VTFSC Testimony on S.131
Senate Government Operations Committee
April 3rd, 2025

This Bill Is Unconstitutional

There are many misconceptions and misunderstandings concerning the Second Amendment, but we all must acknowledge three things:

1) The Constitution of the United States is the Supreme Law of the land,
2) Of all the Amendments listed in the Bill of Rights, the Second amendment is unique with the use of the phrase "***shall not be infringed,***" and
3) When it comes to interpreting our Constitution, it is the Supreme Court of the United States (SCOTUS) that is the ultimate arbiter.

Concerning the Bill of Rights: The Second Amendment was NOT written to guarantee a citizen's Right to self-defense. The Right to self-defense pre-existed the Bill of Rights.

The Second Amendment was written specifically for situations like this: It was written to ban the government from infringing upon a citizen's right to self-defense.

In 1903, the case of State v Rosenthal rose to the Vermont Supreme Court. That case involved the City of Rutland passing an ordinance that banned the carrying of weapons in Rutland without a permit signed by the Mayor or Chief of Police, with one of the listed weapons being "pistol".

The Vermont Supreme Court struck the ordinance down as being unconstitutional, describing the ordinance as being "***…repugnant to the Constitution and the laws of the state…***"

Fast Forward to 2008: SCOTUS decides DC v Heller, a case where they made clear that a person could have a loaded firearm in their house, primarily because any law to the contrary would prohibit self-defense (I.E., the right to **KEEP** arms).

In 2010, SCOTUS decided McDonald v Chicago, a case where they made clear that a person has the right to self-defense outside the home (I.E., the right to **BEAR** arms).

In 2022, SCOTUS decided NYSRP v Bruen, a challenge to a NY law that had been in the books for over 109 years, a law which required a person to have a permit to carry a firearm while at the same time effectively prohibiting a person from obtaining a permit strictly for the purpose of "self-defense".

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In rendering the Bruen decision, SCOTUS made clear how laws involving the Second Amendment should be handled moving forward.

"***In District of Columbia v. Heller,*** *554 U. S. 570****, and McDonald v. Chicago,*** *561 U. S. 742****, the Court held that the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense. Under Heller, when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct, and to justify a firearm regulation the government must demonstrate that the regulation is consistent with the Nation's historical tradition of firearm regulation."***[1]

This Charter Change covers individual conduct with a firearm. As that is the case, SCOTUS directs that the Government must demonstrate that this ordinance would be consistent with the Nation's historical tradition of firearm regulation.

As a matter of fact, our forefathers routinely carried firearms. Much like the cafeteria of the statehouse today where many issues are discussed at length, in their day taverns provided a similar environment.

Should this bill become law, when it is challenged the State will find that there are approximately seven somewhat analogous historical laws relating to firearms and alcohol. Two of these came from territories and did allude to banning firearms in certain locations – but the Supreme Court gives little weight to territorial laws. The other 5 had to do with behavior – specifically addressing drunks with firearms. These 7 laws were apparently enough for the 2nd Circuit to overturn a district court ruling in Antonyuk v James (which considered the same 7 laws) that a ban on guns in bars was unconstitutional.

On this point I will only say that Circuit Courts have been struggling with Second Amendment cases since the Bruen decision, with such things as "assault weapon bans" and "high-capacity magazine bans" being in front of the Supreme Court right now, with various district courts and Circuit courts being at odds.

[1] Supreme Court of the United State, Syllabus, NYSRP v Bruen, page 2, paragraph 2

This uncertainty across the courts should result in us being very cautious about proceeding with a law that may well be unconstitutional per the Supreme Court.

Moving on from that, we can perhaps all agree that this Charter Change is an attempt to balance public safety against the individual right of self-defense, an approach called "interest balancing," which is what the 2nd Circuit relied on in Antonyuk v James.

So, what did SCOTUS say about "interest balancing" or the "means-justifies-the-end" (means-end) approach to the justification of such a law?

"***Since Heller and McDonald, the Courts of Appeals have developed a "two-step" framework for analyzing Second Amendment challenges that combines history with means-end scrutiny. The Court rejects that two-part approach as having one step too many. Step one is broadly consistent with Heller, which demands a test rooted in the Second Amendment's text, as informed by history. But Heller and McDonald do not support a second step that applies means-end scrutiny in the Second Amendment context. Heller's methodology centered on constitutional text and history. It did not invoke any means-end test such as strict or intermediate scrutiny, and it expressly rejected any interest-balancing inquiry akin to intermediate scrutiny."***[2]

The Charter Change presented represents a "means-end" / "interesting balancing" law, it cannot be interpreted any other way, with both supporting theories being specifically rejected by SCOTUS. Based on that: This Bill is unconstitutional.

In considering "interest-balancing" further, SCOTUS had this to say:

"***Historical analysis can sometimes be difficult and nuanced, but reliance on history to inform the meaning of constitutional text is more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field.*** *McDonald, 561 U. S., at 790–791 (plurality opinion)****. Federal courts tasked with making difficult empirical judgments regarding firearm regulations under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures. While judicial deference to legislative interest balancing is understandable—and,***

[2] Supreme Court of the United State, NYSRP v Bruen, Syllabus page 2, paragraph 3

elsewhere, appropriate—it is not deference that the Constitution demands here. The Second Amendment 'is the very product of an interest balancing by the people,' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense."[3]

We do not believe SCOTUS could make it clearer: This bill is unconstitutional.

In considering the testimony on this bill, you will likely hear from three entities which come from the State:

1) Attorney General's Office
2) Defender General's Office
3) Legislative Counsel

All three of those entities are oriented towards the Constitution, they all are aware of the Bruen decision, but we suggest that there will likely be three different opinions from each.

The Defender General's Office represents the interests of Vermont's citizens and is tasked to defend those rights. We believe that they will state that this Charter Change is unconstitutional.

Legislative Counsel is tasked with representing you, the Legislature.

If any of you were to directly ask Legislative Counsel "Do you think this is Charter Change is Constitutional?", they will likely state that they simply do not know; that the issues of "sensitive places" is being debated in several courts across the country; and that these courts have conflicting views. The one thing you will NOT hear from the Legislative Counsel is that they fully believe that an ordinance such as this IS Constitutional.

If I am wrong and Legislative Counsel states that they believe this bill is Constitutional, then you have cover over the oath of office you took, an oath which required that you do nothing injurious to the Constitution.

[3] Supreme Court of the United State, NYSRP v Bruen, Syllabus, page 2, paragraph 4

If Legislative Counsel CANNOT say it is Constitutional, then you are guessing, essentially gambling on a Constitutional Right. If there is any doubt whatsoever that something may not be constitutional, the oath of office demands that a legislator cannot be in favor of it, no matter how much they may support the underlying concept.

As another constitutional consideration, consider the concept of "prior restraint", a term which is usually applied to the First Amendment in situations where the government wishes to silence specific messages from the media. In almost all "prior restraint" cases, such actions are usually found to be unconstitutional.

For example, we have all heard the expression: "You cannot yell "FIRE" in a crowded theater." However: We have no law that states that people going into a theater must be gagged first, on the off chance that someone MAY yell "FIRE."

What this bill proposes is to apply Prior Restraint to the Second Amendment, in that it attempts to prevent everyone from being armed against the possibility that someone may act inappropriately. Given the importance our Constitution placed on the right to self-defense, and the clear instruction that government was to keep their hands off the Second Amendment, we fully believe that this bill should be Dead on Arrival.

Based upon all the above: This Charter Change is unconstitutional on its face, not even mentioning that the ability to carry concealed is a strong deterrence against crime.

In the interest of keeping this testimony as short and pointed as possible, we have included further aspects of the bill that warrant discussion which are included in the following Appendices, which we would be pleased to discuss either now or later:

- APPENDIX 1 – Existing Laws
- APPENDIX 2 – Burlington's Illegal Activity and charter change ballot issues
- APPENDIX 3 – Issues which would need fixing

We would also respectfully ask that the committee consider the following:

- Has this Committee been made aware of how many establishments and venues will be impacted by this Charter Change, and been given estimates of the number patrons that will be affected?

- Has this Committee been given any data on how many times there have been problems with guns *IN* bars or anywhere else which was not addressable by other existing laws?
- If the whole point of this bill is to attempt to define places that serve alcohol as being "dangerous," then is not that establishment precisely the place where a law-abiding citizen would want to be able to defend themselves?

Summary

The Federation understands that the irresponsible consumption of alcohol impairs good judgment, and we agree that the irresponsible consumption of alcohol and the carrying of firearms has no place. The same is true for alcohol and driving. Yet, in considering alcohol and driving, we have the concept of a "designated driver;" someone who stays sober to ensure the safety of their friends.

This bill however assumes that anyone who is carrying a firearm and who enters a location where alcohol is consumed may become impaired, even those that have no intention of drinking as well as those who will not drink enough to become impaired – precisely **BECAUSE** they are carrying, and they carry responsibly.

We all live under the Constitution of the United States.

To be true to that document: It must be understood that honest and law-abiding citizens have a right to own and bear firearms for all lawful purposes, which include self-defense, with that right applying both in the home and in public.

Yes, there are exceptions like: No guns in Courts, or Airports, or Legislatures or Polling Places – all of which typically have built-in security.

It is a Right. It is not a Right that is unlimited, but when it comes to declaring this place or that place a "gun free zone" without requiring the necessary security apparatus and personnel to ensure the safety of those going inside: There is no "safety".

Many Vermonters choose to regularly carry firearms, or otherwise have them nearby, and these firearms provide the means to defend property, ourselves, our friends, our families and other innocent people. It is past time for the responsible firearm owners of Vermont to make clear that bans like this discriminate against honest and law-abiding citizens who

chose to carry; people we should not have any concern about whatsoever as they obey the law.

Being a Dillion's Rule state (24 VSA 2295 makes us a Dillion's Rule state) has served the State of Vermont exceptionally well. By adhering to that Rule – we avoid creating a patchwork of conflicting laws that can only serve to entrap innocent Vermonters and tourists who are unaware of city lines or punitive unconstitutional laws.

This Charter Change is at odds with the Constitution, and until we have better guidance from the Supreme Court, the Oath of Office requires a vote of **NO** on this bill.

APPENDIX 1 – Existing Laws

We already have a law that would allow ANY business establishment to ban firearms in their establishment, and that is 13 VSA 3705 – Vermont's No Trespass law.

Per that law and should the owner / operator choose to post their property to not allow firearms: If an un-authorized person was discovered to have a firearm, anyone could call the police to intercede. When the police interceded, 13 VSA 3705 allows the officer to use discretion: They are empowered to immediately interact with the person involved by telling them that they must immediately remove the firearm from that location, with failure to immediately comply resulting in their arrest.

Why do we need another law which would do the same thing, but without any discretion?

Also, please remember that Vermont has numerous laws that directly address a person doing anything bad with a firearm, with those topics usually being the purview of Judiciary.

Other State's Laws

In the testimony you will hear on this bill, you will likely hear that several states have similar laws to what is being proposed, including states like Texas and Florida. Everytown for Gun Safety lists 15 such states.

What you will not likely hear from those folks is that with those laws:

- Concealed Carry holders are typically exempted,
- Some laws make a distinction between whether you are drinking or not,
- Some laws only pertain to that part of the establishment which is a "bar" while not pertaining to the portion which is a restaurant,
- Some of these are local ordinances but not state-wide, and
- Some laws only apply depending upon the percentage of the establishment's revenue that is based on alcohol sales.

I also remind the committee that just because other states have similar laws in their books, it does NOT mean they are constitutional.

APPENDIX 2 – Charter Issues

Setting Constitutional issues aside, if that is even possible and is somehow seen as being irrelevant, this entire Charter Change is poisoned fruit, meaning: **This bill should not legally even be here.**

Please: Consider the wording of 24 VSA 2295.

"...no town, city, or incorporated village, by ordinance, resolution, or other enactment, shall directly regulate hunting, fishing, and trapping or the possession, ownership, transportation, transfer, sale, purchase, carrying, licensing, or registration of traps, firearms, ammunition, or components of firearms or ammunition."

On November 18th, 2024, the Burlington City Council passed a resolution to ban guns in bars. They then adopted the wording of an ordinance to Ban guns in bars.

Both of those actions were illegal under 24 VSA 2295; a very simple fact that cannot be equivocated away.

Not only did Burlington break the law with 24 VSA 2295, but the ordinance created is also in direct conflict with 24 VSA 2291.

On top of that, the ordinance is also in violation of 24 VSA1971, which states that a municipal ordinance cannot have both civil and criminal penalties, which this Charter Change specifies.

That is three existing state statutes that have served Vermont very well which are now being pointedly ignored by Burlington.

As a result of the illegal actions by the Burlington City Council, an item was placed on the Town Meeting ballot for Burlington. It was titled:

5. CHARTER CHANGE RE: BAN ON FIREARMS IN ANY ESTABLISHMENT WITH A LIQUOR LICENSE.

We believe we understand that the genesis of this bill is based on a murder that took place outside of the Red Square bar in 2024. We are additionally aware of another shooting that

involved Nectar's several years ago which likely influenced Burlington's previous attempt to change their charter. In both instances, the shotting took place outside of each establishment. The discussion that arose out of those two incidents was then presented in the media as "no guns in bars."

This bill however is not just "no guns in bars". This bill encompasses restaurants, hotels, catered events and other venues and related property such as parking lots, going well beyond just bars.

We question whether the phrasing of that ballot question is accurate based on how it was advertised, and what this Charter Change really does in regard to its exceedingly wide scope.

Certainly, while the sheer number of votes in favor of this Charter Change is significant – it must be considered that most of those voting are not owners / operators of establishments that sell alcohol, and some significant percentages do not frequent bars. In many ways, this ballot question is akin to asking voters: "Is it okay to heavily tax the rich?" when we know that rich people are a minority of the voters.

APPENDIX 3 – Other Issues

Based on the Constitutional concerns we have outlined and the legality of Burlington's actions or concerns about the ballot item: The VTFSC believes that more than enough information has been shared to put this bill on the wall. There is precedent for doing as that is exactly what happened when Burlington tried to accomplish the same thing with Charter Change concerning firearms in House Government Ops several years ago.

If the bill is to move forward however regardless, it will need some exceptional "fixing", with a brief list of the problems it represents being:

- **Drunks with Guns**
  The core of this bill is attempting to address people who get drunk and who have in their possession a firearm, not everyone who may enter an establishment where alcohol is served.

- **Forfeiture Section has Problems.**
  - May Seize?
    - Due Process?
    - Under what criteria?
    - Stored where?
      - Liability?
    - Preponderance?

- **Unbelievably Expansive**
  This bill cuts an incredibly wide swath regarding affected establishments and property, encompassing:
  - Restaurants,
  - Hotels,
  - Outdoor drinking venues,
  - Special Occasions (catered weddings, birthday parties, etc.)
  - "***…In any building or on any real property or parking area under the ownership or control of an establishment licensed to serve alcohol on its premises.***"
    - That is ALL land AND buildings.
      - Parking lots, sidewalks, apartments above
    - Firearms cannot be left in a vehicle in the parking lot.

  - Properties spanning municipal lines (Wayside)
  - If an "owner" owns a separate property that has nothing to do with a liquor license, that property would also be affected, and how would any citizen know that?

- **No Signage Requirement**
  - Today in Vermont, we are still encountering people who are not aware that there is a 72-hour waiting period or a high-capacity magazine ban. Without any signage, how would an uninformed Vermonter or tourist even know they might be breaking the law when municipal lines are not clearly marked?
  - Consider two establishments that sell alcohol, closely located together but one is in Burlington and the other in an adjacent municipality. In one location an honest and law-biding citizen is completely legal if they happen to carry, but in the other they become a criminal subject to property forfeiture?
  - If an establishment selling alcohol has its building outside of Burlington, but their parking lot extends into Burlington, a citizen would become a criminal depending on where they parked?

- **Completely Ineffective without Screening**
  - To be effective at insuring compliance for anyone entering the establishment, expensive screening equipment like magnetometers and Xray machines would have to be employed, in addition to personnel who are trained in screening.

- **Owner's liability**
  - Nothing in this bill exempts an owner / operator from failing to stop a person entering their establishment with a firearm. If someone DID smuggle a firearm in and then used it in an illegal fashion, why wouldn't the owner / operator be held in some way responsible for failing to prevent it?
  - And what about the parking lot itself? This bill makes the owner / operator responsible for someone having a firearm in their car.

- **Vulnerability of Employees, Patrons, Security Personnel and Vendors**
  - This bill is written to only allow "*the owner or operator of an establishment*" to have a firearm.

- All workers at that establishment would have to come to work disarmed and then leave to go home disarmed, some late at night, with no provision for vendors or armed security personnel.
- In trying to think like a criminal, we believe that criminals want victims, they do not want adversaries. We believe it likely that people who are inclined towards criminal behavior might look at people coming out of establishments that sell liquor as "easy prey", because there would be a high probability that those folks are unarmed.