATE OF VERMONT

SUPERIOR COURT
Windham Unit

CIVIL DIVISION
Docket No. 315-8-18 Wmcv

GUN OWNERS OF VERMONT,
Plaintiff

v.

MATTHEW BIRMINGHAM,
Director of State Police;
T.J. DONOVAN, Attorney General; and
TRACY KELLY SHRIVER,
State's Attorney for Windham County,
Defendants,

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NOW COMES Eleanor L.P. Spottswood, Assistant Attorney General for the State of Vermont, and hereby enters her appearance as counsel on behalf of Defendants Matthew Birmingham, Director of State Police; T.J. Donovan, Attorney General; and Tracy Shriver, State's Attorney for Windham County (in their official capacities only), in the above-entitled matter, and requests that a copy of all papers in this action be served upon her at the following address: Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609-1001.

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Windham Unit

CIVIL DIVISION
Docket No. 315-8-18 Wmcv

GUN OWNERS OF VERMONT,
Plaintiff

v.

MATTHEW BIRMINGHAM,
Director of State Police;
T.J. DONOVAN, Attorney General; and
TRACY KELLY SHRIVER,
State's Attorney for Windham County,
Defendants,

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November 2018, I served (i) Defendants' Motion to Dismiss Plaintiff's Complaint, (ii) Defendants' Memorandum of Law in Support of Motion to Dismiss Plaintiffs' Complaint, and (iii) Notices of Appearance for Jon Alexander, David Boyd, and Eleanor Spottswood in the above-captioned matter by sending same via first class mail, postage prepaid, to the following:

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Robert D. Lees
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White River Junction, VT 05001

DATED at Montpelier, Vermont this 19th day of November 2018.

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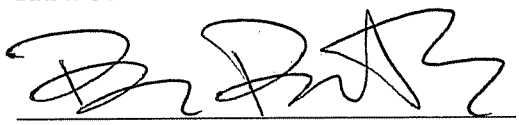
By: 
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