IN THE COURT OF APPEALS OF THE STATE OF OREGON

JOSEPH ARNOLD; CLIFF ASMUSSEN; GUN OWNERS OF AMERICA, INC.; and GUN OWNERS FOUNDATION, Plaintiffs-Respondents, v. TINA KOTEK, Governor of the State of Oregon, in her official capacity; ELLEN ROSENBLUM, Attorney General of the State of Oregon, in her official capacity; and CASEY CODDING, Superintendent of the Oregon State Police, in his official capacity, Defendants-Appellants.	Harney County Circuit Court No. 22CV41008 CA A183242

APPELLANTS' MOTION – STAY PREVIOUS JUDGMENT/ORDER

Appeal from the Judgment of the Circuit Court
for Harney County
Honorable ROBERT S. RASCHIO, Judge

TONY AIELLO, JR. #203404
TYLER D. SMITH #075287
Tyler Smith & Associates PC
181 N Grant St. Ste. 212
Canby, Oregon 97013
Telephone: (503) 496-7177
Email:
tony@ruralbusinessattorneys.com
tyler@ruralbusinessattorneys.com

Attorneys for Plaintiffs-Respondents

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
ROBERT A. KOCH #072004
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: robert.a.koch@doj.state.or.us

Attorneys for Defendants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Other Authorities

APPELLANTS' MOTION – STAY PREVIOUS JUDGMENT/ORDER

INTRODUCTION

Under Article IV, section 1(2), of the Oregon Constitution, the people of Oregon enacted Ballot Measure 114. Broadly, the law restricts firearm-magazine capacity to 10 or fewer rounds; requires a permit to purchase a firearm; and requires the completion, not just initiation, of a background check before transferring a firearm. Oregonians remain free to use any currently legal firearm, so long as its magazine capacity is limited to 10 or fewer rounds; anyone with a permit can purchase any legal firearm; and any legal firearm transfer may proceed once a point-of-sale background check clears.

Measure 114 is a reasonable use of legislative authority to address increasing harms and threats from gun violence and mass shootings. The statute is therefore facially constitutional. And yet, the trial court enjoined its enforcement, reasoning that the statute is facially unconstitutional under Article I, section 27. The trial court's determination lacks support in law or fact.

The state defendants-appellants ("state") thus move under ORS 19.350 for this court to stay the trial court's judgment pending appeal. The state is likely to prevail on appeal: Case law precludes plaintiffs' challenge, and the record confirms both the correctness of that precedent and the reasonableness of the people's policy decision. In addition, the equities warrant a stay here. The

state has a substantial sovereign interest in enforcing all laws, but that interest is particularly acute for laws that seek to protect and promote public safety against the harms of gun violence and the horrors of mass shootings.

The state acknowledges the length of this motion. The state regards this case as highly important, and it takes time to connect the enormous trial court record with the legal questions on appeal. But that length does not mean that the questions are close. The trial court's errors are basic and fundamental.

Alternatively, given the stakes of this case, the state asks that the court expedite the appeal by ordering a briefing schedule of 35 days for principal briefs and 14 days for a reply brief, with oral argument shortly thereafter.

Plaintiffs-respondents object to this motion and intend to file a response.

BACKGROUND

The people of Oregon enacted Measure 114 in the November 2022 general election. (Att-1655).[1] The measure sought "to enhance public health and safety" amidst "a sharp increase in gun sales, gun violence, and raised fears in Oregonians of armed intimidation." Measure 114 ("M114"), Preamble.[2] To

[1] "Att" refers to the attachment included with this motion. The official transcript has not yet been prepared. The attachment thus includes (1) the trial court's general judgment and letter opinions; (2) unofficial transcripts; (3) pertinent pleadings and exhibits; and (4) the OECI case register.

[2] The text of Measure 114 is provided at Att-1657–64. For simplicity, the motion will refer to the provisions by their statutory section and subsection.

that end, Measure 114 has three principal components. First, the statute restricts firearm magazine capacity to 10 or fewer rounds of ammunition. *Id.* § 11(1)(d), (2). Second, it requires a permit to purchase a firearm. *Id.* §§ 3(3), 6(2), 7(3)(a), 8(2), 9(1)(a)(A). Third, it requires a completed point-of-sale background check to transfer a firearm, closing what is colloquially referred to as the "Charleston Loophole." *Id.* §§ 6(3)(c), 6(14), 7(3)(d)(B), 8(3)(c), 10.

Less than one week before Measure 114 took effect in December 2022, plaintiffs sued in Harney County Circuit Court challenging the law under Article I, section 27, of the Oregon Constitution. The trial court granted plaintiffs' emergency request to enjoin enforcement of the law. The state petitioned for a writ of mandamus from the Oregon Supreme Court, which that court denied. *Arnold v. Brown*, No. S069923 (Or, Dec 17, 2022) (order denying mandamus petition without prejudice to future filings).

The trial court then held two preliminary-injunction hearings, ultimately extending its injunction pending a merits trial. The state again petitioned for mandamus; the Supreme Court again denied the petition without prejudice. *Arnold v. Kotek*, 370 Or 716, 719, 524 P3d 955 (2023).

The trial court held a six-day bench trial in September 2023 and issued its letter opinion on November 24, 2023. The court ruled that any application of Measure 114 would be facially unconstitutional under Article I, section 27, and permanently enjoined enforcement. (Att-1–49). The state requested a stay of

judgment pending appeal, which the trial court denied. (Att-1642). Judgment was entered on January 9, 2024. (Att-1698). The state timely appealed.

LEGAL STANDARD

Under ORS 19.350, a court examines four factors on whether to enter a stay pending appeal: (1) "The likelihood of the appellant prevailing on appeal"; (2) "Whether the appeal is taken in good faith and not for the purpose of delay"; (3) "Whether there is any support in fact or in law for the appeal"; and (4) "The nature of the harm to the appellant, to other parties, to other persons and to the public that will likely result from the grant or denial of a stay." ORS 19.350(3).

This court also has inherent discretionary authority to stay a trial court's injunction pending appeal. *Armatta v. Kitzhaber*, 149 Or App 498, 501, 943 P2d 634 (1997). That inquiry similarly "examine[s] the nature of the injunction and evaluate[s] the relative hardship to the parties and the extent to which irreparable harm will occur in the absence of a stay." *Id.*

SUMMARY OF ARGUMENT

This court should stay the trial court's injunction pending appeal. The state is likely to prevail, and the equities warrant a stay.

Measure 114's restrictions on large-capacity magazines are facially constitutional. Large-capacity magazines are not "arms" protected by Article I, section 27, at all. They are not themselves weapons, and their functionality derives from innovations and military developments that emerged decades after

the adoption of that constitutional provision in 1859. Indeed, this court already held that related semi-automatic technology does not warrant protection under Article I, section 27. *Or. State Shooting Ass'n v. Multnomah Cty. ("OSSA")*, 122 Or App 540, 548–49, 858 P2d 1315 (1993), *rev den*, 319 Or 273 (1994).

The magazine restrictions also are reasonable, which is all that case law requires. The law seeks to forestall rising gun violence, and the restrictions reasonably relate to that stated aim. Evidence shows that the use of such magazines increases the lethality of mass shootings, while state magazine restrictions significantly reduce those harms. Nor do the restrictions unduly frustrate self-defense. Capacity-compliant magazines are widely available, and more than 10 rounds are virtually never, if ever, needed for self-defense.

Measure 114's permit-to-purchase requirements also are facially constitutional. The Supreme Court already has upheld a concealed-carry license requirement and process that largely mirror the requirements and process under Measure 114. *State v. Christian*, 354 Or 22, 40–41, 307 P3d 429 (2013). The reasoning of *Christian* applies with equal force here. The policy also is reasonable. The statute requires a background check, an assessment for a disqualifying mental illness, and a demonstration of firearm safety. Evidence shows that such permit programs lead to significant decreases in both homicides and mass shootings. And the provisions do not unduly frustrate armed self-

defense. Anyone who meets the reasonable criteria may obtain a permit, and any permit holder may acquire any legal firearm.

Closing the Charleston Loophole is facially constitutional too. The Supreme Court has held that the state may promote public safety by disarming convicted felons. *State v. Hirsch/Friend*, 338 Or 622, 677, 114 P3d 1104 (2005), *overruled on other grounds by Christian*, 354 Or at 40. Requiring a completed background check at the point of transfer is a logical and permissible means to that constitutional end. The closure also does not unduly frustrate armed self-defense, as any purchaser whose background check has cleared is free to complete their firearm transfer.

Finally, the equities weigh heavily in favor of a stay. Keeping people safe is a fundamental role of government. For more than a year, the trial court has stalled the people's legislative efforts to promote public safety, based on rulings that lack any basis in law or fact.

ARGUMENT

This court should stay the trial court's judgment pending appeal. This motion will proceed in three parts. Part A will explain the pertinent legal standards under Article I, section 27. Part B will explain why the state is likely to prevail on appeal. And Part C will discuss why the equities weigh in favor of this court staying the trial court's judgment pending appeal.

A. Article I, section 27, protects only certain weapons and allows for the reasonable regulation of protected weapons to promote public safety.

Article I, section 27, provides: "The people shall have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." Or Const Art I, § 27. The right protected by this provision "is not an absolute right." *Christian*, 354 Or at 33.

Rather, the right protects only the types of weapons commonly used by Oregonians for self-defense by 1859. *Hirsch/Friend*, 338 Or at 640. The right does not extend to military weapons that postdate statehood. *State v. Kessler*, 289 Or 359, 368–69, 614 P2d 94 (1980); *OSSA*, 122 Or App at 544.

This court requires three elements for a weapon to fall within the ambit of constitutional protection: "(1) although the weapon may subsequently have been modified, it must be 'of the sort' in existence in the mid-nineteenth century; (2) the weapon must have been in common use; and (3) it must have been used for personal defense." *OSSA*, 122 Or App at 544 (citing *State v. Delgado*, 298 Or 395, 400, 692 P2d 610 (1984); *Kessler*, 289 Or at 369).

If a weapon meets these criteria, the constitution still permits "reasonable regulations to promote public safety as long as [an] enactment does not unduly frustrate the individual right to bear arms for the purpose of self-defense." *Christian*, 354 Or at 33. To determine a law's reasonableness and concomitant constitutionality, a court therefore examines and weighs: (1) the magnitude of

the harm the law seeks to address; (2) whether the law reasonably relates to that purpose; and (3) whether the law unduly infringes on armed self-defense. *Id.* at 33–34; *see Hirsch/Friend*, 338 Or at 678 (reaffirming "the permissible legislative purpose of protecting the security of the community against the potential harm that results from the possession of arms").

Notably, "the legislature has wide latitude to" regulate protected weapons. *Id.* As a result, Oregon courts generally have found a burden to be undue under Article I, section 27, only if a regulation bans the possession of a protected weapon outright. *See, e.g.*, *Delgado*, 298 Or at 404 (switch-blade knife); *Kessler*, 289 Or at 372 (billy club).

B. The state is likely to prevail on appeal.

Case law firmly establishes that Measure 114 is facially constitutional. The record below confirms both the soundness of that precedent and the reasonableness of the law. The trial court's rulings are fundamental legal error.

The state will address each of the law's three components in turn.

1. Measure 114's restrictions on large-capacity magazines are facially constitutional.

Plaintiffs' challenge to Measure 114's restrictions on large-capacity magazines fails as a matter of law. Large-capacity magazines are not protected "arms" under Article I, section 27—or arms at all. The restrictions also are reasonable and do not unduly burden the right of armed self-defense.

a. Large-capacity magazines are not protected "arms" under Article I, section 27.

As noted, to warrant constitutional protection, "a weapon must satisfy three criteria: (1) although the weapon may subsequently have been modified, it must be 'of the sort' in existence in the mid-nineteenth century; (2) the weapon must have been in common use; and (3) it must have been used for personal defense." *OSSA*, 122 Or App at 544 (citing *Delgado*, 298 Or at 400; *Kessler*, 289 Or at 369). Large-capacity magazines satisfy no required element.

i. Firearms with large-capacity magazines were not commonly used for self-defense in 1859.

As a threshold matter, large-capacity magazines are not arms at all. Such magazines are not, by themselves, commonly used for self-defense, now or in 1859. Magazines are a component of many firearms for feeding ammunition into the firearm. (Att-1378). But a *large-capacity* magazine is not necessary for a firearm to function. That is, the capacity of a magazine does not impact the operability of a firearm; it changes only the number of shots that can be fired without pausing to reload. (Att-499, 737, 1393–96, 1399, 1435).

More fundamentally, no firearms commonly used for self-defense in 1859 had a large-capacity magazine or anything like a large-capacity magazine. Instead, the practicality and functionality of a large-capacity magazine derive from three separate innovations in the 1880s, two of which were military innovations.

Up until the 1850s, firearms generally were single-shot and muzzle-loading; a single round was loaded from the open end of the gun barrel. (Att-792). The user poured gunpowder down the barrel, put a projectile ball on a grease patch, and used a rod to ram the ball to the barrel's bottom; additional gunpowder then was used with a flintlock ignition system to ignite the powder charge. (Att-360, 792–94). A percussion-cap ignition system enabled the development of "cap-and-ball" ammunition by the 1830s, but this system still required that each round be loaded individually. (Att-793–94, 798, 806, 1021).

By the 1850s, five types of muzzle-loading firearms were common: the musket, military musket, rifle, shotgun, and pistol. (Att-790–92). Two different pistol-type weapons had developed and were referred to as "repeaters" because they could store and fire more than one round before the user had to reload ammunition. (Att-800). The first was the pepperbox pistol, which used a single axis with multiple barrels, typically 4 to 8. (Att-380–81, 801–04). The second was the revolver, popularized by Samuel Colt, which had a single barrel with multiple chambers, typically 5 to 8. (Att-321, 804–05).

In the 1850s, the Oregon territory was at the end of the nation's supply chain. (Att-995–97). As explained by Dr. Mark Tveskov—an anthropology professor and historical archeologist at Southern Oregon University who has studied Oregon's territorial period extensively—this created a culture of independence and self-reliance, with a preference for tried-and-true rather than

experimental technology. (Att-890–91, 1001, 1024–26, 1033). Those in the territory commonly used single-shot muzzle-loading firearms for self-defense, and some even eschewed newer percussion-cap rifles for older, single-shot, flintlock rifles. (Att-890–91, 1002–05, 1012–14, 1021, 1024–26, 1033, 1046).

Only in 1860s did the nation see its first commercially successful firearms with a capacity of more than 10 rounds: the Henry and Winchester rifles. (Att-811–12). Both depended on recent advancements from the Industrial Revolution. Metallic cartridges provided pre-assembled, self-contained ammunition of primer, propellant, and projectile. (Att-809–10). Breech-loading technology loaded ammunition from the back (breech) of the barrel, rather than from the front muzzle. (Att-807–09). Both rifles had a tubular magazine; the user fed ammunition one-by-one into a tube, and then manually ejected and chambered each round with a lever. (Att-812–14).

Henry and Winchester rifles initially were rare. By the early 1870s, they comprised at most 0.2% of firearms in the United States, as the vast majority were sold and shipped overseas. (Att-815–18). Indeed, there is no evidence that any firearm with a capacity of more than 10 rounds appeared in Oregon until after the Civil War. (Att-1035–36, 39).

In the 1880s, three innovations dramatically altered the form and functionality of firearms. First, Hiram Maxim, a British inventor, invented automatic fire for military use. (Att-824). He perfected a team-operated gun

that sat on a tripod, harnessed the explosive power from one round to eject the spent cartridge and rechamber the next automatically, and was fed ammunition from an adjoining crate. (Att-824, 893). Second, James Paris Lee, a Canadian inventor, invented the first successful detachable magazine, also for military use; it held eight rounds in a spring-loaded box, and the rounds were fed one-by-one into a military rifle using a lever. (Att-823, 893). Third, Paul Vieille, a French chemist, invented nitrocellulose, a smokeless gunpowder three times stronger than black powder that left virtually no residue; the residue of black powder quickly fouled a barrel, rendering the firearm inoperable. (Att-827–28).

In the 1890s, the three innovations from the 1880s were combined to create semi-automatic technology. (Att-341, 826, 828). With semi-automatic technology, each trigger pull fires a cartridge, and the resulting energy from that shot is used to eject the spent cartridge and chamber a new round automatically. (Att-825–26).

Those innovations allowed large-capacity magazines to become useful; they also would have been unforeseeable to those living in the 1850s. As explained by Dr. Brian DeLay—a history professor and scholar at UC Berkeley who has published a number of peer-reviewed articles and is completing a study on the international firearms trade in the 1700s and 1800s—the technologies, separately and combined, constituted "profound ruptures in the history of firearms technology." (Att-829). Before those innovations, a firearm user

always had to expend time and energy to manually remove and rechamber a spent round of ammunition; the capacity of a firearm was limited in large part by its dimensionality, where the size of the firearm dictated its potential capacity; and the rate of repeat fire was limited by the quick fouling of the barrel caused by black powder. (Att-827–31). As such, large-capacity firearms were not practical in 1859. Unsurprisingly then, they were not common anywhere in the United States, much less commonly used for self-defense. (Att-398, 401, 810–12, 815–18, 1035–36, 1039).

None of this history is disputed. Indeed, in *OSSA*, this court cited military innovations that post-dated statehood as "not the 'sort' of weapons for defense of self intended by the drafters to come within Article I, section 27." 122 Or App at 546–49. The court explained that, with such innovations, "[t]echnology has now defined a difference between personal weapons for defense of self and weapons of warfare." *Id.* at 547. As noted, large-capacity magazines derive their practicality from three innovations in the 1880s, two of them for military purposes. Such devices thus lack constitutional protection for the reasons already explained by this court in *OSSA*, 122 Or App at 547–49.

In short, large-capacity magazines bear no relation to the rudimentary firearms commonly used for self-defense in 1859, in Oregon or anywhere else in the country. Measure 114's large-capacity magazine restrictions thus do not implicate, much less facially contravene, Article I, section 27.

ii The trial court's ruling to the contrary constitutes fundamental legal error.

The trial court concluded otherwise. (Att-29–32). In doing so, the trial court failed to cite, much less apply, the criteria announced by this court for determining whether weapons constitute "arms" protected by the constitution. The court acknowledged that "the key to well-functioning semiautomatic weapons" did not appear until the 1880s; but the court cited the general interest of gunmakers in developing this nonexistent technology to conclude that "the drive for larger capacity magazines" was enough to confer constitutional protection. (Att-31 n 12). That ruling constitutes legal error.

The intent of gunmakers in the 1800s has no legal relevance to the question of whether large-capacity magazines are akin to weapons commonly used for self-defense in 1859. *OSSA*, 122 Or App at 544. The uncontroverted answer to that question is "no," as explained above. A general historical desire for increased firearm capacity is legally insufficient to confer constitutional protection on later, technologically distinct weaponry that derived from military innovations. *Kessler*, 289 Or at 369; *OSSA*, 122 Or App at 546–47.

Separately, and incongruously, the trial court reasoned that "[l]arge capacity magazines existed in the early 1800s" and "that firearm technology at the founding of the state is the foundation for the current firearm technology."

(Att-29, 31). To the extent those statements represent factual findings, they lack any basis in the evidentiary record.

The trial court invoked two types of "repeater" firearms as historical analogues. In the trial court's view, large-capacity magazines are the modern-day equivalent of both "repeating rifles of the 1850s," as well as "Colt revolvers and pepperboxes." (Att-31 & n 12). The trial court is mistaken.

With respect to repeating rifles, this court already held in *OSSA* that such firearms are not valid historical analogues for conferring constitutional protection because they were not commonly used for self-defense in the 1850s. 122 Or App at 549. The trial court attempted to distinguish that legal holding factually, stating that "[t]he record in this case leads the court to very different factual conclusions" and citing the identification of "several other models of multi-shot firearms pre-statehood including, but not limited to, the Lorenzoni and Girandoni rifles[.]" (Att-31 n 12). Stare decisis precludes that reasoning, as does the record.

It was undisputed at trial that, as *OSSA* held, repeating rifles were not common, much less commonly used for self-defense, in the 1850s. According to plaintiffs' own expert, there is evidence of only one Lorenzoni-style firearm making its way to the United States. (Att-370, 896). And the Girandoni was not a firearm at all: Like a pellet gun, it used compressed air, which the user had to manually pump, to expel its projectiles. Regardless, plaintiffs' expert

could identify only one Girandoni that appeared in the United States, famously brought by Merriwether Lewis on the Lewis and Clark Expedition as a show gun. (Att-377, 378–79, 856–57). Air rifles in general were so rare and obscure at the time that museums charged admission to see one. (Att-898–99).

As this court previously explained, and as the record here demonstrates, repeating rifles were not commonly used for self-defense in the 1850s because the technology did not exist to make them in sufficient quantity and quality. *OSSA*, 122 Or App at 549; (Att-810–11). For example, the Volcanic was an attempted repeating firearm from the 1850s, but it was underpowered and prone to gas leakage, and the company ultimately filed for bankruptcy. *OSSA*, 122 Or App at 549; (Att-868). As another example, the Belton was a musket with "superposed loads," meaning that all rounds in the weapon would fire after one trigger pull; there is no evidence that a Belton was ever even sold to the public, and superposed loads never became commonly used because they lacked any control or safety; a misfire could turn the firearm into a pipe bomb and kill the user. (Att-374, 894–95).

With respect to pistol-type weapons, it is true that Colt revolvers and pepperbox pistols were commonly used for self-defense in the 1850s. But large-capacity magazines are not their modern-day equivalent.

As already explained, the capacity of those weapons was limited by their dimensionality. That is, to increase capacity beyond the 4–8 rounds that they

typically held, additional chambers or barrels would need to be added; doing so, however, was not physically or practically feasible, given the size and weight of each. (Att-418, 801–02). Moreover, reloading to fire more than 10 rounds would have been time-consuming and laborious. Each individual round had to be reloaded manually—primer, propellant, and projectile—and the barrel required frequent cleaning due to fouling from black gunpowder. (Att-802–06). Reloading a firearm would have taken at least a minute and a half. (Att-806).

Finally, the trial court cited *Delgado*, 298 Or 395, in support of its decision. (Att-30–31). *Delgado* held that an outright ban of switchblade knives ran afoul of Article I, section 27, because the only difference from its historical antecedent, the jackknife, was "the presence of [a] spring-operated mechanism that opens the knife." 298 Or at 403. That is, the resulting weapon was the same; the only difference lay in how the knife was opened. Large-capacity magazines, on the other hand, present wholly distinct weapons from revolvers and pistols in the 1850s—in form, function, and lethality. Such magazines became practical and functional only after three separate innovations emerged in the 1880s, two of them for military purposes. In other words, modern-day large-capacity magazines did not derive from Colt revolvers or pepperbox pistols. And military-derived technology that postdates statehood generally does not warrant constitutional protection. *OSSA*, 122 Or App at 547.

b. Measure 114's large-capacity magazine restrictions are reasonable regulations for promoting public safety.

Even if large-capacity magazines were protected "arms" under Article I, section 27, Measure 114's restrictions still would pass constitutional muster. The restrictions reasonably relate to significant threats to public safety, and they do so without unduly frustrating armed self-defense. The trial court ruled to the contrary by misconstruing the text of the statute and by misstating the pertinent legal standard.

i. The restrictions reasonably relate to public safety without unduly frustrating armed self-defense.

To determine whether a law runs afoul of the reasonableness requirement of Article I, section 27, a court weighs: (1) the harm to the public that the law seeks to address; (2) whether the law reasonably relates to that purpose; and (3) whether the law unduly infringes on the right to bear arms for self-defense. *Christian*, 354 Or at 33–34; *Hirsch/Friend*, 338 Or at 678. Measure 114's large-capacity magazine restrictions easily satisfy that test.

(A) The restrictions seek to prevent harm from gun violence, including mass gun violence.

Measure 114 seeks to prevent "horrific deaths and devastating injuries due to mass shootings, homicides and suicides," which were viewed as "unacceptable at any level." M114, Preamble. The measure also provides that ready access to large-capacity magazines "pose[s] a grave and immediate risk to

the health, safety and well-being of the citizens of this State, particularly our youth." *Id.* Those public safety harms are significant.

Homicides pose a threat to public safety. Between 2001 and 2021, Oregon firearm-related homicides rose 310%, from 47 in 2001, to 146 in 2021. (Att-1167). Mass shootings also pose a threat to public safety. Between 1982 and 2022, the country experienced 179 public mass shootings in which four or more people were killed not including the shooter. (Att-1313–14). The number and frequency of mass shootings also have increased over time. (Att-1333).

In mass shootings, large-capacity magazines pose a particular threat. NERA Economic Consulting, an economic research firm that analyzes data quantitatively across industries, examined news accounts and crime statistics of mass shootings to measure that threat. (Att-1237, 1312–13). In 115 of the 179 public mass shootings, NERA was able to determine whether a large-capacity magazine was used. Across that subset of mass shootings, the use of a large-capacity magazine resulted in an exponential increase in the number of shots fired and, in turn, an exponential increase in the number of fatalities, injuries, and casualties (fatalities plus injuries):

	# mass shootings	Avg. shots fired	Avg. fatalities	Avg. injuries	Avg. total casualties
LCM	73	99	10	16	26
No LCM	42	16	6	3	9

(Att-1327–33).

When a mass shooting is defined as four or more casualties (as opposed to fatalities), the harm grows even greater. In 2021 alone, the country experienced 689 such mass shootings accounting for 3,453 total casualties; in 2022, the country experienced 645 mass shootings with 3,298 total casualties. (Att-1334–37). Oregon has not been immune to this mass violence. Since 2014, Oregon has experienced 21 such mass shootings with 118 total casualties, including at Umpqua Community College in 2015, when a shooter using a large-capacity magazine killed nine and injured eight. (Att-1340–42).

That these are very real public safety harms cannot reasonably be denied, and Article I, section 27, allows the people of Oregon to adopt reasonable regulations to address them.

(B) The restrictions reasonably relate to the harm they seek to address.

Restricting the capacity of magazines reasonably relates to the public-safety threats that Measure 114 seeks to address. Statistics and studies confirm what common sense suggests: Large-capacity magazines are associated with an increase in mass shootings and firearm-related violence, while state restrictions on such magazines decrease the incidence and lethality of mass shootings.

As discussed above, a shooter's use of a large-capacity magazine typically results in more shots fired, more fatalities, more injuries, and more casualties. (Att-1327–33). Epidemiological studies have uniformly found that

large-capacity magazines are used in most mass shootings; that a shooter's use of a large-capacity magazine results in more than double the number of average fatalities compared to mass shootings where such a magazine is not used; and that state restrictions on large-capacity magazines reduce the average number of mass-shooting fatalities. (Att-1123, 1129–31, 1143–44, 1147, 1657, 1687–90). Those correlations by themselves are more than sufficient to reasonably relate Measure 114's magazine restrictions to the law's stated intent.

Indeed, logic alone reasonably relates the two. The defining feature of a large-capacity magazine allows a shooter to fire more than 10 rounds without having to pause to reload. Limiting magazine capacity means that a shooter will have to pause to reload sooner and more frequently. This in turn means that bystanders will have increased opportunity to try to stop a shooter or to flee. (Att-1132–33, 1138). And this has, in fact, happened. In 2011, Representative Gabby Giffords and 18 others were shot. Six of the victims died. The gunman opened fire in a supermarket parking lot; his rampage was stopped when he paused to reload. (Att-1138). In 2019, a gunman opened fire on the Chabad of Poway synagogue, killing one and injury two; again, the gunman was stopped only when he paused to reload. (Att-1139). Perhaps unsurprisingly, one of plaintiffs' expert witnesses conceded the obvious fact that limiting magazine capacity creates a window of time in which an active

shooter must pause to reload. (Att-206–07; *see also* Att-1407–08 (defendants' expert discussing the steps required to reload ammunition)).

(C) The restrictions do not unduly frustrate armed self-defense.

Measure 114's restrictions on magazine capacity do not unduly frustrate armed self-defense. Undisputed evidence at trial established that ample and suitable firearm self-defense options are permissible under the statute. Those options include firearms like revolvers, which are generally not implicated by the restrictions; the widespread existence of capacity-compliant magazines for most popular brands of firearms; and the ability to permanently modify larger capacity magazines so that they will accept no more than 10 rounds. If Measure 114 burdens armed self-defense at all, the burden is minimal.

As an initial matter, some firearms, like a revolver or a pistol with a 10-round magazine, are sold initially with a capacity-compliant magazine. (Att-197, 438, 526–27, 1379–80). Those firearms are not affected at all by Measure 114's magazine restrictions.

For firearms that may currently have a magazine with a capacity of more than 10 rounds, capacity-compliant magazines are readily available. Plaintiffs' own experts conceded at trial that every major firearm manufacturer, and large after-market magazine manufacturers, make and sell magazines with a capacity of 10 or fewer rounds for both rifles and pistols, including the popular brands of

Glock, Remington, Smith & Wesson, Sig Sauer, Browning, and Magpul. (Att-526–27, 696–99, 708, 736, 1396–98, 1414–24). Plaintiffs Joseph Arnold and Cliff Asmussen both testified that they already own capacity-compliant magazines. (Att-224, 229, 239, 241). Indeed, Mr. Arnold's preferred weapon to carry for self-defense is a pistol with a 10-round magazine. (Att-229, 241).

Compliant magazines are not only readily available, but they also are readily usable. Plaintiffs' experts conceded that the vast majority of firearms will readily accept and operate with a capacity-compliant magazine. (Att-499, 737, 1393–96, 1399, 1435). That is because the capacity of a magazine does not impact the operability of a firearm: A firearm that takes a magazine generally functions the same regardless of the magazine size, and the magazine's capacity impacts only how often the user needs to pause to reload. (Att-499, 737, 1393–96, 1399, 1435).

In addition, the statute permits both manufactures and users to permanently modify the capacity of the magazine to accept 10 or fewer rounds of ammunition. M114 § 11(1)(d). For example, in other jurisdictions that limit magazine capacity, such as California and Canada, manufacturers have added metal rivets to render the magazine capacity compliant. (Att-444).

Finally, more than 10 rounds of ammunition are generally not used or needed for armed self-defense. NERA Economic Consulting conducted two separate studies to analyze instances where the defender fired a firearm in self-

defense against another person. The first analyzed the National Rifle Association's armed citizen database, a self-reported database of defensive gun uses. The second analyzed news stories using Factiva, a news aggregator of more than 33,000 news sources, to identify stories on defensive gun use. (Att-1246–48, 1269–71). Each covered the timeframe of January 2011 to May 2017. (Att-1271, 1287, 1347). Consistent across both studies, at least 99% of documented defensive gun uses involved firing 10 or fewer rounds in self-defense, and the average number of rounds fired was just over 2:

	Total shots fired (% of incidents)				**Avg. shots fired**
	0	*1–5*	*6–10*	*>10*	
NRA	18%	80%	2%	0.3%	2.2
Factiva	12%	86%	3%	0%	2.3

(Att-1257–58, 1294).

NERA also conducted a separate study of gun uses in Portland between 2019 and 2022. (Att-1299–300). Out of 3,956 reported shootings, only one involved a defensive gun use, and the defender there fired 4 or 5 rounds. (Att-1299–301).

Plaintiffs, meanwhile, offered no evidence at trial that any defensive gun use by a civilian against an attacker in Oregon has ever involved the use of more than 10 rounds of ammunition. Instead, plaintiffs only presented testimony from a sheriff who, while hunting, "hazed" a pack of wolves by firing 30 rounds from a .22 caliber firearm. (Att-635, 1438).

In short, capacity-compliant magazines are readily available and usable. And more than 10 rounds are virtually never, if ever, used in self-defense. The magazine restrictions therefore do not unduly frustrate armed self-defense.

ii. The trial court's ruling to the contrary constitutes fundamental legal error.

Measure 114's magazine restrictions reasonably address a significant public harm without unduly frustrating armed self-defense. The trial court's contrary conclusion is based on three clear errors of law. (Att-29–48).

First, the trial court adopted an implausible interpretation of the statute to ban virtually all magazines. In doing so, the court ignored the text and context of the statute, as well as core canons of statutory construction. Second, the trial effectively conducted an overbreadth analysis, reviewing possible future applications of the law, which is not permissible under Article I, section 27. Third, the trial court applied the wrong legal standard. Instead of the proper judicial inquiry whether the people made reasonable choices, the court usurped the role of policymaker and decided that, in its opinion, the policies were misguided. That assessment by a court has no basis in Oregon jurisprudence.

(A) The trial court misconstrued the text of the statute to ban all magazines.

First, the trial court adopted an interpretation of the statute that is clearly erroneous. The court ruled that the statute "effectively bans all firearm magazines fixed or attached" and thus "effectively bans most of firearms

currently within the possession of Oregon citizens." (Att-38). That interpretation violates the text of the statute and core canons of construction.

Measure 114 defines a large-capacity magazine as

> a fixed or detachable magazine, belt, drum, feed strip, helical feeding device, or similar device, including any such device joined or coupled with another in any manner, or a kit with such parts, that has an overall capacity of, or that can be readily restored, changed, or converted to accept, more than 10 rounds of ammunition and allows a shooter to keep firing without having to pause to reload.

M114 § 11(1)(d). By its terms, the statute restricts both those magazines with a current capacity that exceeds 10 rounds of ammunition, and those "that can be readily restored, changed, or converted to accept" more than 10 rounds. *Id.* Specifically prohibited is "any such device coupled with another in any matter, or a kit with such parts." *Id.* For example, many manufacturers make magazine extensions that attach to the bottom of a magazine to increase firing capacity. (Att-450, 1413). Such an extension attached to a magazine is clearly prohibited if the resulting capacity exceeds 10 rounds of ammunition.

The trial court, however, extrapolated from the phrase "readily restored, changed, or converted" to conclude that all magazines are effectively banned. The court's reasoning was that, with enough time, effort, and ingenuity, a gunsmith can use tools or parts to increase *any* magazine's capacity to hold more than 10 rounds of ammunition, such as by adding a magazine extension or

by removing parts from the magazine. (Att-34–37). That is not what the statute says or means, nor does the record support the trial court's interpretation.

When interpreting a statute, Oregon courts employ the familiar analytical framework of *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). The "paramount goal is to ascertain the intent of the legislature that enacted the disputed provision, and we determine that intent by examining the text, in context, as well as legislative history[.]" *Marshall v. PricewaterhouseCoopers, LLP*, 371 Or 536, 540, 539 P3d 766 (2023) (cleaned up).

In short, the trial court concluded that, in prohibiting the purchase and restricting the use of *large-capacity* magazines, the voters actually intended to ban *all* magazines. To do so, the trial court essentially read the word "readily" out of the statute. However, the Oregon Supreme Court already has interpreted the term "readily" in the firearm-modification context and, in doing so, interpreted the term to convey and require a short temporal window. *State v. Briney*, 345 Or 505, 200 P3d 550 (2008).

In *Briney*, the question was whether defendant's pistol, which had a broken firing pin, constituted a firearm under a definition requiring that the pistol be "readily capable of use as a weapon." *Id.* at 507. An individual could obtain a new firing pin via overnight delivery and then install the new pin in a matter of minutes. *Id.* at 508. The court held that the pistol could not "readily"

be used as a weapon. Specifically, the court held that "readily" required "that the firearm either be operational or promptly able to be made so." *Id.* at 516.

Here, no evidence at trial supported the notion that every magazine can "promptly" be made into a device capable of holding more than 10 rounds of ammunition. The trial court found that a user could remove interior parts from a capacity-compliant magazine to increase the capacity to more than 10 rounds "in [a] manner of seconds." (Att-33 & n 16). No one testified to that effect, and the record refutes the idea that any user could promptly accomplish such a feat with any magazine.

For example, plaintiffs' gunsmithing expert testified that he attempted to modify two 10-round magazines. (Att-1493–1501). With one, he used a knife to cut locks and remove four of six spring coils that force ammunition toward the chamber of a firearm. (Att-1493–98). With the other, he removed the locking floorplate of the magazine, which keeps the baseplate from falling off and thereby holds the ammunition in the magazine. (Att-1498–501). The former took the gunsmith 15–20 minutes; the latter five minutes. (Att-1495, 1501). He squeezed 11 rounds into each magazine but never fired any rounds. (Att-1497). Unsurprisingly, he counsels against such home modifications, citing concerns over safety and uncertainty on whether the resulting device would function: "I just don't think it would be a safe thing to do if you want an operational firearm." (Att-443, 472).

The trial court cited for support to three exhibits and one piece of testimony, each of which is inapt. (Att-33 n 16). In one exhibit, plaintiffs' gunsmithing expert showed a 10-round magazine that already had attached to it a 3-round magazine extension. (Ex 19). The assembled combination is indeed prohibited by Measure 114. But as in *Briney*, where the defendant first needed to acquire a working firing pin, the fact that a magazine extension exists somewhere in the world does not mean that every person with a 10-round magazine can "readily" convert the magazine to hold more than 10 rounds.

The other pieces of evidence are even less apposite. The second cited exhibit was an advertisement for a magazine "block" that users can insert into a large-capacity magazine to decrease the magazine's ammunition capacity. (Ex 20). The third exhibit showed the gunsmithing expert using a power drill to remove a dimple in a magazine that the manufacturer had inserted to limit the magazine's capacity to 10 or fewer rounds. (Ex 21). And in the last, the gunsmithing expert testified about possibly using boiling water to remove a magazine's baseplate to attach a magazine extension. (Att-474). But the fact that some modifications to reduce magazine capacity may not be permanent, or that a magazine extension may exist somewhere in the world, does not support the claim that every capacity-compliant magazine can always be "readily" modified to hold more than 10 rounds.

Understood by its plain terms, Measure 114 does not restrict a magazine with a capacity of 10 or fewer rounds. Only magazines with greater capacity are restricted. Every major firearm manufacturer, and many after-market magazine manufacturers, make and sell detachable magazines with a capacity of 10 rounds or fewer. (Att-526–27, 696–99, 708, 736, 1396–98, 1414–24). In addition, magazines with a current capacity of more than 10 rounds can be modified to hold fewer rounds. As noted, to comply with capacity restrictions in other jurisdictions that limit magazine size, some manufacturers install metal rivets or dimples in a magazine to alter the capacity. (Att-444).

To be sure, future cases may raise the question of how the statutory provisions on modifications apply to interesting edge cases. For example, it may be necessary to decide when a particular modification is sufficiently "permanent" to turn a large-capacity magazine into a compliant magazine, as the statute expressly allows. M114 § 11(1)(d)(A). But a facial challenge is not the proper venue for such line drawing. *Christian*, 354 Or at 39

The trial court also concluded that all 10-round magazines are impermissible under the statute because all firearms can hold one round the chamber of the gun, resulting in an overall capacity of 11 rounds in the firearm (Att-37). This interpretation ignores the text of Measure 114. The statute regulates and restricts the capacity of an "ammunition feeding device." The

chamber is not an ammunition feeding device. It is the part of the firearm into which a magazine feeds ammunition. (Att-695–96, 1378, 1381–82).

At bottom, the trial court adopted a strained interpretation that the statute bans all firearm magazines. Armed with that interpretation, the court found the statute unconstitutional. But courts are required to "*avoid* interpreting a statute in a way that would render it unconstitutional if a different, but also plausible, interpretation would be constitutional." *City of Damascus v. State ex rel. Brown*, 367 Or 41, 67, 472 P3d 741 (2020) (emphasis added).

Indeed, the trial court's implausible understanding of the law is belied by decades of experience with similar firearm laws. Like Measure 114, the former federal assault-weapons ban restricted large-capacity magazines, including a device "that can be *readily restored or converted to accept*, more than 10 rounds of ammunition." *Former* 18 USC § 921(31) (1994) (emphasis added). Yet Plaintiff Arnold testified that he lawfully purchased capacity-compliant magazines while the law was in effect. (Att-241, 1386, 1409).

Similarly, Connecticut, Delaware, Illinois, Massachusetts, New York, Rhode Island, Vermont, and the District of Columbia also restrict large-capacity magazines, including magazines that can be "readily" converted to a large-capacity magazine. Conn. Gen. Stat. § 53–202w(a)(1); Del. Code tit. 11 § 1468; 720 Ill. Comp. Stat. § 5/24-1.10(a)(1)(2); Mass. Gen. Laws ch. 140, § 121; N.Y. Penal Law § 265.00(23); R.I. Gen. Laws § 11-47.1-2; Vt. Stat.

Ann. tit. 13, § 4021; D.C. Code Ann. § 7-2506.01. But James Yurgealitis, a former firearms expert for the ATF (the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives), purchased a variety of 10-round magazines in three of those states in the weeks leading up to trial, including magazines that accept an extension. (Att-1414–25, 31).

The trial court's determination that all magazines would be banned under Measure 114 has no legal or practical basis.

(B) The trial court conducted an overbreadth analysis, which is not permissible.

Second, the trial court applied an erroneous legal standard for assessing facial constitutionality. In a facial challenge, the pertinent legal question is "whether the ordinance is capable of constitutional application in *any* circumstance." *Christian*, 354 Or at 40 (emphasis added). That is, a statute is facially constitutional unless a challenger can show that there are "no reasonably likely circumstances in which application of the statute would pass constitutional muster." *Id.* (quoting *State v. Sutherland*, 329 Or 359, 365, 987 P2d 501 (1999)).

Nowhere in the trial court's opinion does the court apply that legal standard. Instead, the court speculated on various ways in which the court thinks the statute might be applied in the future. (Att-32–41). That is an overbreadth analysis. As the Supreme Court has explained, an overbreadth

challenge asks whether a "statute swept so broadly as to infringe rights that it could not reach." *Christian*, 354 Or at 35 (quoting *State v. Blocker*, 291 Or 255, 261–62, 307 P3d 429 (1981)). But after explaining that, the Supreme Court squarely held that "overbreadth challenges are not cognizable in Article I, section 27, challenges." *Id.* at 40. Neither a challenger nor a court can "raise hypothetical questions about the application of [the] law[] untethered by facts on the ground," seeking "to determine the rights of parties who are not before the court." *Id.* at 39.

Under the correct legal analysis for a facial challenge—whether the law can be applied constitutionally in any circumstance—the clear answer is "yes," for the reasons explained above.

(C) The trial court misapplied the legal standard of reasonableness.

Third, the trial court did not apply the correct legal standard to determine whether the restrictions are reasonable. Again, the pertinent legal question is whether the policy decision was reasonable based on (1) the harm to the public that the law seeks to address; (2) whether the law reasonably relates to that purpose; and (3) whether the law unduly infringes on the right to bear arms for self-defense. *Id.* at 33–34; *Hirsch/Friend*, 338 Or at 678. The trial court conducted no such analysis.

Instead, the court weighed the policy merits of the measure. On harm, the court opined that "mass shootings rank very low in frequency" and "are highly sensationalized by the media"; that "[t]he historic number of causalities [sic] from mass shootings is staggeringly low in comparison [to] the media's sensationalized coverage of the events"; and that the "number of people killed and injured is statistically insignificant compared to the number of lawful gun owners." (Att-42–43, 45–46). The court further opined that "the restriction on large capacity magazines would [not] affect the mass shooting event outcomes with any scientific certainty" and that there was not "evidence demonstrating a positive public safety result for the large capacity ban beyond a speculative, de minimis impact on mass shooting fatalities which occur very rarely." (Att-43, 48). The court also stated that "[t]he limited number of mass shootings in the country weighed against the massive criminalization of lawful firearm possession in Oregon does not allow for" the burden imposed by the restriction, which the court had misconstrued as a ban of nearly all firearms. (Att-47).

As an initial matter, much of the trial court's reasoning lacks any support in the record. There was no evidence at trial about whether the media sensationalizes mass-shooting events (or what that might even mean), nor on how many Oregonians might be affected by the restrictions on large-capacity magazines. Indeed, both named plaintiffs testified that they own capacity-

compliant magazines; they can continue to exercise the right to armed self-defense regardless of Measure 114. (Att-224, 229, 239, 241).

More fundamentally, the trial court misunderstood the pertinent legal inquiry. There is no minimum number of mass shootings that Oregon communities must suffer before the voters may legislate to mitigate or prevent them. And the legislative power is not limited to policies that a court believes are certain to be effective. To pass constitutional muster, a legislative policy decision need only reasonably relate to the harm that the legislative body seeks to address. *Christian*, 354 Or at 33–34; *Hirsch/Friend*, 338 Or at 678. The magazine restrictions easily clear that bar, as explained above.

2. Measure 114's permit-to-purchase provisions are facially constitutional.

a. Plaintiffs' challenge to the permit-to-purchase program is foreclosed by *Christian*.

Plaintiffs next challenge the facial constitutionality of Measure 114's permit-to-purchase requirements. That challenge is foreclosed by the Supreme Court's decision in *Christian*, 354 Or 22. There, the court held that requiring a license to carry a loaded firearm in public was facially constitutional because the restriction was not a total ban on carrying a firearm for self-defense; instead, anyone who acquired a license to carry a concealed handgun was free to do so. *Id.* at 41. That holding applies on all fours to the permit-to-purchase provisions.

The *Christian* court reiterated that a "facial challenge is limited to whether the ordinance is capable of constitutional application in any circumstance." *Id.* at 40. And the court readily concluded that requiring a permit to carry a loaded firearm could be applied constitutionally. Under Oregon law, a sheriff "shall issue" a concealed handgun license to any applicant who passes a background check, lacks a disqualifying mental illness, and demonstrates their competence with firearm safety. *See* ORS 166.291 (delineating requirements). Thus, any Oregonian could carry a loaded firearm for self-defense by obtaining a license. *Christian*, 354 at 41.

So too here. Like concealed-carry licenses, sheriffs and chiefs of police "shall issue" a permit-to-purchase to any applicant who passes a background check, lacks a disqualifying mental illness, and demonstrates their competence with firearm safety. M114 §§ 3(3), 4(1), 4(3). As such, any Oregonian can purchase a legal firearm for self-defense by obtaining a permit. Consequently, the permit-to-purchase provisions are facially constitutional under Article I, section 27. *Christian*, 354 at 40.

b. The trial court misstated the record, misread the statute, and misapplied the legal standard of reasonableness.

The trial concluded otherwise based on two factual determinations that the record contradicts and by applying an "intermediate scrutiny" legal standard that has no basis in Oregon law. (Att-17–29). That ruling was clear legal error.

i. The trial court misstated the record and misread the text of the statute.

First, the trial court found determinative that the statute "delays the purchase of firearms for a minimum of 30 days" and that, in the future, the FBI (Federal Bureau of Investigation) could "refuse[] to conduct criminal background checks" under the measure. (Att-17–18). Neither has any basis in the record or the statutory text.

The court's determination that Measure 114 establishes a "30-day absolute prohibition on the initial purchase of a firearm" is flatly wrong. The statute does provide that any applicant who has not received their permit after 30 days can file an action in circuit court to compel its issuance.[3] But the availability of that remedy after 30 days does not imply, much less require, that a permit agent must delay processing the application for 30 days. A permit agent is free to grant a permit once the statutory requirements have been met.

The trial court incorrectly stated that a 30-day minimum delay was "agreed upon by the parties at trial." (Att-17). The record belies that assertion. During opening statements, the court engaged in an extended colloquy with the

[3] The trial court reviews the matter de novo and must issue a decision "within 15 judicial days of filing or as soon as practicable thereafter." M114 §§ 5(1), (5), (8), (10). The resulting decision is then appealable as a matter of right to this court. *Id.* § 5(11).

state's counsel on the permit process, including on the length of time before an applicant could seek judicial review:

> COURT: So it's 30 days -- you agree that it has to be issued within 30 days.
>
> COUNSEL: Correct.
>
> COURT: Or you can seek relief.
>
> COUNSEL: Correct, Your Honor. And I will say the statute directs the issuance of a permit if the requirements are met during that 30 days.
>
> COURT: Okay. Thank you.
>
> COUNSEL: And another one is that that's a maximum, not that the statute requires or even contemplates that a permit agent would unduly sit on an application if it's -- if they've met all the requirements in a few hours or a few days.

(Att-174). On day three of trial, the court recounted defendants' position that delay "could not be more than 30 days." (Att-744). At no point did the state "agree" that Measure 114 creates a minimum 30-day prohibition against purchasing firearms. More importantly, the statutory text does no such thing.

As a legal matter, the trial court's re-characterization of a permit requirement as a temporary-yet-absolute prohibition cannot be reconciled with *Christian*. There, too, a person who had not yet received a license could not engage in the armed self-defense conduct covered by the requirement; but the requirement was facially constitutional because one need only obtain a license to engage in the conduct. *Christian*, 354 at 41. Indeed, any license or permit

system necessarily requires time to process applications, and no Oregon law supports the trial court's treatment of such a system as an absolute prohibition.

As to the FBI, the court stated that an FBI background check "is required by the" statute and that, although the FBI currently states that it will process background-check requests, the FBI could change its mind "[a]t any moment." (Att-26 n 10, 27). Neither rationale has merit.

First, the statutory text does not require that the FBI conduct a background check. Rather, the statute directs OSP to *request* a fingerprint-based background check from the FBI:

> The applicant must submit to fingerprinting and photographing by the permit agent. The permit agent shall fingerprint and photograph the applicant and shall conduct any investigation necessary to determine whether the applicant meets the qualifications described in paragraph (b) of this section. The permit agent shall request the department [of state police] to conduct a criminal background check, including but not limited to a fingerprint identification, through the Federal Bureau of Investigation. The Federal Bureau of Investigation shall return the fingerprint cards used to conduct the criminal background check and may not keep any record of the fingerprints.

M114 § 4(1)(e). OSP then must report the results of its background checks, including any information received from the FBI, to the permit agent:

> Upon completion of the criminal background check and determination of whether the permit applicant is qualified or disqualified from purchasing or otherwise acquiring a firearm the department shall report the results, including the outcome of the fingerprint-based criminal background check, to the permit agent.

Id.

This structure—requiring OSP to request a background check and report any results, while imposing no requirement on the FBI—is consistent with basic federalism. Under the Supremacy Clause, the State of Oregon cannot "directly regulate the Federal Government's operations or property." *Blackburn v. United States*, 100 F3d 1426, 1435 (9th Cir 1996). If the statute *did* impermissibly direct the FBI to conduct a background check, the proper judicial recourse would be to sever that ineffective provision, rather than to invalidate the entire statute. M114 § 12 (severability clause); ORS 174.040 (severability). But the statute does no such thing. Instead, Measure 114 requires OSP to report the results of its background checks to the permit agent, including whatever information the FBI ultimately provided. If the checks that OSP conducts reveal no disqualifiers, then OSP would so report, and the permit agent then "shall issue" the permit. M114 § 4(3)(a).

Second, the trial court's unsupported speculation about what the FBI may or may not do in the future does not render Measure 114's permit requirements unconstitutional on their face. Even if the FBI decided not to continue processing fingerprint-based background checks, that would not preclude issuance of any permit for the reasons just discussed. More fundamentally, speculation about a future hypothetical scenario that may or may not come to pass has no place or bearing on a facial challenge.

ii. The trial court applied "intermediate scrutiny," which has no basis in Oregon law.

In addition, the trial court invoked an "intermediate scrutiny" standard unknown to Oregon law to conclude that Measure 114 is facially unconstitutional. (Att-21). Applying that standard, the court reasoned that the state must show "an important government objective and competent evidence" before regulating or restricting an individual's right to bear arms, including by "proving a citizen is too dangerous to own a firearm." (Att-25). The court further indicated that the state was required to prove that a permit process would definitively reduce firearm-related violence. (Att-28).

That simply is not the legal standard for assessing the constitutionality of a law under Article I, section 27. Precedent requires only that the legislative policy decision be reasonable. *Christian*, 354 Or at 33–34; *Hirsch/Friend*, 338 Or at 678. In adopting its heightened standard, the court cited to two Oregon cases. (Att-22, 25 n 9). Both cases, however, used intermediate scrutiny to assess claims under the *federal* constitution. *See Christian*, 354 Or at 41–46; (Second Amendment); *Matter of Comp. of Williams*, 294 Or 33, 40, 653 P2d 970 (1982) (Equal Protection Clause). It is long established "that the Oregon Constitution has a content independent of that of the federal constitution." *State v. Soriano*, 68 Or App 642, 645, 684 P2d 1220 (1984), *aff'd*, 298 Or 392 (1984). This includes Article I, Section 27, which allows for the reasonable

regulation of protected weapons so long as the regulation does not unduly burden armed self-defense. *Christian*, 354 Or at 33–34; *Hirsch/Friend*, 338 Or at 671, 678; *Kessler*, 289 Or at 61–62.

All the more puzzling is that the trial court excluded, on relevance grounds, the very evidence that the court found lacking. (Att-129–31, 136, 1094–97). The state proffered statistically significant, peer-reviewed, published epidemiological studies that show that permit-to-purchase requirements lead to a significant decrease in firearm-related homicides and mass shootings. (Att-1685–86; *see also* Att-1657 (Measure 114 Preamble citing to studies)). The Oregon Constitution does not require such statistical proof to justify an exercise of legislative authority to promote public safety. But the existence of such studies further underscores the reasonableness of the law.

3. Measure 114's closure of the Charleston Loophole is facially constitutional.

a. Plaintiffs' Charleston challenge is foreclosed by *Hirsch/Friend* and *Christian*.

Plaintiffs also challenge Measure 114's closure of the Charleston Loophole. Their challenge is foreclosed by *Hirsch/Friend*, 338 Or 622, and *Christian*, 354 Or 22. Under that case law, the legislature may permissibly exclude those with a criminal background from the right to bear arms under Article I, section 27. And any Oregonian whose background check has cleared experiences no infringement on their right to self-defense.

In *Hirsch/Friend*, the court upheld the facial constitutionality of a state prohibition on felons possessing a firearm. 338 Or at 677. The court undertook an extensive analysis of the history that led to the adoption of Article I, section 27, examining the Oregon constitutional convention, Oregon territorial laws, English history, American colonial history, and the adoption of the Second Amendment to the United States Constitution. *Id.* at 643–673; *see State v. Parras*, 326 Or App 246, 255, 531 P3d 711, *rev den*, 371 Or 511 (2023) (discussing the "extensive historical excavation" conducted in *Hirsch/Friend*). The court concluded that "the drafters of the Oregon Constitution * * * did not intend to deprive the legislature of the authority to restrict arms * * * to protect the public safety." *Hirsch/Friend*, 338 Or at 677. As a result, the court held that the legislature reasonably could choose to promote public safety by disarming those "posing identifiable threats to the safety of the community by virtue of earlier commission of serious criminal conduct." *Id.*

In short, requiring a completed background check at the point of sale or transfer of a firearm is a logical and permissible means to that constitutional end. That is, if the legislature can permissibly disarm convicted felons, then it is reasonable for the legislature to institute a process to identify felons when they seek to purchase a firearm. And just as any qualified person could obtain the required permit at issue in *Christian*, any firearm transferee who passes a

background check is permitted to acquire a firearm. The fact that doing so may take time does not create any sort of prohibition, absolute or otherwise.

b. The trial court enjoined the Charleston closure with no examination or analysis.

Eliding the analysis that Oregon precedent requires, the trial court simply refused to consider the facial constitutionality of closing the Charleston Loophole. At trial, the court stated that the "Charleston Loophole, it's all related to the permit to purchase program, and I'm not going to deviate [sic] or separate out that." (Att-744). In its letter opinion, the court then did not discuss the loophole closure at all. Instead, the court stated that Sections 1–10 of the statute, which include the closure provisions, are "so essentially and inseparably connected with and dependent upon the unconstitutional permit-to-purchase scheme, [that] the court finds it apparent the remaining parts would not have been enacted without the unconstitutional part." (Att-17). This was legal error.

Under Oregon law, severability is the rule, rather than the exception. Specifically, "it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force." ORS 174.040. The legislature provides three exceptions to this rule, only one of which the trial court invoked: when "[t]he remaining parts are so essentially and inseparably connected with and dependent upon the

unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part." ORS 174.040(2).

The text of Measure 114 makes it clear that each part of Measure 114 would have been enacted without the others: "The people hereby declare that they would have adopted this Chapter, notwithstanding the unconstitutionality, invalidity and ineffectiveness of any one of its articles, sections, subsections, sentences or clauses." M114 § 12.

Moreover, the trial court could have tailored any injunctive relief to enjoin permit-to-purchase without enjoining the closure of the Charleston Loophole. That is, the court could have issued an injunction that prohibited the state from requiring a permit for a firearm transfer, while not prohibiting the state from requiring a completed point-of-sale background check. The two policies are distinct, and an injunction could easily treat them separably.

The trial court's reasoning lacks any support in the text or context of the statute. The law's Charleston Loophole provisions require that a point-of-sale background check must complete before a firearm transfer can proceed. M114 §§ 6(3)(c), 6(14), 7(3)(d)(B), 8(3)(c). Only two of the four provisions even mention permit-to-purchase. Section 6(3)(c) refers to a firearm purchaser as a "permit holder"; Section 6(14) prohibits transferring a firearm to a purchaser who either does not have a completed background check, or who does not have

a valid permit.[4] A simple injunction against requiring permits would prohibit the state from requiring a permit without causing any confusion about the background check requirements. The trial court's refusal to evaluate the two policies independently is clear error.

C. The equities weigh in favor of a stay.

For the above reasons, the state is likely to prevail on appeal. The equities also warrant staying the trial court's injunction pending appeal. It is axiomatic that, "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 US 1301, 1303, 133 S Ct 1, 183 L Ed 2d 667 (2012) (Roberts, C.J., in chambers) (citation omitted). The state has a sovereign interest in enforcing all laws, but that interest is particularly acute for laws that seek to protect and promote public safety amidst an epidemic of violence. Keeping people safe is a fundamental purpose of government.

---

[4] Section 6(3)(c) states: "The dealer may not transfer the firearm unless the dealer receives a unique approval number from the department and, within 48 hours of completing the transfer, the dealer shall notify the state that the transfer to the permit holder was completed."

Section 6(14) states: "Knowingly selling or delivering a firearm to a purchaser or transferee who does not have a valid permit-to-purchase a firearm in violation of subsection 2(d) of this section, or prior to receiving a unique approval number from the department based on the criminal background check in violation of subsection 3(c) of this section, is a Class A misdemeanor."

Here, by ignoring precedent, misconstruing the statute, and repeatedly applying incorrect legal standards, the trial court disregarded the will of the people and forestalled their efforts to protect themselves from gun violence. In doing so, the trial court arrogated to itself policy-making authority on a matter of great public import and safety. Under the Oregon Constitution, that authority properly belongs to the legislature and, through the initiative process, "to the people." Or Const, Art IV, § 1.

The recent Poway synagogue shooting illustrates the equities at stake. California is one of twelve other states that prohibit the sale of large-capacity magazines. After a legal challenge, a federal district court found the state law unconstitutional but stayed its injunction pending appeal. *Duncan v. Becerra*, 366 F Supp 3d 1131 (SD Cal 2019) (subsequent history omitted). The very next week, a 19-year-old San Diego man bought several 10-round magazines; the stay prevented him from purchasing large-capacity magazines. Two weeks later, wearing a tactical vest, he entered the synagogue and began shooting. His stated goal was to kill as many Jews as possible, and he ultimately killed one congregant and injured three others. But his rampage was stopped while trying to reload a magazine cartridge, averting further bloodshed. *See United States v. Earnest*, No. 3:19-cr-1850 (SD Cal Sept 17, 2021), ECF 125 at 14–16 (transcript of plea hearing). Had he been able to purchase and use a large-capacity magazine, that opportunity would not have presented itself when it did.

Of course, the state cannot predict when or where the next mass shooting in Oregon might occur. But that is precisely the point. Facing escalating gun violence in Oregon and across the country, the people enacted Measure 114 to prevent and mitigate the community-shattering impacts of gun violence. More than a year later, the voters' efforts to do so remain stalled, based on rulings by the trial court that have no basis in either Oregon law or the record in the case.

CONCLUSION

The court should stay the trial court's injunction pending appeal. Alternatively, the court should expedite consideration of this appeal, ordering a briefing schedule of 35 days for principal briefs and 14 days for a reply brief, and scheduling oral argument shortly thereafter.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Robert A. Koch

ROBERT A. KOCH #072004
Assistant Attorney General
robert.a.koch@doj.state.or.us

Attorneys for Defendants-Appellants
Tina Kotek, et al.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 9, 2024, I directed the original Appellants' Motion – Stay Previous Judgment/Order to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Tony Aiello, Jr., attorney for respondents, by using the electronic filing system.

I further certify that on February 9, 2024 I directed the Appellants' Motion – Stay Previous Judgment/Order to be served upon Tyler D. Smith, attorney for respondents, by mailing a copy, with postage prepaid, in an envelope addressed to:

Tyler D. Smith
Tyler Smith & Associates PC
181 N Grant St. Ste. 212
Canby, Oregon 97013