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Misch attorneys ask court to strike down ban

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MONTPELIER — Attorneys for Max Misch, a Bennington man accused of violating a state ban on large-capacity firearm magazines, are asking the Vermont Supreme Court to strike down the law as unconstitutional. This ruling could lead to the dismissal of the charges against Misch.

Misch, 37, was charged in February 2019 of two counts of possessing "large capacity ammunition feeding devices" after police found two 30-round rifle magazines at his home. Authorities said the magazines were purchased after Oct. 1, 2018, when a state ban took effect outlawing magazines containing more than 10 rounds for long guns and more than 15 rounds for handguns.

Misch's attorneys told the state Supreme Court that the ban violates two articles in the Vermont Constitution: people's right to bear arms for defense, and a prohibition against the passage of laws that benefit only certain people.

In a brief filed Friday, defense attorney Rebecca Turner said the court has already recognized that while the state legislature's powers are expansive, it can't infringe on any part of the state Constitution.

A limitation on the right to bear arms for the defense of self and of the state "is not supported by the constitutional text, its history or this Court's precedent," wrote Turner, supervising attorney in the appellate division of the Vermont Office of the Defender General.

The government, she said, doesn't accuse Misch of using the 30-round magazines unlawfully or intending to use them unlawfully. Rather, it alleges that the mere possession of the magazines constituted misdemeanors, each count punishable by up to a year in jail and a fine of \$500. Misch is believed to be the first person charged for violating Vermont's magazine ban.

The state Attorney General's Office, which is prosecuting Misch, told the Court in an October brief that limiting magazine capacity to 10 rounds "does not significantly burden the right to use a firearm in self-defense." And even if it did, the office said, "that burden is justified by the State's interest in protecting public safety by reducing the likelihood and harm of a mass shooting in Vermont."

'Preferential treatment' laws

In the defense brief, Turner argues also that the state Constitution's common benefits clause prohibits the enactment of laws that give preferential treatment to the government over the people.

The magazine ban, she said, exempts government bodies such as federal and state law enforcement, federal and state departments, as well as federally licensed firearm manufacturers and importers. The law permits this "specially exempted group in Vermont" to join millions around the country who possess these magazines.

"Without the ability to purchase or possess these magazines, the people of Vermont are placed at significant disadvantage of defending themselves and others to their ultimate detriment," Turner wrote.

There are currently about 100 million magazines over 10 rounds owned by Americans, according to the Cato Institute, among four groups and an individual who filed amicus briefs siding with the defense.

The attorney general's office has said this argument should be rejected because it is well-settled that the legislature "may use a grandfather provision to mitigate the potential burden of a new regulation." A grandfather provision allows an old rule to continue applying to some situations even after a new rule has taken effect.

A group of 17 states and the District of Columbia, as well as nonprofit organizations, filed amicus briefs that side with the attorney general's office.

Bennington County case

Associate Justice William Cohen, recently appointed to the state Supreme Court, deemed the magazine ban lawful when he heard Misch's case in Bennington County Superior Court. Afterward, the attorney general's office and Misch's attorneys together asked the Vermont Supreme Court to assess the magazine ban's constitutionality.

As Superior Court judge, Cohen said that if the state Supreme Court "finds the statute unconstitutional, the charges against Mr. Misch would have to be dismissed, as these are based solely on the challenged statute."

Cohen is recusing himself from the Supreme Court appeal.

When asked for comment on the defense's brief, Donovan's chief of staff, Charity Clark, said the attorney general's office is looking forward to responding in a brief to be filed May 8.

The parties will have the opportunity to request an oral argument. If no one requests it, the court could still schedule an oral argument or make a ruling based on the briefs, said Emily Wetherell, staff attorney with the state Supreme Court.

Turner and Clark said the court usually issues rulings about six months after oral arguments are held, longer in more complicated cases.

Misch is free from jail on conditions. The state also has accused Misch of violating his conditions of release three times in 2019. In one instance, he allegedly purchased a gun from a Bennington store, though he did not physically take possession of it, according to court documents. Misch has pleaded not guilty to those three charges.

A self-described white nationalist, Misch has admitted to trolling former state Rep. Kiah Morris around the time she filed complaints of racially motivated harassment and threats. Donovan said

that Morris, who is African American, was a "victim of racial harassment," but found no grounds for criminal charges.