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STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
Docket No. 224-4-18 Wncv

Vermont Federation of,  
Vermont State Rifle & Pistol,  
Powderhorn Outdoor Sports,  
John Fogarty,  
Samuel Frank,  
Plaintiffs

v.

Matthew Birmingham,  
T.J. Donovan,  
Sarah George,  
William Porter,  
Defendants

Opinion and Order on Joint Motion for Appeal on Report

In this action, Plaintiffs bring a legal challenge to 13 V.S.A. § 4021, which regulates large capacity magazines for firearms. Specifically, they maintain that the restrictions of Section 4021 violate Chapter I, Article 16 of the Vermont Constitution. A similar legal challenge to the law is now before the Vermont Supreme Court in *State v. Misch*, No. 172-2-19 Bncr, which arose in the criminal context. Before the Court is the parties' Renewed Joint Motion for Appeal on Report. The Court makes the following determinations.

A. Procedural History

The parties sought similar relief in this Court in the summer of 2019. The motion was denied. The Court concluded that, while the legal issues were similar in this case and in *Misch*, depending upon the results of that case, it could be important to develop a factual record in the Superior Court regarding the constitutional claim.

The Plaintiffs then sought a stay of the proceedings, which the Court also denied for similar reasons. Leaving aside some procedural events, the question of the propriety of that denial was appealed the Supreme Court. The Supreme Court concluded that the Superior Court would have been within its discretion to grant or deny the motion for stay. The Court, thus, denied the appeal and remanded the matter to this Court.

B. The Present Motion

The current motion is similar to that filed last summer, with one significant exception. The parties now suggest that the current Covid pandemic has imposed impediments to conducting and completing discovery and that, as a result, the opportunity to appeal has increased force.

C. Analysis

The Rules of Appellate Procedure allow for the Superior Court to “Report” a case to the Supreme Court prior to final judgment if: (1) the parties agree, (2) “the court concludes that a question of law raised is raised of sufficient importance or doubt to justify reporting;” and (3) “in a civil action, the Supreme Court's disposition would finally dispose of the action in at least one alternative.” Vt. R. App. P. 5(a)(1).

In this instance, all three of those requirements are met. This is a stipulated motion. No doubt, the constitutionality of Section 4021 is a matter of significant interest not only to Plaintiffs but to many members of the public. And, the Supreme Court's determination of the constitutionality of Section 4021 would likely resolve Plaintiff's claims.

The Court must also consider other factors, however. This Court has indicated its desire to create a factual record, and it is mindful that it should not be commonplace to renew motions over time before the same Court. The "law-of-the-case doctrine" also counsels against such a practice. *See State v. Malshuk*, 2004 VT 54, ¶ 7, 177 Vt. 475, 476

On the other hand, the Supreme Court has also held that it can be appropriate to renew motions at later points in a proceeding, *see Morrisseau v. Fayette*, 164 Vt. 358, 364, (1995), and the law-of-the-case doctrine is discretionary and can give way to other considerations, *see Malshuk*, 2004 VT 54, ¶ 7, 177 Vt. at 476 (In a "proper case, the trial court may depart from the doctrine." (internal quotation omitted)).

Here, the Court agrees that the current Covid crisis has likely created impediments, delays, and increased costs in connection with discovery in this action. Such concerns could not have been anticipated when the Court entered its prior ruling in 2019. The crisis amounts to a change in circumstances that allows this Court to exercise its discretion to revisit its earlier determination. In light of present circumstances, the calculus of requiring far-reaching discovery, including

possible expert discovery, regarding what, ultimately, may be a legal issue, has changed.<sup>1</sup>

D. Conclusion

In light of the foregoing, the Motion is granted. The Court Reports the following question to the Vermont Supreme Court:

1. Does 13 V.S.A. § 4021 violate Chapter I, Article 16 of the Vermont Constitution?

So ordered

Dated at Montpelier, Vermont this \_\_\_ day of May, 2020.

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Timothy B. Tomasi  
Superior Court Judge

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<sup>1</sup> The Court is also aware that the Supreme Court retains the authority to reject this Report if it concludes that additional factual development in this Court is necessary. Vt. R. App. P. 5 Reporter's Notes.