NO. 102940-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

GATOR'S CUSTOM GUNS, INC., a Washington for-profit corporation, and WALTER WENTZ, an individual,

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Under Gator's Custom Guns' dangerous misinterpretation of article I, section 24 and the Second Amendment, the right of the people, through their elected representatives, to respond to horrific acts of mass violence by ensuring dangerous weapons remain off the streets would be stripped away. Thankfully, our state and federal constitutions are wise enough not to place "military-style armaments which have become primary instruments of mass killing and terrorist attacks in the United States … beyond the reach of our nation's democratic processes." *Bianchi v. Brown*, 111 F. 4th 438, 441 (4th Cir. 2024) (*en banc*).

Court after court has held as much. Indeed, since the State filed its opening brief, this consensus has further solidified, with two additional courts rejecting constitutional challenges to LCM restrictions, and a third rejecting an analogous challenge to an assault weapon restriction. *Vt. Fed'n of Sportsmen's Clubs v. Birmingham*, 2:23-CV-710, 2024 WL 3466482, at *6, *22

(D. Vt. July 18, 2024); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Platkin*, --- F.Supp.3d. ---, 2024 WL 3585580, at *21 (D.N.J. July 30, 2024); *see also Bianchi*, 111 F. 4th at 441. Overwhelmingly, Gator's arguments for unlimited access to military-style armaments have lost.

Our Legislature passed SB 5078 after finding it would likely save lives without interfering with lawful self-defense. These findings are abundantly corroborated by evidence in the record. Gator's offered no evidence to the contrary—just its own *ipse dixit* contempt for the Legislature's factual and policy judgments about how best to protect Washingtonians from gun violence. There is a place for these arguments, but it is the ballot box, not this Court. Because the People of Washington are entitled to take action to protect themselves from mass shootings, the superior court's order should be reversed.

II. ARGUMENT

A. SB 5078 Comports with Article I, Section 24

The superior court's order facially invalidating SB 5078 under Washington's constitution was wrong for three reasons. First, LCMs are not "arms," and thus are not covered by section 24. *See* Op. Br. at 24-28.[1] Second, even if they were "arms" in a lay sense, they are not "arms" within the meaning of section 24 because they are not traditionally or commonly used for self-defense. *See id.* at 28-37; *see also Vt. Fed'n of Sportsmen's Clubs*, 2024 WL 3466482, at *6 ("LCMs … are not in common use for self-defense" and thus do not "qualify for presumptive Second Amendment protection[.]"); *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 108 F.4th 194, 216 (3d Cir. 2024) (Roth, J., concurring) ("[T]he LCMs Delaware seeks to regulate are most useful as military weapons

[1] In its opening brief, the State cited extensive case law supporting its arguments. Gator's entirely fails to address this authority. Accordingly, to avoid redundancy, the State largely refrains from re-citing these cases, and instead focuses on subsequently decided cases.

and thus are not 'Arms' protected by the Second Amendment.").[2] Third, even if LCMs came within section 24, SB 5078 is a constitutionally reasonable response to the crisis of mass shootings that does not burden the right to self-defense—as every scrap of record evidence confirms. Op. Br. at 37-44.

Gator's responds with a jumble of conclusory arguments and evidence-free assertions that fundamentally fail to carry its burden on any point.

1. LCMs Are Not Arms

Gator's argues that LCMs are arms because they are "integral component[s]" of semiautomatic firearms. Resp. Br. at 10; *see also* Op. Br. at 30, 38. This argument is doubly wrong.

To begin with, it's simply inaccurate, as the State explained in its opening brief. Op. Br. at 26-28. While

[2] In *Delaware State Sportsmen's Association*, the Third Circuit affirmed denial of a preliminary injunction based on plaintiffs' failure to demonstrate irreparable harm. 108 F.4th at 205. Judge Roth, writing separately, would also have affirmed based on plaintiffs' failure to show likely success on the merits.

semiautomatic weapons may need *a* magazine to fire semiautomatically, it is undisputed that they do not require *large-capacity* magazines. CP 1194, 1306.[3] Anyone who swapped their 17-round magazine for a 10-round magazine would still have a semiautomatic firearm that worked exactly as intended. CP 1321-27; *Vt. Fed'n of Sportsmen's Clubs*, 2024 WL 3466482, at *7. LCMs are thus like bump stocks or laser sights—accessories that modify the capability of firearms, but that are not necessary for their use.

Moreover, even if LCMs were "integral components" of firearms, Gator's never explains why that would automatically make LCMs themselves "arms." For example, steel is an integral component of the vast majority of firearms, but that does not

[3] As Gator's notes, even without *any* magazine, semiautomatic weapons will still fire as "single[-]shot breechloader[s]." Resp. Br. at 54. Because SB 5078 doesn't regulate ordinary magazines, it does not turn any firearms into single-shot weapons.

mean that steel is an arm. Gator's argument is thus missing a critical step.

Gator's also claims, without explanation or support, that "[m]agazines" are "'instruments designed as weapons traditionally or commonly used by law-abiding citizens for the lawful purpose of self-defense[.]'" Resp. Br. at 30 (quoting *City of Seattle v. Evans*, 184 Wn.2d 856, 869, 366 P.3d 906 (2015)); *see also id.* at 38 ("Detachable magazines, as an integral component of a firearm, are unquestionably an instrument designed as a weapon."). Because they don't explain, it's not at all clear how Gator's comes to the conclusion that LCMs themselves are weapons. The State, on the other hand, has definitively established that an LCM, by itself, has virtually no utility in self-defense. LCMs are not arms.

Accordingly, SB 5078 does not implicate section 24.

2. Even if LCMs Were Arms, they Are not the Type of Arms Protected by Section 24

Even if LCMs are arguably "arms," they are not the type of arms protected by article I, section 24, because they are not "weapons traditionally or commonly used" for "self-defense." *Evans*, 184 Wn.2d at 869; Op. Br. at 28-31.

On this point, Gator's response is most significant for what it lacks: they do not seriously argue, and they offer *no* evidence, that LCMs actually facilitate self-defense. *See generally* Resp. Br. at 56-57. This is fatal to their claim because it is *their* burden to show that LCMs are the type of weapon accessory covered by section 24. *Quinn v. State*, 1 Wn.3d 453, 470-71, 526 P.3d 1 (2023) ("The burden to prove a legislative act is unconstitutional rests on the statute's challenger[.]"). Gator's bare assertions that, for example, SB 5078 "impairs the ability of the individual citizen to bear arms in defense of himself and the state," Resp. Br. at 58, unsupported by any evidence, do not cut it. *See Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182

(1989) (summary judgment is appropriate where "the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial[.]'") (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Nor does Gator's hypothetical about "multiple assailants," Resp. Br. at 21, substitute for evidence. *See Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 45 (1st Cir. 2024) (noting that "imagined burdens" don't shed any light on "how a regulation actually burdens the right of armed self-defense").

Not only has Gator's failed to meet their burden, but the undisputed factual record shows they *cannot*. As the State explained, LCMs have basically no utility in self-defense because "individuals almost never fire more than ten rounds in self-defense." Op. Br. at 31. *see also* CP 1510-21 (expert testimony of Lucy Allen).[4] Rather, they "serve combat

[4] As noted in the State's opening brief, the superior court, *sua sponte*, suggested without explanation that it found

functions": killing more people, more quickly. Op. Br. at 29. Court after court has thus concluded that LCMs are not constitutionally protected. *See, e.g.*, *Or. Firearms Fed'n v. Kotek*, 682 F. Supp. 3d 874, 897 (D. Or. 2023)[5]; *Ocean State Tactical*, 95 F.4th at 45; *Capen v. Campbell*, --- F. Supp. 3d ---, 2023 WL 8851005, at *20 (D. Mass. Dec. 21, 2023); *Hanson v. D.C.*, 671 F. Supp. 3d 1, 14 (D.D.C. 2023); *Vt. Fed'n of Sportsmen's Clubs*, 2024 WL 3466482, at *8.

Despite the State addressing all this in its opening brief, Gator's does not directly challenge any of it. Instead, they try to brush aside reality. First, they claim the State adopts an unduly

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Ms. Allen's methodology unreliable. Op. Br. at 31 n. 5. Since the State filed its brief, the Vermont District Court conducted an *extensive* analysis of Ms. Allen's methodology and "f[ou]nd[] that Allen's testimony is relevant, credible, and methodologically sound." *Vt. Fed'n of Sportsmen's Clubs*, 2024 WL 3466482, at *9, *9-12.

[5] In its introduction, Gator's declares: "the only district court from the Ninth Circuit to reach a determination on the merits found a similar law unconstitutional." Resp. Br. at 9. Not so: the *Oregon Firearms Federation* court is within the Ninth Circuit. (And the district court opinion Gator's alludes to is stayed pending appeal. Op. Br. at 19-20.)

narrow definition of "use" to reflect only "incidents in which a firearm is discharged." Resp. Br. at 18. But Gator's is wrong: the State expert's studies include defensive gun uses in which no shots are fired. CP 1511. Moreover, focusing on brandishing only undermines Gator's claim, because when a gun is merely brandished, the LCM's defining feature is not used. Op. Br. at 32; *see also Vt. Fed'n of Sportsmen's Clubs*, 2024 WL 3466482, at *12.

Gator's next argues—again, without any supporting evidence or authority—that "[d]etachable magazines have been used since before the founding of this State, and as long as semiautomatic firearms have been in existence." Resp. Br. at 57. But this is irrelevant to whether LCMs are commonly used for self-defense or whether the Legislature now may constitutionally restrict their sale in response to the modern crisis of mass shootings. What's more, it's wrong, as Commissioner Johnston has spelled out in exacting detail. Ruling Denying Direct Discretionary Review at 23, *Guardian Arms v. State*,

Case No. 102436-3 (Wash. Jan. 22, 2024) ("What a typical Washingtonian firearms owner would *not* have had in 1889 was a semiautomatic weapon. *That was simply not a possibility*.") (emphasis added); *id.* at 26 (noting that although some semiautomatic rifles from the first half of the 20th century could be equipped with a detachable box magazine "capable of storing 10 to 15 rounds," those magazines were "sold only to law enforcement"). LCMs "did not become widely available for civilian use until the 1980s," fully 100 years post-statehood. *Nat'l Ass'n for Gun Rights v. Lamont*, 685 F. Supp. 3d 63, 101 (D. Conn. 2023). Gator's historical argument, irrelevant under this Court's precedent, fails even on its own terms.

Gator's reliance on the supposed popularity of LCMs, Resp. Br. at 16-17, 56-57, fares no better. The State comprehensively addressed this argument in its opening brief, but to briefly summarize, *Evans* explicitly hinges protection under section 24 on "use," not ownership or possession. Op. Br. at 35-36. Gator's tries to blur this distinction by likening firearms

to seatbelts and implying that guns are "used" even when they are neither brandished nor fired. Resp. Br. 18. But "the Court's choice of the phrase common *use* instead of common *possession* suggests that only instances of 'active employment' of the weapon should count, and perhaps only active employment in self-defense." *Bianchi*, 111 F. 4th at 459. Moreover, if Gator's position is that mere possession of a gun is "use" insofar as gun possession has a deterrent effect, this argument is self-defeating; deterrence doesn't require more than ten rounds. *See Vt. Fed'n of Sportsmen's Clubs*, 2024 WL 3466482, at *11 (explaining that if relevant use "include[d] situations in which intruders decide not to break into homes due to the threat of a gun, the average number of shots fired would be infinitesimally small—showing with even greater force that LCMs are not in common use for self-defense").

Gator's proposed rule, focused exclusively on ownership numbers, is not the law and defies common sense because it would afford constitutional immunity to any weapon or

accessory, no matter how dangerous, as long as enough people bought one. Under Gator's circular theory, constitutional protection would wax and wane with sales receipts. Op. Br. at 36. It defies logic "to hold that arms manufacturers can secure constitutional immunity for their products so long as they distribute a sufficient quantity before legislatures can react," because constitutional rights "cannot be read to expand or contract based on nothing more than contemporary market trends." *Bianchi*, 111 F. 4th at 460.

On top of the unworkable and illogical flaws in the argument, Gator's offers no competent evidence regarding the supposed commonality of LCMs. Op. Br. at 37. Gator's tries to overcome its reliance on hearsay (which the superior court correctly rejected) by relying on additional hearsay—an unpublished paper by William English. Resp. Br. at 56-57. Beyond being hearsay, the English study is riven with methodological flaws that cast serious doubt on its reliability. *See* Deborah Azrael, et al., *A Critique of Findings on Gun*

Ownership, Use, and Imagined Use from the 2021 National Firearms Survey: Response to William English, Duke Law School Public Law & Legal Theory Series No. 2024-50 (June 30, 2024), 78 SMU Law Review (forthcoming 2025), available at https://ssrn.com/abstract=4894282. In the end, all Gator's can stand on is its own say-so.

Finally, Gator's suggests that LCMs ought to be protected under section 24 precisely *because* of their combat abilities to kill lots of people very quickly. That is, Gator's suggests that because one purpose of the right to bear arms is "'protection against governmental or military tyranny,'" they impliedly have a right to carry whatever weapons they deem fit to take up arms for (or possibly against) the State or federal government. Resp. Br. at 56 (quoting *State v. Sieyes*, 168 Wn.2d 276, 291, 225 P.3d 995 (2010)); Resp. Br. at 40.[6] Under Gator's argument, any

[6] The *Sieyes* Court ultimately held only that the petitioner failed to adequately raise his constitutional arguments. *Sieyes*, 168 Wn.2d at 296. The Court's discussion of the scope of article I, section 24 and the Second Amendment is thus dicta.

military weapon—M-16s, M167 Vulcan Air Defense Systems, MQ-1 Predator drones, even nuclear bombs—would be constitutionally protected because they are all potentially useful in military combat. But as both the Washington and federal Supreme Courts have made clear, Gator's limitless reading of the right to bear arms—whether under article I, section 24 or the Second Amendment—is simply wrong.

As this Court has held, section 24 protects only those "weapons traditionally or commonly used by law abiding citizens for the lawful purpose of self-defense." *Evans*, 184 Wn.2d at 869. This does not include LCMs. *Supra* at 7-9.

So too, the federal Supreme Court in *Heller* concluded that the Second Amendment protects only weapons "in common use at the time for lawful purposes like self-defense." 554 U.S. 570, 624 (2008) (quotation omitted). *Heller* repeatedly confirmed that the Second Amendment does not extend to every weapon imaginable, and even explicitly highlighted "weapons that are most useful in military service" as weapons that "may be

banned." *Id.* at 627; *see also Bevis v. City of Naperville*, 85 F.4th 1175, 1194 (7th Cir. 2023) ("[T]he Arms protected by the Second Amendment do not include weapons that may be reserved for military use."); *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017) ("Because … large-capacity magazines are clearly most useful in military service, we are compelled by *Heller* to recognize that those … magazines are not constitutionally protected.").

To the extent Gator's objects that this Court and U.S. Supreme Court's interpretation of article I, section 24 and the Second Amendment, respectively, fits awkwardly with constitutional language regarding "defense of … the state" or a "well-regulated militia," the *Heller* Court already answered this objection, explaining:

> [T]he conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated

> arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

Heller, 554 U.S. at 627-28.

Ultimately, Gator's bears the burden to show LCMs are "weapons traditionally or commonly used" for "self-defense." *Evans*, 184 Wn.2d at 869. They have failed to introduce any evidence to carry their burden. The superior court's grant of summary judgment should be reversed.

3. Even If LCMs Were Arms under Section 24, SB 5078 Is a Constitutionally Reasonable Regulation That Makes Washingtonians Safer

Gator's makes no serious attempt to show that SB 5078 is constitutionally unreasonable under *State v. Jorgenson*. 179 Wn.2d. 145, 312 P.3d 960 (2013) Instead, it alternately argues that *Jorgenson* is inapplicable (*e.g.*, Resp. Br. at 45-46), or that it must give way to federal standards (*e.g.*, *id.* at 42-43). Neither

of these arguments has legs, as the State already explained. Op. Br. at 40-43.[7]

Gator's also does not introduce any evidence whatsoever to undermine the Legislature's conclusion (or the expert testimony submitted by the State) that SB 5078 will likely save lives without impinging on Washingtonians' exercise of self-defense. Instead, in an attempt to get around the deference owed the Legislature's findings, Gator's launches a misguided attack on the Legislature's capacity to make factual findings about the health effects of restricting LCMs. Gator's urges this Court to ignore the Legislature's findings because "[t]he legislature may not determine what is 'within the purview of a constitutional provision[.]'" Resp. Br. at 34 (quoting *Tacoma v. O'Brien*, 85

[7] Gator's also muddles the holding of *Jorgenson* by pointing to language regarding this Court's application of "intermediate scrutiny." Resp. Br. at 46. The language they cite comes from the section of *Jorgenson* applying the Second Amendment (pre-*Bruen*) to the law at issue, using the framework applied by federal courts at the time. *Jorgenson*, 179 Wn.2d at 160-62. This language has no bearing on the section 24 analysis.

Wn.2d 266, 271, 534 P.2d 114 (1975)). But the Legislature did no such thing. The Legislature made factual findings that SB 5078 would likely reduce mass-shooting casualties, without limiting Washingtonians' ability to defend themselves. Engrossed Substitute Senate Bill, 5078, 67th Leg., Reg. Sess., § 1 (Wash. 2022). This is precisely the type of "factual determination[]" that "Legislatures must necessarily make … as an incident to the process of making law." *Wash. Off Highway Vehicle All. v. State*, 176 Wn.2d 225, 236, 290 P.3d 954 (2012). And it is precisely this type of legislative determination that "courts ordinarily will not controvert or even question[.]" *Id.*; *see also Jorgenson*, 179 Wn.2d at 149 ("We defer to the legislature's conclusion that when a trial judge finds probable cause to believe a defendant committed a serious offense, public safety justifies temporarily limiting that person's right to possess arms.").

Even without these legislative findings, though, the undisputed evidence clearly demonstrates that laws like SB 5078 save lives. CP 1883-92, 1944-73. As Dr. Lou Klarevas

summarized it: "[A] systematic analysis of the empirical data and a forthright review of the relevant literature" demonstrates that "the use of LCMs in mass shootings results in greater carnage, whereas restrictions on LCMs save lives." CP 1973. In short, Gator's unsupported assertion that SB 5078 is "ineffective[]," Resp. Br. at 22, has been proven wrong.

Finally, Gator's suggests this Court should follow the trial court's opinion in *Arnold v. Kotek*, No. 22CV41008 (Harney Cty. Cir. Ct., Or., Nov. 21, 2023), which enjoined Oregon's Ballot Measure 114. Resp. Br. at 27.[8] But *Arnold*—which addresses a different law under a different state constitutional provision—is contrary to the vast weight of precedent. *See supra* at 2, Op. Br. at 18-20 (listing cases).

Further, the trial judge's reasoning was limited to particular features of Oregon's law that are absent here. His analysis turns principally on language in Ballot Measure 114—

[8] The *Arnold* opinion letter is attached hereto as an Appendix.

absent from Washington's SB 5078—that, according to the Court, effectively banned all magazines with "removable baseplates," which is to say, "nearly all magazines." App. 32; *see also* App. 31-32 (concluding that Oregon's statute can also be read to ban most semiautomatic weapons, shotguns, and fixed-magazine rifles). Washington's law is not similarly broad. Indeed, contrary to *Arnold*, Gator's admits that Washington's SB 5078 does not have the effect of banning *any* firearm. CP 1194 (admitting that "each firearm [Gator's] sell[s] that accepts large capacity magazines" can also "accept magazines holding ten or fewer rounds"). And to the extent that any (heretofore unidentified) language in SB 5078 can *arguably* be read to restrict more than just LCMs, that might be grist for an as-applied challenge, but certainly cannot carry Gator's facial-challenge burden of proving that "no set of circumstances exists in which the statute, as currently written, can be constitutionally applied." *City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004).

Gator's tries to spin SB 5078 as an anti-democratic measure in which "the Legislature[] attempt[s] to insert [its] own estimations of what is well-suited for self-defense purposes, rather than [letting] the people of Washington … decide that issue of paramount importance for themselves." Resp. Br. at 19. The irony is palpable. The people's democratically elected representatives have made a decision about what weapons are well-suited for self-defense. They have decided that weapons equipped with LCMs are not. It is Gator's, in its efforts to sell more and more deadly weapon accessories, that is trying to undermine the will of the people. In trying to force "a near absolute" right to sell whatever weapons they want, Gator's would "strike[] a profound blow to the basic obligation of government to ensure the safety of the governed." *Bianchi*, 111 F. 4th at 440. Article I, section 24 "does not require courts to turn their backs to democratic cries—to pile hopelessness on top of grief" and "disable representative government at the very moment that lethal technologies are proceeding at an accelerated

and indeed unprecedented pace." *Id.* at 472. SB 5078 complies with article I, section 24.

B. SB 5078 Comports with the Second Amendment

1. LCMs Are Neither Arms, Nor in Common Use for Self-Defense

Gator's Second Amendment claim fails at the threshold for the same reason their article I, section 24 claim does. The analysis of whether LCMs are "arms" is largely identical, with the caveat that interpreting the federal constitution focuses more specifically on "the understandings of those who ratified it." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 28, 142 (2022). As the State explained, the historical understanding of the Second Amendment did not encompass accessories like magazines, and, as under section 24, excludes weapons not commonly used for self-defense. Op. Br. at 45-52. Thus, restrictions on LCMs do not implicate the Second Amendment at all.

Gator's limited response relies on Justice Alito's concurrence in *Caetano v. Massachusetts*, 577 U.S. 411 (2016),

in which he (joined only by Justice Thomas) would have held that stun guns are in common use because approximately 200,000 people owned them. Resp. Br. at 70-72. But *Caetano* is irrelevant: the majority opinion is a narrow *per curiam* opinion that rejects three arguments no one makes here. Justice Alito's suggestion in his concurrence that "the relative dangerousness of a weapon is irrelevant" so long as 200,000 or so people own one, *Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring), "failed to garner a Court majority in *Caetano*," *Kolbe*, 849 F.3d at 142. It's not the law.

Adopting a new standard whereby any weapon would be immune from regulation as long as enough people bought one would also "upend settled law," because the number of stun guns owned by Americans is roughly equal to the number of "legal civilian-owned machine guns in the United States." *Del. State Sportsmen's Ass'n*, 664 F. Supp. 3d at 592. Thus, under Gator's reasoning, "the National Firearms Act's restrictions on

machineguns" would be unconstitutional, *id.*, a suggestion the Supreme Court itself called "startling." *Heller*, 554 U.S. at 624.

Gator's has failed to carry its burden to show that LCMs are protected by the Second Amendment.

2. SB 5078 Fits Well Within America's Historical Tradition of Weapons Regulations

Even if LCMs were arms in common use, SB 5078 fits comfortably within more than two centuries of America's historical weapons regulations, as the State detailed in its opening brief. Op. Br. at 53-77. Again, all of this evidence is undisputed. As the Fourth Circuit recently put it, America's history reveals "a strong tradition of regulating those weapons that were invented for offensive purposes and were ultimately proven to pose exceptional dangers to innocent civilians." *Bianchi*, 111 F. 4th at 471. Time and again, "we see states and localities responding to the calls of their citizens to *do something* about the horrors wrought by excessively dangerous weapons, while preserving the core right of armed self-defense." *Id.*

Courts are effectively unanimous on this point. Each court to address this question has either found that LCM restrictions come within America's historical tradition, or been overruled or stayed. *See* Op. Br. at 74-75 (collecting cases); *Vt. Fed'n of Sportsmen's Clubs*, 2024 WL 3466482, at *22; *Ass'n of N.J. Rifle & Pistol Clubs*, 2024 WL 3585580, at *21. Gator's offers nothing whatsoever to justify a different result here.

The State already addressed most of Gator's arguments in its opening brief. Gator's contends that SB 5078 is inconsistent with history because "laws restricting magazine capacity" were not enacted until the 20th century. Resp. Br. at 74-77. But not only does this argument run headlong into the Supreme Court's instruction that "analogical reasoning" does not require "a historical twin," *Bruen*, 597 U.S. at 30, it is also nonsensical: of course legislatures didn't legislate about LCMs before they existed or became widespread. Op. Br. at 72-73, 76-77; *see also Vt. Fed'n of Sportsmen's Clubs*, 2024 WL 3466482, at *19-20 (rejecting same argument); *Ass'n of N.J. Rifle & Pistol Clubs*,

2024 WL 3585580, at *23 (same). Eighteenth-century legislatures' inability to conceive of the kind of carnage wrought by LCMs in Newtown or Uvalde doesn't require us to shrug our shoulders in the face of mass shootings.

Gator's points to an early militia law requiring citizens to "have between 20 to 24 shots." Resp. Br. at 76 (citing 1 Stat. 271, 2 Cong. Ch. 33). But "a duty to possess guns in a militia or National Guard setting is distinguishable from a right to bear arms unconnected to such service." *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 137 (3d Cir. 2024). Moreover, a requirement that 18th-century citizens have 20 bullets is emphatically *not* a requirement that they be able to fire 20 shots without reloading. To the contrary, 18th-century militiamen had to reload between each shot—a lengthy process even for trained soldiers. *E.g.*, CP 1453, 1617-18.

Finally, Gator's tries to nitpick (some of) the hundreds of historical statutes cited by the State. They claim, for example, that trap gun prohibitions—which criminalized these weapons

completely and prohibited their use in defending homes and businesses—are irrelevant because trap guns supposedly "are not wielded in self-defense." Resp. Br. at 79. But as they themselves point out, self-defense includes the right to defend one's property, which is precisely what trap guns were used for. *Id.* at 19-20, 48-49. Gator's suggests that the hundreds of historical laws restricting the carry, sale, or possession of clubs or knives are not analogous because clubs and knives are not "firearms," Resp. Br. at 79, but the Second Amendment protects arms, not just firearms. Op. Br. at 64. They protest that most historical statutes did not "ban" weapons (Resp. Br. at 77-79, 81)—though many did (Op. Br. at 61, 63, 66, 68, 69)—but ignore that SB 5078 likewise does not ban the carrying or possession of LCMs.

More fundamentally, Gator's effort to highlight the small differences between historical and contemporary statutes simply ignores the Supreme Court's holding that courts look to historical laws to discern historical "principles," not "dead ringer[s]" or "historical twin[s]." *United States v. Rahimi*, 602 U.S. ----, 144

S.Ct. 1889, 1898, (2024). The principle underlying the hundreds of laws cited by the State is clear: the Second Amendment empowers legislatures to respond to citizen calls to restrict the use of dangerous weapons associated with criminal violence. *See, e.g.*, *Bianchi*, 111 F. 4th at 464 ("[L]egislatures, since the time of our founding, have responded to the most urgent and visible threats posed by excessively harmful arms with responsive and proportional legislation."); *Bevis*, 85 F.4th at 1200 ("Historical regulations show that at least since the Founding there has been an unbroken tradition of regulating weapons to advance … purposes" like "[p]rotect[ing] … [c]ommunities[.]"); *Ocean State Tactical*, 95 F.4th at 49 ("[O]ur nation's historical tradition recognizes the need to protect against the greater dangers posed by some weapons … as a sufficient justification for firearm regulation.").

Gator's final retort is that some of the restrictions cited by the State might have been considered unconstitutional by some at the time. For example, they claim that two U.S. Department of

Justice officials had doubts about the constitutionality of banning machineguns in the 1930s. Resp. Br. at 78. Maybe so. But the Supreme Court has since spoken, calling the suggestion that machineguns might be protected by the Second Amendment "startling." *Heller*, 554 U.S. at 624.

In the same vein, Gator's cites decisions that it contends show that historical restrictions on Bowie knives and pistols were regarded unfavorably by courts. Resp. Br. at 80. But the cases it cites show the exact opposite.

In *Nunn v. State*, the Georgia Supreme Court struck down Georgia's ban on carrying concealable pocket pistols only insofar as the statute prohibited open carry. 1 Ga. 243, 251 (1846). That is, insofar as the statute went beyond the problem the Georgia legislature sought to address—"the evil practice of carrying weapons secretly"—the court found it went too far. *Id.* at 249 (quotation omitted). The *Nunn* court did not express any disagreement with the Georgia law's restriction on selling pistols or other dangerous weapons. *Id.* at 246; *see also* CP 1377 ("The

Nunn decision, far from a full-throated defense of limitless gun rights, in fact reiterated states' authority to prohibit the concealed carrying of deadly weapons in the name of public safety and set no precedent regarding weapon-specific sales bans.").

State v. Reid is equally unhelpful. *Contra* Resp. Br. at 80. There, the Alabama Supreme Court *upheld* the conviction of a sheriff for carrying a concealed pistol. *State v. Reid*, 1 Ala. 612 (1840). As the Court explained, "[t]he right guarant[e]ed to the citizen, is not to bear arms upon all occasions and in all places, but merely 'in defence of himself and the State.'" *Id.* at 613. Beyond that, "the Legislature [has] the authority to adopt such regulations … as may be dictated by the safety of the people and the advancement of public morals." *Id.* So too here.

Contrary to Gator's representation, Resp. Br. at 80, *Cockrum v. State* did not concern a statute prohibiting Bowie knives at all, but rather a statute fixing increased penalties for assaults committed with a Bowie knife. 24 Tex. 394, 402 (1859). And the Court upheld that statute because the Bowie knife was

an "instrument of almost certain death," which the legislature was empowered to regulate. *Id.*

Finally, *Andrews v. State* sharply undermines Gator's argument. *Contra* Resp. Br. at 80. There, the Tennessee Supreme Court actually held that the statute in question was constitutional "so far as it prohibits the citizen 'either publicly or privately to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol[.]'" 50 Tenn. 165, 186 (1871) (quoting statute). The Court noted that the statute *might* violate the Second Amendment if it prohibited carrying a "revolver" which "may or may not be such a weapon as is adapted to the usual equipment of the soldier[.]" *Id. Andrews* thus stands for the proposition that the Second Amendment countenances restrictions on arms *except* "the arms in the use of which a soldier should be trained," i.e., those most useful in military service. *Id.* at 179. While *Andrews* makes sense in a historical context—recall that militias were formed from men carrying the weapons they had on hand—*Andrews*'

reasoning was rejected by the Supreme Court in *Heller*. *Supra* at 16-17.

To be sure, *Andrews* also talks about self-defense. But the principles it outlines support laws like SB 5078, even against arguments that LCMs might be useful in self-defense:

> Admitting the right of self-defense in its broadest sense, still on sound principle every good citizen is bound to yield his preference as to the means to be used, to the demands of the public good; and where certain weapons are forbidden to be kept or used by the law of the land, in order to the prevention of crime—a great public end—no man can be permitted to disregard this general end[.]

50 Tenn. at 188-89.

The *Andrews* comparison gets even worse for Gator's. Because following *Andrews*, "[i]n 1879, [Tennessee] lawmakers prohibited the sale of 'belt or pocket pistols, or revolvers, or any other kind of pistols, except army or navy pistols.'" CP 1376. Two years later, the Tennessee Supreme Court upheld the sales restriction against a Due Process challenge, characterizing the law "as being made in the exercise of that authority, inherent in every sovereignty, to make all such rules and regulations as are

needful to secure and preserve the public order and to protect each individual in the enjoyment of his own rights and privileges[.]" *State v. Burgoyne*, 75 Tenn. 173, 176 (1881) (quoting Cooley on Taxation, 396). Exactly right.[9]

As these cases—and the hundreds of historical statutes cited by the State—make clear, SB 5078 fits well within America's historical tradition of regulating weapons associated with criminal violence.

C. Reassignment on Remand Is Necessary to Ensure Fairness

This case must be reassigned on remand. Op. Br. at 77-83. Gator's disagrees, pointing out that "legal errors alone do not warrant reassignment." Resp. Br. at 86 (quoting *State v. McEnroe*, 181 Wn.2d 375, 388, 333 P.3d 402 (2014)). But Judge Bashor was not merely wrong on the law: he prejudged issues that will bear on discretionary determinations to be made

[9] The following year, the Arkansas Supreme Court upheld a similar sales restriction, concluding "[i]t does not abridge the constitutional right of citizens to keep and bear arms for the common defense." *Dabbs v. State*, 39 Ark. 353, 357 (1882).

later about the appropriate remedy for Gator's violations—including the legality (and wisdom) of the Attorney General's enforcement of SB 5078 and Gator's good faith in flouting the law. This alone warrants reassignment. But on top of that, he exhibited hostility to the State's positions, and even suggested arguments to Gator's. On remand, the superior court will necessarily exercise significant discretion on issues that Judge Bashor has plainly "prejudged," *McEnroe*, 181 Wn.2d at 387, and on which his "impartiality might reasonably be questioned," *State v. Solis-Diaz*, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). Fairness demands that this case be reassigned.

III. CONCLUSION

The State of Washington respectfully requests that this Court reverse the superior court's grant of summary judgment to Gator's and its denial of summary judgment to the State, and remand to a new superior court judge for further proceedings.

This document contains 5,984 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 11th day of September 2024.

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DATED this 11th day of September 2024, at Seattle, Washington.

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NO. 102940-3

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

GATOR'S CUSTOM GUNS, INC., a Washington for-profit corporation, and WALTER WENTZ, an individual,

Respondents.

APPENDIX TO APPELLANT'S REPLY BRIEF

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Appellant State of Washington submits this Appendix to their Reply Brief.

This document contains 11 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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State of Washington,
v.
Gator's Custom Guns, Inc., et al.

Supreme Court of the State of Washington
Cause No. 102940-3

APPENDIX TO APPELLANT'S REPLY BRIEF

Number	**Description**	**Bates Stamp Numbers**
1.	Opinion Letter Granting Permanent Injunction Pursuant to ORS 28.020, *Arnold v. Kotek*, No. 22CV41008 (Harney Cty. Cir. Ct. Or. 2023)	1-44

Oregon Judicial Department

TWENTY-FOURTH JUDICIAL DISTRICT

Robert S. Raschio, Presiding Judge

November 21, 2023

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Re: Joseph Arnold and Cliff Asmussen, Plaintiffs v. Tina Kotek, Governor of the State of Oregon, Ellen Rosenblum, Attorney General of the State of Oregon, Casey Codding, Superintendent of the Oregon State Police, Defendants, Harney County Circuit Court case #22CV41008: *Opinion Letter Granting a Permanent Injunction Pursuant to ORS 28.020.*

Parties:

The Harney County Circuit Court is issuing a Permanent Injunction under Oregon Revised Statute 28.020 declaring 2022 Ballot Measure 114 unconstitutional thereby permanently enjoining its implementation.

The court finds the plaintiffs have shown their rights to bear arms under Article I, § 27 of the Oregon Constitution would be unconstitutionally

impaired if Ballot Measure 114 is allowed to be implemented. Doyle v. City of Medford, 356 Or. 336 (2014). Based upon a facial constitutional evaluation of Ballot Measure 114, the measure unduly burdens the plaintiffs' right to bear arms. State v. Christian, 354 Or. 22 (2013).

I. Standard of Review

The Oregon Constitution "has content independent of that of the federal constitution." State v. Soriano, 68 Or. App. 642, 645 (1984).[1] Therefore, any irreparable harm of Ballot Measure 114 must be analyzed separately under Oregon law and is not dependent on a federal constitutional determination. The pleading before this court focused solely on the Oregon Constitution and the state constitutional analysis is dispositive.

According to Hon. Jack L. Landau, retired Oregon Supreme Court Justice, the Oregon Supreme Court's analysis under Article I, § 27 developed from a historical analysis:

> "In some cases, the court adopted a historical or originalist approach, as in State v. Kessler. That case involved the meaning of Article I, § 27, which guarantees the right to bear arms. The court observed that federal court decisions construing the Second Amendment guarantee of a right to bear arms 'are not particularly helpful.' Turning to the meaning of the state constitutional guarantee, the court declared that its task was 'to respect the principles given the status of constitutional guarantees and limitations by the drafters ....' The court set out a history of the provision, from its roots in the English Bill of Rights of 1689 to colonial American fears of standing armies and concerns for personal safety to the state constitution of Indiana, from which the Oregon guarantee was borrowed. In the end, the court concluded that the 'arms' that the state constitution guarantees a right to possess consist of those that would have been used by nineteenth-century settlers for personal defense and military purposes."

[1] This court will not reach the second amendment analysis since there has been a clear and convincing showing that Ballot Measure 114 is unconstitutional under Oregon Constitution Article I, § 27 under Oregon jurisprudence.

JACK LANDAU, An Introduction to Oregon Constitutional Interpretation, 55 Willamette L. Rev. 261, 265-66, Spring 2019.

State v. Hirsch similarly cited a range of modern treatises and articles on the historical origins of the constitutional right to bear arms, including writings of the framers of the Second Amendment of which Article I, § 27 of the Oregon Constitution is a descendant. *See, e.g.*, State v. Hirsch, 338 Or. 622 ("[W]e must discern the intent of the drafters of Article I, § 27, and the people who adopted it.").

The Supreme Court has held total bans on types of weapons and firearms used for self and state defense violate Article I, § 27. Hirsch at 40-41 quoting State v. Delgado, 298 Or. 395 at 403-404 ("The problem here is that ORS 166.510(1) absolutely proscribes the mere possession or carrying of such arms [switchblades]. This the constitution does not permit.").

Building off and clarifying of past precedence, the Supreme Court created the current constitutional interpretation of Article I, § 27 found in State v. Christian, 354 Or. 22 (2013). The court laid out a five-part test for any statute that would restrain a firearm activity. First, the Oregon Constitution prevents the legislature from infringing on citizen rights to bear arms in self-defense. Id. at 30. Second, the term "arms" includes firearms and certain hand carried weapons used for self-defense at the founding of Oregon. Id. [2] Third, the legislative restraint is valid and reasonable if it is addressing dangerous practices which allows for regulating the carrying and use of a firearm. Id. at 32 citing State v. Robinson, 217 Or. 612, 618.[3] Fourth, restrictions must be reasonable in scope and for the purpose of promoting public safety. Id. at 33-34. Fifth, the reasonable restrictions cannot unduly frustrate the right to bear arms. Christian at 38 ("…the legislature may specifically regulate the manner of possession and the use of protected

---

[2] The Oregon Supreme Court, in its early interpretations of the Oregon Constitution ask the lower courts to consider "what did those conservative pioneer citizens have in mind." Jones v. Hoss, 132 Or 175, 178-179 (1930).

[3] A list of such legal restrictions is contained in Board of County Commissioners of Columbia County v. Rosenblum, 324 Or App. 221, footnote 11, which supports the use, possession, dangerous group delineation on firearms restraints.

Further, dangerous groups contain individuals who "demonstrated an identifiable threat to public safety" or are "serious lawbreakers" can be prevented from bearing arms. Christian, 354 Or at 32-33 citing State v. Hirsch/Friend, 338 Or 622, 679 and 675-76 (2005).

weapons to promote public safety as long as the exercise of that authority does not unduly frustrate the right to bear arms guaranteed by Article I, § 27.").

The Supreme Court limited the judicial inquiry to a facial challenge of the constitutionality of a statute in all applications. Christian at 40.

Considering of the above factors, the Oregon Supreme Court held the legislature has "wide latitude to enact specific regulations restricting the possession and use of weapons to promote public safety." Christian, 354 Or. at 33. The court upheld the City of Portland ordinance disallowing loaded firearms in the city limits, unless under the control of a concealed handgun licensee, because the restrained "conduct" of having a loaded firearm "creates an unreasonable and unjustified risk or harm to members of the public." Id. at 35.

II. Historical Context for Oregon's Right to Bear Arms

"The people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." Oregon Constitution Article I, § 27.

At the time of adoption of the Oregon Constitution in 1857, the Oregon territory legally existed since 1848. The first European settlement was Fort George established in 1812, later named Astoria after being secured by the Astor party from the United States. The first American colony was established in 1834. The "great migration" from United States to the Oregon country began in 1843. The period was marked by western emigration and persistent violent conflicts with the Indian Tribes. As described by Professor Brian DeLay of University of California, Berkley, in his testimony, the emigrants were in a state of war with the Indian population and used whatever firearms were available to them in defense of themselves and their burgeoning community while pushing the native tribes of their ancestral lands.

Professor Mark Axel Tveskov of Southern Oregon University testified that during the Oregon territorial era, firearms were restrained by the supply chain to the region, which was very distant from the supply sources on the east coast of the United States, but in no other way by regulation by government.

Professor Delay described the technological improvements over the muskets of the revolution to the firearms of 1857 as consisting of five general developments: fulminates; percussion cap ignitions; breach loading; multi-shot technology; and metallic cartridges. The development of fulminates allowed quick ignition of gun powder and improved propulsion of projectiles leading to percussion caps which dramatically increased reloading speeds. Multi-shot technology will be described below. Breach loading allowed cartridges to be inserted into the barrel through the buttstock which increased reloading speed. Metallic cartridges are the modern bullet with the projectile and powder inside a single device which allowed for breach loading from the stock. The user of the firearm no longer needed to set the firearm on its stock, load the barrel with black powder, place a ball down the barrel, tamp it in place, pick up the firearm, place an ignition cap with fulminate and then shoot the weapon. The court finds each of these developments were focused on improving efficiency in firing speeds and ability to deploy more rounds when using the weapons at a high rate of firing speed. As Dr. Delay stated in his testimony, there was an "allure toward multi-shot technology."

The court finds the best firearm technology of 1857 and before was in the Oregon territory pre-statehood. There is evidence in the historical and archeological record of Colt revolvers and "buck and ball" technology. Buck and ball were a paper cartridge consisting of a single ball and two buck shots fired simultaneously like modern shotgun ammunition.

There were pepperboxes in the region, then the most popular multi-shot firearm. Pepperboxes are multi-barrel handguns on a coaxially revolving mechanism making them multi-shot firearms. The loading of the firearms was difficult, the barrels had to be waxed or grease to hold the gun on one's person and avoid self-injury. The gun typically had no more than six barrels as more barrels proved too heavy for practical use. However, there were some models with over ten barrels with smaller caliber ammunition.

As described by Professor DeLay, multi-shot firearms had made significant advancements from the 1830s with the development of the Colt revolver until statehood. Gunmakers had been pursuing multi-shot technology for centuries prior to the revolver, but Colt achieved an outcome that laid the foundation for all further multi-shot advancements. Additionally, the development of the metallic cartridges in the 1850s was a large

advancement multi-shot rifle technology leading to the Henry rifle of 1860 that could hold 10 rounds. In 1857, there were tubular magazines that could hold 10 rounds. According to Dr. Delay, the citizen population in the 1860s was the best armed in the world.

Colt revolvers looked very similar to the revolvers of today. Loading would require a loading of black powder, ball being seated on the powder, percussion caps placed on the back of each First-generation revolvers had to be partially disassembled, each bore greased or waxed, percussion caps placed on the back nipples, powder being poured, and a ball tamped into the chambers. Each chamber of the magazine would need to be loaded with each of those five steps. Reloading a six-shot revolver in the 1830's would take 30 steps and take a minute and half to complete for an experienced owner. The first weapons need the shooter to move the chamber to the next round. As it was developed, a hinged loading lever and capping window were added around 1839, improving reloading speeds.

Firearms development happened quickly from 1830 until 1857. Shotguns were in high use for personal protection. The militia generally had single shot rifles and muskets. Some of the most highly sought-after rifles were breach-loaded Sharps rifles in the 1850s, which were the "first solution" to multi-shot rifles because of reduced reloading times and capacity to hold more than one round at a time.

Ashley Hlebinsky, who was a museum curator integral in the development of the Buffalo Bill Center of the West which contains 7000 unique historical firearms dating back to the 1500s and who has extensive training on firearms development at the Smithsonian American History Museum, testified multi-shot technology had been researched and tested since at least the 1500s. The multi-shot technology was really revolutionized by Colt in the 1830s with the onset of the industrial revolution. The court finds, generally, gun makers were striving for repeater technology and there was a proliferation of the technology in 1857 when Colt's patent ended.

The court finds, and all the experts agree, there was no clear distinction between private and military use at the time of statehood. See also State v. Kessler, 289 Or. 359, 368 (1980). Professor DeLay did testify most private gun manufacturers were angling for military contracts but would sell any firearm to private citizens who could afford one. Private citizens used

those firearms for self-defense and defense of the state in the form of militia activities. As early as 1803, Meriwether Lewis bought his large capacity magazine weapon on the Lewis and Clark expedition to impress upon the Indian Tribes American firearm superiority. As Professor Delay explained there were examples of 10-round firearm magazines prior to 1857, but issues with the technology that were not solved by statehood. The Henry rifle, which was developed and completed by the Winchester Repeating Arms company in 1860, was a breakthrough in firearms technology allowing for over 10-round capacity in a tubular magazine with a lever action repeating technology. See Also State v. Delgado, 298 Or. at 403 (Oregon's Constitutional Delegates "must have been aware that technological changes were occurring in weaponry as in tools generally. The format and efficiency of weaponry was proceeding apace. This was the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles."). Black powder, with the repeating firing, would foul barrels requiring regular cleaning for the weapon to fired, and produced significant smoke from repeating firing of cartridges, made the rapid-fire technology impracticable in most utilizations.

The court finds the metal cartridge, percussion cap ignition and repeating technology, along with development of detachable magazines in 1870s, firearm automation and smokeless powder in the 1880s, were the foundation for the semi-automatic firearm. See Also Kessler at 369.

Further, the court finds, and each expert on firearm historical development agreed, almost all emigrants to the Oregon Territory had firearms. Firearms were a necessity of life for self-defense, service in the militia and subsistence through hunting. Most had muskets, but many had rifles, pistols, including revolvers and pepperboxes, and shotguns.

Along with firearm development, government developed in Oregon. There were multiple attempts to have a constitutional convention in Oregon prior to 1857. Ultimately, Territorial Governor George L. Curry encouraged the creation of a state because it would likely mean drawing in more settlers by creating protected routes of travel from the "Indian difficulties upon our frontiers". CHARLES HENRY CAREY, editor, The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857, 1926, pg. 20-21. After three prior electoral defeats, Curry's speech turned the tide on the concept of a constitutional convention leading to the electorate

passing the initiative 7,617 for to 1,679 against, a "sweeping victory…more remarkable in view of the previous repeated rejections". Id. at 21-22.

Professor Tveskov testified that at the time of the constitutional convention, the Rogue Valley Indian War was concluding to which at least two delegates had a collateral relationship. Jesse Applegate had military assistance to strike a road in that region during the fighting and LaFayette Grover had engaged in diplomatic talks to end the conflict. The professor testified the delegates, and citizens generally of Oregon, wanted the best firearms they could have for defense of themselves and their communities. Further, most emigrants could take a half day ride to town and purchase any firearm that might be available for sale at the local mercantile, though supplies were unpredictable since Oregon was so remote.

The convention opened at the courthouse in Salem, Oregon on August 17, 1857, concluding on September 18, 1857.

During the convention, a committee on the bill of rights was added to the list of standing committees and framed the bill of rights "very closely [to] the phraseology of similar provision in the Indiana constitution of 1851". Id at 28. Article I, § 27 was adopted without any noted debate by the delegates. CLAUDIA BROWN and ANDREW GRADE, A Legislative History of Oregon, 37 Willamette L. Rev. 469 (2001). The court infers from that silent record that no concerns were raised over the types of firearms allowed for self or state defense.

The voters of Oregon, in a special election on November 9, 1857, adopted the constitution by a vote of 7,195 for and 3,217 against. Id. at 27.

Each historical expert agreed, and the court finds, that delegates to the Oregon constitutional convention, and those voting for the constitution, would have been generally aware of firearms development and multi-shot technology. Professor Tveskov described textual evidence of Oregonians knowing and thinking about all the technological advancements to firearms and wanting the finest firearms technology available. Additionally, the court finds the highest level of firearm development had been introduced in Oregon at the statehood.

The best evidence for a constitutional provision's intended meaning is to examine the wording of the provision. State v. Mills, 354 Or. 350, 356 (2013).

The court finds the historical record produced in this case well developed and provides clear and convincing evidence of the intent of the framers and people adopting the Oregon Constitution in the election of 1857. See Hirsch, 338 Or. at 643.

"A constitution is dependent upon ratification by the people. Its language should therefore be considered in the sense most obvious to the common understanding of the people at the time of its adoption." LANDUA at 266.

Our constitution was derived from the voters in November of 1857 and requires deference as much as anything derived from voters now.

A constitutional provision must be considered under that lens.

> "In construing the organic law, the presumption and legal intendment are that every word, clause and sentence therein have been inserted for some useful purpose. School District No. 1, Multnomah County v. Bingham, 204 Or. 601, 611 (1955).
>
> When so engaged, the object is to give effect to the intent of the people adopting it. But this intent is to be found in the instrument itself. It is to be presumed that the language which has been employed is sufficiently precise to convey the intent of the framers of the instrument."

Monaghan v. Sch. Dist. No. 1, Clackamas County, 211 Or. 360, 366–67 (1957).

The question for the court to answer is what did the voters of 1857 understand Article I, § 27 to mean? The answer lies with voters heavily reliant on firearms for their basic subsistence and protection; voters engaged in forceable removal of the indigenous tribes of Oregon, which the settlers described as war and which they engaged in militia-type service; voters who wanted the very best weapons they could procure for those purposes and a clear lack of governmental restraint on the types of weapons available to the public, both private and military grades. The court finds the voter of 1857 did not seek to restrain access to the best firearms with the highest functionality possible they could procure.

That answer is bolstered the first case on self-defense with a firearm landing in the Oregon Supreme Court in 1861. The opinion was written

under the pen of Justice Rueben Boise[4], establishing the legal rule, with a foundation in English common law, for the use of deadly force in self-defense. The rule continues in similar form in the law today. Justice Boise wrote:

> "If [the defendant] … believing he was in actual and imminent danger of death, or great bodily harm, should kill [the decedent], I think he would be justified. By the common law, one acting from appearances in such a case, and believing the apparent danger imminent, would be justified, though it afterwards turned out that there was no real danger, and the gun of assailant was only loaded with powder…the court should have instructed the jury, that, if they believed, from the evidence in the case, that there was reasonable ground for [the defendant] to believe his life in danger, or that was in danger of great bodily harm from the deceased, and that such danger was imminent, and he did so believe, and acted on such a belief killed the deceased, he was excusable; and there it was not necessary that he should wait until an assault was actually committed."

Goodall v. State, 1 Or. 333, 336-337 (1861).

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[4] Rueben Boise is an important figure in early Oregon history. Territorial prosecutor starting in 1852, his first case as a prosecutor was to advocate for a formerly enslaved petitioner against his former enslaver to achieve freedom for the petitioner's children held in bondage by the enslaver contributing to Oregon's character as a free state See R. GREGORY NOKES, Breaking Chains: Slavery on the Trail, 2013, pg 72-93 He was successful in the litigation.

As a territorial judge, he presented the preamble for an unanimously passed bill to resubmit the question of state government to a popular vote in 1856. CAREY at pg. 17 Many attacks were laid at the proposal by the editor of Oregonian, Thomas J. Dryer, who later was a delegate to the Constitutional Convention of 1857. Among those attacks that immigration was being stunted by the Indian Wars and the federal government was unlikely to pay the Indian war claims accruing from them, leading to a large war debt for the newly created state. CAREY at pg 18. Boise was undeterred and ultimately his faction was successful

Boise was a delegate to the constitutional convention and appointed as head of the committees on the legislative department and seat of government and public buildings. CASEY at pg. 29. He was among the "leaders of the policies of the convention." Id.

He was elected as one of the first four Justices of the Oregon Supreme Court in 1859, serving in the role of Chief Justice three times (1864-1866, 1870-1872 and 1876-1880).

Parenthetically, in Goodall, the defendant shot twice from a pistol with repeater technology after the decedent drew his pistol and threated violence.

The historical record supports the court finding that self-defense using a firearm was justified when threatened with imminent threat of deadly force and the firearms available were pistols, shotguns, rifles and muskets. The pistols were multi-shot capable, and the pistols and rifles had repeating technology. See Christian, 354 Or. at 30.

III. Ballot Measure 114 Severability Clause

As stated on the record, the court finds Sections 1 through 10 are severable from Section 11 of Ballot Measure 114. Sections 1 through 10 relate to a permit-to-purchase scheme and its application to multiple statutory sections of current Oregon law. While some sections further tweak current statutes to add additional restraints on the purchase of firearms, the overall emphasis is on the permit-to-purchase application to those statutes. Section 11 relates to a large capacity magazine ban and has limited reference to the permit-to-purchase scheme. The court believes it appropriate to analyze those two statutory schemes separately pursuant to Section 12 of Ballot Measure 114.

This court does not hold a line-item veto allowing it to redline the language of Ballot Measure 114 to make it read in a constitutional way. Such an act of judicial power would be a true arrogation of authority reserved for the legislative branch. Sections 1-10 each and all contain the language "permit-to-purchase" or "permit" both in titling of the sections and the language within the body of the text. The court cannot practicably rewrite those statutory changes to make them constitutional.

For example, Section 4 outlines the permit-to-purchase process, section 5, the appeal process, and the remaining sections apply the permitting process to various sale of firearm provisions. As this court noted in its opinion letter of January 3, 2023, the "language the defendants urge the court to use to sever is inexorably linked with the permit-to-purchase program. To find otherwise requires the court to ignore the operative language linking each provision on background checks to the permit-to-purchase program. The court would be separating sentences at commas

and considering the phrase 'permit holder' surplusage. It is not surplusage." The court does not have the authority to strike language word by word, comma by comma. Clear to the court, each section is so essentially and inseparably connected with and dependent upon the unconstitutional permit-to-purchase scheme, the court finds it is apparent the remaining parts would not have been enacted without the unconstitutional part. ORS 174.040(2). Further, removing the permit-to-purchase or permit language would leave the remaining parts, standing alone, incomplete and incapable of being executed in accordance with the legislative intent, except as to Section 11. ORS 174.040(3).

As to Section 11, the court will not strike or add language to remedy the clear typographical errors or bring the language of the section in conformance with the language of other states' statutes to create an application for the adoptive statute doctrine. In fact, to do so is inapposite to that legal doctrine. In fact, the legislature has given clear direction on this type of issue. ORS 174.010 limits the court in "the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all." Ballot Measure 114 would have the court exercise authority in clear violation of the separation of powers doctrine as described in ORS 174.010. The court will determine whether the section, on its face, is constitutional.

IV. Ballot Measure 114 Permit-to-Purchase Scheme is Facially Unconstitutional

Oregon citizens have a right to self-defense against an imminent threat of harm, which is unduly burdened by Ballot Measure 114.

Three salient facts were agreed upon by the parties at trial: A) Ballot Measure 114 delays the purchase of firearms for a minimum of 30 days; B) the permit-to-purchase program derives its language source in the concealed handgun license statutes (ORS 166.291, et. al); and C) the Federal Bureau of Investigations (FBI) refuses to conduct criminal background checks. The court finds these agreed to facts are fatal to the constitutionality of the permit-to-purchase scheme.

A. The right under Article I, § 27 is the ability to respond to the imminent threat of harm which is unduly burdened by the 30-day delay.

"As a general proposition, individuals in Oregon have a right to possess firearms for the defense of self and property under Article I, § 27, of the Oregon Constitution." Willis v. Winters, 350 Or. 299, footnote 1 (2011).

"It is axiomatic that we should construe and interpret statutes 'in such a manner as to avoid any serious constitutional problems.'" Easton v. Hurita, 290 Or. 689, 694 (1981) cited by Bernstein Bros. v. Dep't of Revenue, 294 Or. 614, 621 (1983). This court has attempted to follow the axiom, but simply cannot avoid the serious constitutional problems with Ballot Measure 114. This court finds the permit-to-purchase facially unconstitutional unable to applied in a constitutional way under any factual circumstances.

Oregon has an array of statutes allowing and limiting self-defense and the types of use of force available to citizens in response to a threat of harm from another.[5] Imminent use or use of unlawful physical force is required

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[5] **ORS 161.209 Use of physical force in defense of a person.** Except as provided in ORS 161.215 and 161.219, a person is justified in using physical force upon another person for self-defense or to defend a third person from what the person reasonably believes to be the use or imminent use of unlawful physical force, and the person may use a degree of force which the person reasonably believes to be necessary for the purpose

ORS 161.215 Limitations on use of physical force in defense of a person.

(1) Notwithstanding ORS 161.209, a person is not justified in using physical force upon another person if

(a) With intent to cause physical injury or death to another person, the person provokes the use of unlawful physical force by that person.

(b) The person is the initial aggressor, except that the use of physical force upon another person under such circumstances is justifiable if the person withdraws from the encounter and effectively communicates to the other person the intent to do so, but the latter nevertheless continues or threatens to continue the use of unlawful physical force.

(c) The physical force involved is the product of a combat by agreement not specifically authorized by law.

(d) The person would not have used physical force but for the discovery of the other person's actual or perceived gender, gender identity, gender expression or sexual orientation

(2) As used in this section, "gender identity" has the meaning given that term in ORS 166.155

to trigger the statutory defense. For use of deadly force, a citizen is only allowed to use such force if there is use or threatened use of physical force against the citizen while the perpetrator is committing a felony. See ORS 161.219 and ORS 161.225. The legislature recognizes citizens are placed in imminent threat of violence inside their homes have the right to use deadly force to protect themselves from that threat. The court must give deference to the controlling statutes on self-defense. State v. Sandoval, 324 Or. 506, 511-12 (2007).

The Oregon Supreme Court, in Sandoval, held:

ORS 161.219 Limitations on use of deadly physical force in defense of a person. Notwithstanding the provisions of ORS 161.209, a person is not justified in using deadly physical force upon another person unless the person reasonably believes that the other person is.

(1) Committing or attempting to commit a felony involving the use or threatened imminent use of physical force against a person; or

(2) Committing or attempting to commit a burglary in a dwelling; or

(3) Using or about to use unlawful deadly physical force against a person.

ORS 161.225 Use of physical force in defense of premises.

(1) A person in lawful possession or control of premises is justified in using physical force upon another person when and to the extent that the person reasonably believes it necessary to prevent or terminate what the person reasonably believes to be the commission or attempted commission of a criminal trespass by the other person in or upon the premises.

(2) A person may use deadly physical force under the circumstances set forth in subsection (1) of this section only.

(a) In defense of a person as provided in ORS 161.219, or

(b) When the person reasonably believes it necessary to prevent the commission of arson or a felony by force and violence by the trespasser.

(3) As used in subsection (1) and subsection (2)(a) of this section, "premises" includes any building as defined in ORS 164.205 and any real property. As used in subsection (2)(b) of this section, "premises" includes any building.

ORS 161.229 Use of physical force in defense of property. A person is justified in using physical force, other than deadly physical force, upon another person when and to the extent that the person reasonably believes it to be necessary to prevent or terminate the commission or attempted commission by the other person of theft or criminal mischief of property

> "[T]he statute...sets out a specific set of circumstances that justify a person's use of deadly force (that the person reasonably believes that another person is using or about to use deadly force against him or her) and does not interpose any additional requirement (including a requirement that there be no means of escape). That impression is not altered by the requirement in ORS 161.209 that the use of deadly force be present or 'imminent,' or by the same statute's reference to 'the degree of force which the person reasonably believes to be necessary.' We conclude, in short, that the legislature's intent is clear on the face of ORS 161.219: The legislature did *not* intend to require a person to retreat before using deadly force to defend against the imminent use of deadly physical force by another."
>
> Id. at 513-14.

Oregonians have no duty to retreat from their homes when under imminent threat of harm prior to using deadly physical force. Id. at 514. Given Oregonians statutory and constitutional rights use of deadly physical force under the appropriate circumstances, Ballot Measure 114's permit-to-purchase scheme is an unconstitutional restraint.

In fact, the scales, at least in rural communities, regarding Ballot Measure 114 weigh negatively on public safety. The court finds that the testimony of Harney County Sheriff Dan Jenkins, who leads five deputies, and Union County Sheriff Cody Bowen, who leads fifteen deputies, demonstrated definitively citizens cannot rely on law enforcement to respond quickly to their needs if they are subject to a break in or threat of deadly physical harm. Victims can be left without a law enforcement response for hours. A citizen's need to protect themselves, their loved ones and their property is immediate as there is no one else will be there to do it for them. [6]

[6] As the Oregon Court of Appeals wrote: "the [Oregon] Supreme Court traced the historical context of Article I, § 27, of the Oregon Constitution and in doing so, examined the adoption of the Second Amendment. The court noted that the framers of the United States Constitution considered those who committed crimes to be outside of the right to bear arms: '"[T]he general view of the framers of the Second Amendment that a certain criminal element—notably, 'outlaws' using weapons or otherwise committing injurious crimes against person and property—occupied a lesser status in the community than the responsible, law-abiding citizenry, particularly respecting the bearing of arms.'" State v. Parras, 326 Or. App 246, 255, 531 P.3d 711, 716 (2023). Ballot Measure 114 imposes that large burden on law-abiding citizens.

The court further finds the 30-day absolute prohibition on the initial purchase of a firearm is not permitted under the Oregon Constitution. The Oregon Supreme Court held as such in Christian when it found the Portland ordinance was "not a total ban on possessing or carrying a firearm for self-defense in public like those bans that this court held violated Article I, § 27 in previous cases." Christian at 40. The court finds there are no reasonably likely circumstances in which the application of [Ballot Measure 114 sections 1 through 11] would pass constitutional muster." Id. at 42 quoting State v. Sutherland, 329 Or. 359, 365 (1999).

B. Ballot Measure 114 mimics the concealed handgun license scheme reducing the right to bear arms to an unduly burdensome administrative due process right.

Possessing a concealed weapon is a privilege in Oregon. Without a concealed handgun license ("CHL"), a weapon must be openly carried to alert other citizens said citizen is carrying a firearm. Open carry of a firearm is right of all citizens who are not otherwise precluded from possessing a firearm. As the Oregon Supreme Court describes:

> "The Court of Appeals stated: 'As a logical matter, if the general prohibition against possessing a concealed firearm without a license is constitutional, then it follows that ORS 166.250(2)(b), which allows greater freedom to possess firearms, cannot be unconstitutional.' We agree."

State v. Perry, 336 Or. 49, 58 (2003).

The court agrees with defendants' argument that the permit-to-purchase statutory framework is an analog of the CHL statutory framework. The legal interpretation of the CHL framework likely to be applied to Ballot Measure 114. The language of each is *ejusdem generis*, requiring that the language of Ballot Measure 114 be given the same legal meaning as the CHL statute. "Words that are legal terms of art are exceptions to that rule [of plain, ordinary meaning be ascribed to a word]; we give those words their established legal meaning, often beginning our analysis with *Black's Law Dictionary.* Muliro, 359 Or. at 746, 380 P.3d 270; State v. Dickerson, 356

Or. 822, 829, 345 P.3d 447 (2015) (interpreting statutes by giving "legal terms * * * their established legal meanings')." Gordon v. Rosenblum, 361 Or. 352, 361 (2017).

The courts conducting a legal review of decisions to deny a concealed firearms license have done so under a rational basis test. Perry at 59 (2003) ("Our discussion of ORS 166.250 demonstrates that the legislature intended to create licensing requirements, with exceptions, for the possession of concealed weapons. Drawing a distinction between business owners and employees for purposes of one of the exceptions to the license requirement is not irrational.").[7]

The standard of judicial review for regulations under Article I, § 27 is intermediate scrutiny. See Christian. This court recognizes the intermediate scrutiny standard was applied by Oregon Supreme Court in weighing the ordinance against the Second Amendment right to possess a firearm under the United States Constitution. However, the use of intermediate scrutiny by the supreme court highlights the importance of the right to bear arms under Oregon law. This court finds that the use of a rational basis structure to deny a primary right does not meet the Supreme Court's requirements of intermediate scrutiny. The court also finds that the use of the same language in both Ballot Measure 114 and the concealed weapons statutes undermines the importance of the right by directing courts to reduce the standard of review to a rational basis test for a constitutional right.

For example, ORS 166.291 outlines an extensive list of requirements to receive a CHL. ORS 166.293 allows an officer to deny a CHL if:

> "…Notwithstanding ORS 166.291 (1), and subject to review as provided in subsection (5) of this section, a sheriff may deny a

[7] Other types of cases allowing the low bar of rational basis analysis on constitutional issues include, but are not limited to, searches of probationers without the need for a warrant based upon probable cause. State v. Gulley, 324 Or. 57 (1996), revocations of the privilege of probation State v. Martin, 370 Or. 653 (2022), reviewing convictions in Post-Conviction Relief Watkins v. Ackley, 370 Or. 604 (2022), Revocation of professional licensure Sachdev v. Oregon Medical Board, 312 Or. App. 392, Denial of entry into government buildings State v. Koenig, 238 Or. App. 297 (2010), Placement in segregated housing in a prison Barrett v Belleque, 344 Or 91, Rights after conviction for a parole hearing Rivas v. Board of Parole and Post-Prison Supervision, 272 Or App 248 (2015).

None of these types of matters, or the others operating with a rational basis standard, are restraints, in the first instance, on a constitutional right.

> concealed handgun license if the sheriff has reasonable grounds to believe that the applicant has been or is reasonably likely to be a danger to self or others, or to the community at large, as a result of the applicant's mental or psychological state or as demonstrated by the applicant's past pattern of behavior involving unlawful violence or threats of unlawful violence."

Compare that language to Ballot Measure 114 Section 4(1)(b)(C) where a person may obtain a permit-to-purchase so long as the person "does not present reasonable grounds for a permit agent to conclude that the applicant has been or is reasonably likely to be a danger to self or others, or to the community at large, as a result of the applicant's mental or psychological state or as demonstrated by the applicant's past pattern of behavior involving unlawful violence or threats of violence." The conduct described would have to be separate from objective standards such as convictions from crimes, mental health or domestic violence court-ordered restraints on firearm possession or prohibitions based upon release agreements. See Ballot Measure 114 Section 4(1)(b) (A-B) and Section 4(2) see also Concealed Handgun License for Stanley v. Myers, 276 Or. App. 321, 331 (2016).

ORS 166.293(5) is a judicial review process nearly identical to the Ballot Measure 114(5)(5) judicial review process. The judicial review standard for a denial of a CHL under the "reasonable grounds" is characterized by the court as:

> "It is not clear that the proceeding under ORS 166.293 appropriately can be characterized as an 'equitable action or proceeding'. Rather, it is a special statutory proceeding to review a decision by an elected county official, more in the nature of an administrative review proceeding under the Administrative Procedures Act…the issue for the reviewing court is the correctness of that determination..."

Concealed Handgun License for Stanley v. Myers, 276 Or. App. 321, 328 (2016).[8]

[8] The opinion was penned by now Chief Judge of Court of Appeals Erin Lagesen on a panel with now Oregon Supreme Court Chief Justice Meagan Flynn and Justice Rebecca Duncan

The court finds a due process administrative review hearing undermines the right to bear arms by allowing the consideration of all types of information that would not be allowed in court proceeding where the rules of evidence would apply. Stanley at 331. This process meets the rational basis rule allowing a review of a decision by an elected official under the principles of due process, a very low bar of review with hardly any procedural protection for an applicant. Id. at 339. The review process does not meet an intermediate scrutiny standard. The burden falls on the government:

> "[I]s to prove that the regulation at issue survives a 'heightened' level of scrutiny. See, e.g., Binderup v. Attorney Gen. United States of Am., 836 F.3d 336, 347, 356 (3d Cir. 2016), cert. den., 137 S. Ct. 2323, 198 L.Ed.2d 752 (2017) (once the challengers have carried their burden to show that their offenses were not serious and have distinguished their circumstances from persons historically excluded from the right to bear arms, the government must 'meet some form of heightened scrutiny'—in Binderup, intermediate scrutiny); accord Kanter v. Barr, 919 F.3d 437, 442 (7th Cir. 2019) ('We have consistently described step two as 'akin to intermediate scrutiny' and have required the government to show that the challenged statute is substantially related to an important governmental objective.'"

State v. Shelnutt, 309 Or. App. 474, 477–78, review denied, 368 Or. 206 (2021).

Rational basis reviews of government actions do not meet the heightened standards required under Intermediate Scrutiny.

The court finds much like concealed handgun hearings, there is no evidence competency rule in Ballot Measure 114 Section 5(5). While a citizen denied a permit-to-purchase has the due process right to be heard and present evidence, the core determination of the court would remain "did the permitting agent have reasonable grounds to deny the permit?" Reducing the right to bear arms by a lawful citizen with unsubstantiated, uncharged, hearsay-based alleged conduct because it was written in a police report or testified to by scorned lover on uncharged conduct that she

had earlier denied, is unduly burdensome to the primary right to bear arms. See Stanley at 331.

Intermediate Scrutiny is a recognition that the right to bear arms is a protected right. The state must have an important government objective and competent evidence to allow a restrain on the right. The court finds the "reasonable grounds" review under Ballot Measure 114 using a rational basis test to deny a permit-to-purchase, does not meet the constitutional standard required under Christian. [9] The court further finds that Ballot Measure 114 is unduly burdensome by flipping the burden of proof, requiring citizens to prove they are not dangerous, rather than the state meeting the intermediate scrutiny standard proving a citizen is too dangerous to own a firearm.

C. The lack of Federal Bureau of Investigations background checks means permits cannot be issued without full judicial review unduly burdening the right to bear arms.

The parties have stipulated that the Federal Bureau of Investigations ("FBI") will not conduct background checks on applicants who apply for a permit-to-purchase a firearm. The defendants invite the court to assume that the permits will be issued anyhow. The defendants provide no evidence on why that the assumption would be true.

A plain reading of Ballot Measure 114 Section 4(1)(e) clearly contradicts that assumption:

> "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. 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

[9] The first description of intermediate scrutiny by the Oregon Supreme Court was "[t]he Supreme Court when faced with gender discrimination challenges imposes what has come to be known as an "intermediate tier" scrutiny somewhere between a "rational basis" equal protection test and a "strict scrutiny" test." Matter of Comp. of Williams, 294 Or. 33, 40 (1982)

> results, including the outcome of the fingerprint-based criminal background check, to the permit agent."

Ballot Measure 114 further direct that during the FBI background check, state police must investigate the applicant further, but they must rely on the FBI to complete the check prior to issuing a permit. The parties stipulate the state cannot order the FBI to conduct a background check. Further, there is no opt out language in Ballot Measure 114 to not complete these background checks. The FBI has stated that language of 'the permitting agent or their designee' prohibits the FBI from assisting Oregon because Public Law 92-544 is clear only law enforcement can receive the FBI background check, not designees.[10]

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[10] On November 10, 2023, each of the defendants filed an amended admission including a set of emails between defendants' attorneys and the United State Department of Justice. The salient paragraph of those emails for this court's findings is from Joshua K. Handell, Senior Counsel Office of the Deputy Attorney General, U.S. Department of Justice on October 26, 2023·

> "As discussed on our call, FBI is willing to extend a grace period during which the State of Oregon will be permitted access to FBI criminal history record information (CHRI) while the Department of Justice continues to review whether Oregon's law complies with federal requirements
>
> That allowance is contingent on Oregon's assurance that it will not designate any private party to act as a Permit Agent or otherwise receive CHRI during the grace period Cf. Measure 114, sec 3(4) ("'Permit Agent' means a county sheriff or police chief with jurisdiction over the residence of the person making an application for a permit-to-purchase, or *their designees*." (Emphasis added)). In the event a county sheriff or police chief opts to designate another person to serve as Permit Agent, such a designee must be a subordinate officer to the county sheriff or police chief who is employed in the same office "

Even if this grace period could be executed with each of the state's 36 sheriffs under the terms outlined by the FBI, the rights of Oregonians would hang on the determination of the FBI whether to continue conducting background checks for the state under Ballot Measure 114 At any moment, the FBI could declare, and Oregonians would be without legal recourse, that the FBI can no longer provide background checks.

Even having background checks does not save the constitutionality of the Ballot Measure 114 and this new wrinkle does not change the court's analysis. The defendants negotiated the above paragraph with the federal government starting November 23, 2022, until November 3, 2023 A right of Oregonians under their Oregon Constitution should not be subject to an administrative determination of a federal agency which took a year to grant a grace period and could in a moment end it.

No further hearing is necessary on this late-filed wrinkle, as the outcome of a hearing does not change the analysis of the court that the required thirty-day delay of Ballot Measure 114 does not meet the imminency requirement of Article I, § 27 The delay of 30 days is unconstitutional If the FBI eliminates background checks, there would be a further delay protracting the unconstitutionality. The grace period is not particularly germane to the court's overall analysis of the constitutionality of the measure.

The court finds the fact that background checks cannot be completed is fatal to the permit-to-purchase provisions. ORS 174.040(3). The court agrees with the plaintiff that the FBI background check is required by the Ballot Measure 114 and "no Oregonian will be able to be issued a permit-to-purchase by any permit agent in the state and will be forced to seek relief under Section 5 of the Measure at the 30-day mark." Plaintiff's trial memorandum, pg. 29.[11] Requiring every applicant to go through judicial review, without any other reason than the state cannot meet the requirements of the law, is unduly burdensome on their right to bear arms as it requires all Oregonians to prove they are safe to possess a firearm, flipping the current protections of the right to bear to arms on its head. *Supra*.

It is worth noting that getting a permit-to-purchase does not create "any right of the permit holder to receive a firearm." Ballot Measure 114, section 4(6)(a).

The court finds the lack of FBI background checks further devolves the right and does not meet the test under Christian for the reasons outlined above. During the 30-day delay, along with a subsequent required judicial review, the permit-to-purchase scheme facially prevents the applicant from defending themselves or "for the defense of community as a whole", the guaranteed right under Article I, § 27. Hirsch, 338 Or. at 633.

D. Permit-to-purchase policy is unreasonable and unduly burdensome on the right to bear arms.

The court finds Sections 1 through 11 of Ballot Measure 114 are facially unconstitutional under Christian analysis as follows:

First, the Oregon Constitution prevents the legislature from infringing on citizens' rights to bear arms in self-defense and the 30-day delay in

[11] Further, the Eastern Oregon Counties Association has misread Ballot Measure 114. They stated in their Amicus brief that many counties are unable to fund and/or staff the permit-to-purchase program so citizens will have to travel great distance to other counties to get a permit. The citizen would not be allowed to do so, as they must apply with a permit agent in the "jurisdiction over the residence of the person". Ballot Measure 114 Section 4(1)(a)

obtaining a firearm through the permitting process does infringe on citizens ability to protect themselves from an imminent threat of harm.

Second, the term "arms" includes firearms and certain hand carried weapons used for self-defense in 1857. Sections 1 through 11 effect all firearm purchases, thus imposing on all legal arms used for self-defense.

Third, the legislative restraint is valid and reasonable if it restrains dangerous practices by regulating the carrying and use of a firearm. Ballot Measure 114 creates a barrier to all firearm purchases by assuming the very act of owning firearm is a dangerous practice. The defendants failed to provide any convincing evidence of a threat to public safety requiring a permitting process. The defendants did not link the harms of suicide and homicide to the immediate sale of firearms failing to demonstrate that a 30-day delay would change those tragic outcomes. Even if they had, they did not provide sufficient evidence to find these harms require a complete restraint on firearm purchases for at least 30 days.

Fourth, the "carry or use" exercise of policing powers is only allowed for reasonable restriction on ownership of weapons that promote public safety. The court finds no evidence in the record that public safety is promoted by the permit-to-purchase policy. The defendant showed there is a harm from gun violence in terms of injuries and deaths, but as stated above provided no evidence the program would help reduce those harms. The court finds the number of deaths from homicides and suicides weighed against the right to self-defense with a firearm weigh against the permit-to-purchase policy. The court finds from the evidence that Oregon has a relatively low rate of firearms deaths compared to gun ownership which consists of 38.3% of citizens in Oregon. The defendants want the court to assume there must be value in the program based upon a preamble and voters' guide. The court finds the preamble and voters' guide were designed to persuade the voter to approve the measure. The defendants endeavored to prove the preamble and voters' guide statements true, and to prove, if true, those statements justified the burden on firearm possess. The court finds that the defendants did not meet that burden. As a result, the court will not give weight to either the preamble or the voters' guide as a result. ORS 174.020(1)(b) ("A court may limit its consideration of legislative history to the information that the parties provide to the court. A court shall give the weight to the legislative history that the court considers to be appropriate.").

Fifth, the reasonable restrictions cannot unduly frustrate the right to bear arms. The court reiterates its finding that the significant delay imposed by Ballot Measure 114, the enactment of a "rational basis" policy on a right that requires the deference of intermediate scrutiny, the inability of the defendants to institute the policy as written with no FBI background checks and failing to demonstrate the Ballot Measure 114 permit-to-purchase policy promotes public safety, all of which unduly frustrate the right to bear arms.

V. Ballot Measure 114 Large Capacity Magazine Ban is Facially Unconstitutional

"Our purpose is not to freeze the meaning of the state constitution to the time of its adoption, but is 'to instead to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstance'" Couey v. Atkins, 357 Or. 460, 490 (2015) quoting State v. Davis, 350 Or. 440, 446 (2011). In terms of firearms, the courts are to seek to "'apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise." State v. Hirsch, 338 Or. 622, 631 overruled on separate grounds by State v. Christian, ibid.

Magazines, along with the rest of a firearm's components, are protected arms under Article I, § 27. There is no historical basis for limiting the size and capacity of firearms, including their magazines.

The court finds that a magazine is a necessary component of a firearm under Oregon law. ORS 166.210(4) defines "Firearm" to mean "a weapon, by whatever name known, which is designed to expel a projectile by the action of powder". The projectile and the powder are contained within the magazine in the form of ammunition. ORS 166.210(5) defines "Handgun" to mean "any pistol or revolver using a fixed cartridge containing a propellant charge, primer and projectile, and designed to be aimed or fired otherwise than from the shoulder." The definition is a classification of a firearm and defines a pistol or a "revolver using a fixed cartridge", which assumes the pistol has a detachable cartridge, or magazine, to function as a firearm. The firearm, as testified to during trial by Mr. Springer, consists of the firing mechanism and magazine containing the projectile and

powder. The statutes support that functional reality through the codification of the above definitions. Without a magazine, the remaining components of a gun are not a firearm. State v. Boyce, 61 Or. App. 662, 665 (1983) ("In a public place, [a citizen] may possess both a firearm and ammunition, so long as the ammunition is not in the chamber, cylinder, clip or magazine."). The court in Boyce found that the ammunition is separate from the magazine, not that the magazine is separate from the firearm. See Defendant's Trial Memorandum, pg. 9.

As stated above, the conservative pioneers who voted for the Oregon Constitution in 1857 wanted the best shotguns, rifles, handguns, including revolvers and pepperboxes, and muskets they could afford. There was a deep desire to have repeating features. *Supra*. Arms consisted of those weapons used by settlers for both personal and military defense excepting cannons and other heavy ordnances not kept by militiamen or private citizens. Hirsch at 641 citing State v. Kessler, 289 Or. 359, 368 (1980). The Constitutional delegates and voters of 1857 would be impressed by the advancement in today's firearms technology, but they would understand our current stock of firearms as direct descendants of those they possessed, including multi-shot and repeater technologies.

As the Oregon Supreme Court concluded regarding weapons development at the founding of the state:

> "The only difference is the presence of the spring-operated mechanism that opens the knife. We are unconvinced by the state's argument that the switchblade is so 'substantially different from its historical antecedent' (the jackknife) that it could not have been within the contemplation of the constitutional drafters. They must have been aware that technological changes were occurring in weaponry as in tools generally. The format and efficiency of weaponry was proceeding apace. This was the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles. The addition of a spring to open the blade of a jackknife is hardly a more astonishing innovation than those just mentioned."

State v. Delgado, 298 Or. 395, 403 (1984).

As described above, the court finds that firearm technology at founding of the state is the foundation for the current firearm technology [12] Large capacity magazines predated the automation and mass production of metals of the industrial revolution, though they were substantially advanced with the onset of the era. Large capacity magazines existed in the early 1800s. The technology was sought as early as the 1500s. Breach-loaded rifles were prized. Colt revolvers and pepperboxes were types of firearms with large magazines used for self-defense at statehood and would have been understood to be firearms being developed for militia usage and self-defense. See Christian, 354 Or. at 30 quoting State v. Kessler, 289 Or. at 368 (1980).[13],[14]

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[12] "In State v. Kessler, 289 Or. at 369, the court held. 'Firearms and other hand-carried weapons remained the weapons of personal defense, but the arrival of steam power, mechanization, and chemical discoveries completely changed the weapons of military warfare The development of powerful explosives in the mid-nineteenth century, combined with the development of mass-produced metal parts, made possible the automatic weapons, explosive, and chemicals of modern warfare P. Cleator, *Weapons of War* 153–177 (1967).'" Oregon State Shooting Ass'n v. Multnomah Cnty., 122 Or. App. 540, 545–46 (1993). This same evidence was evinced during the trial. Smokeless powder development in the 1880s was the key to well-functioning semiautomatic weapons, but the drive for larger capacity magazines was well under way at statehood The record in this case shows that the Volcanic was one of, but certainly not the only, repeating rifles of the 1850s Id. at 550 (The parties presented a battle of the experts to prove that the weapons were or were not of the "sort" used in mid-nineteenth century). The Oregon State Shooting Association case had a very different record of the historical facts than in this case. The court of appeals relied on the historical record made in that case to make its determination on twenty-five firearms listed. The record in this case leads the court to very different factual conclusions. For example, the finding by the court of appeals was that the "first commercially available successful lever action repeating rifle" appeared in 1862. Id. at 549 On this record, Professor Delay testified it appeared in 1860 Ms Hlebinsky testified to several other models of multi-shot firearms pre-statehood including, but not limited to, the Lorenzoni and Girandoni rifles, not found in that record. All of the historians testified to pepperboxes and Colt revolvers had multi-shot technology in this case The patent for Colt ended in 1857 leading to a proliferation of multi-shot firearms. The historical record showed the proliferation of multi-shot firearms at the time of statehood, and that the technology was not new to the voters in 1857 As Professor Delay stated there was a significant "allure of multi-shot technology". The notion of "wide use" is extremely hard for the court weigh that factor, because as the experts in this case testified sales records were not kept or archived in a way at the time of statehood. The historical and archeological record does confirm that multi-shot and repeating technology was available and commonly used in 1859, not in rifles per se, but certainly in handguns The parsing between handguns, shotguns, rifles, and muskets does not seem to serve any legal purpose on the question of firearm development. The gunsmiths at the time were actively trying to apply the multi-shot, repeating technology to all forms of firearms of that era, and succeeding before the advent of the Civil War two years after statehood.

[13] Kessler found that the term "arms" in Article I, § 27 are weapons used by militia and for self-defense maintained by the individual. Kessler at 370. Kessler also announced that "regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution." Id

[14] The Defendants have not shown that large capacity magazines are "advanced weapons of modern warfare", Kessler at 369. The historical record diverges from that conclusion as the technology existed prior to statehood. While the technology for a specific number of 10-round magazines was very limited at statehood, that also is not the legal analysis The legal analysis is. was the technology for multi-shot magazines in existence and a focus of technology advancement at statehood?

A. Statutory Analysis of Section 11, the Large Capacity Magazine Ban

The court will highlight areas causing the facial unconstitutionality of the statute. The statutory issues are not based upon overbreadth, but on the only clear application of the law if allowed to go into effect.

Defendants argue that Ballot Measure 114, Section 11 has language borrowed from other states pointing to the language from the federal assault rifle ban of 1994 to 2004, New York, Massachusetts, and Rhode Island.[15]

"When one state borrows a statute from another state, the interpretation of the borrowed statute by the courts of the earlier enacting state ordinarily is persuasive." State ex rel. W. Seed Prod. Corp. v. Campbell, 250 Or. 262, 270–71 (1968). The defendants argue the court should find that the same implementation strategies in those states would occur under Ballot Measure 114. The main gist of the testimony of defense witness James Yurgealitis was that in each of the states listed, there were magazines

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[15] Former 18 U S C. § 921(31) (emphasis added): "The term 'large capacity ammunition feeding device' (A) means a magazine, belt, drum, feed strip, or similar device manufactured after the date of enactment of the Violent Crime Control and Law Enforcement Act of 1994 that has a capacity of, or that can be **readily restored or converted to accept, more than 10 rounds of ammunition**; but (B) does not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition.

N Y Penal Law § 265.00(23) (emphasis added): "'Large capacity ammunition feeding device' means a magazine, belt, drum, feed strip, or similar device, that has a capacity of, or that can be **readily restored or converted to accept, more than ten rounds of ammunition**, provided, however, that such term does not include an attached tubular device designed to accept, and capable of operating only with, 22 caliber rimfire ammunition or a feeding device that is a curio or relic.. "

Mass. Gen. Laws Ann. Ch. 140, § 121 (emphasis added): "'Large capacity feeding device,' (i) a fixed or detachable magazine, box, drum, feed strip or similar device capable of accepting, or that can be **readily converted to accept, more than ten rounds of ammunition or more than five shotgun shells**; or (ii) a large capacity ammunition feeding device as defined in the federal Public Safety and Recreational Firearms Use Protection Act, 18 U S C section 921(a)(31) as appearing in such section on September 13, 1994. The term "large capacity feeding device" shall not include an attached tubular device designed to accept, and capable of operating only with, .22 caliber ammunition "

R.I Gen Laws § 11-47.1-2, (emphasis added): "'Large capacity feeding device' means a magazine, box, drum, tube, belt, feed strip, or other ammunition feeding device which is capable of holding, or can **readily be extended to hold, more than ten (10) rounds of ammunition** to be fed continuously and directly therefrom into a semi-automatic firearm. The term shall not include an attached tubular device which is capable of holding only 22 caliber rimfire ammunition "

purporting to limit the magazines to ten rounds that could be purchased that did not have fixed plates or that could be easily modifiable with tools to hold more than ten rounds. Defendants want to the court to draw the inference that the plaintiff's testimony from Scott Springer demonstrating that those types of magazines can be modified to carry significantly more rounds in manner of seconds with a $15.00 drill bit from Home Depot was not relevant because it took a tool to modify the magazine to defeat the manufacture limitations.[16]

However, the court finds the language of Ballot Measure 114 Section 11 deviates substantially from the language of the statutes cited in footnote 15. The pertinent definitions are:

> Ballot Measure 114, SECTION 11 (1) As used in this section:
> (b) "Detachable magazine" means an ammunition feeding device that can be loaded or unloaded while detached from a firearm and readily inserted in a firearm;
> (c) "Fixed magazine" means an ammunition feeding device contained in or permanently attached to a firearm in such a manner that the device cannot be removed without disassembly of the firearm action;
> (d) "Large-capacity magazine" means 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, but does not include any of the following:
> (A) An ammunition feeding device that has been permanently altered so that it is not capable, now or in the future, of accepting more than 10 rounds of ammunition;

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[16] Mr. Springer in Ex 19 modified a ten-round limited magazine to carry 17 rounds in seconds In Ex. 20, he demonstrated a quick removal of a retaining place and spacer designed to limit capacity on a magazine, modifying it to hold substantially more rounds. In Ex. 21, he removed a ten-round limitation dimple in a magazine in 35 seconds allowing for a 17-round capacity. All with those alterations were done $15.00 drill bit

He also testified that the plastic ten-round limitation in Glock magazines can be removed by boiling the magazine in water for 30 seconds, increasing capacity to 17 rounds. His testimony was creditable and provides the court necessary evidence to conclude as it does regarding the ready changeability of most, if not all, magazines with purported limitations on magazine capacities

(B) An attached tubular device designed to accept, and capable of operating only with 0.22 caliber rimfire ammunition; or
(C) A tubular ammunition feeding device that is contained in a lever-action firearm.

The distinctions are clear. The modifications restrictions of Ballot Measure 114 of the "overall capacity of, or that can be readily restored, changed, or converted" is not the same as "readily converted to accept", "capable of holding, or can readily be extended to hold", "readily restored or converted to accept" nor "readily restored or converted to accept" in the other statutes. The word "changed" does not exist in any of the other states' statutory definitions and, pursuant to statutory construction, changed must have a different meaning than converted. The court finds Mr. Springer showed demonstrably that the 10-round limited magazines on the market could be readily changed in under a minute's time to hold substantially more ammunition.

Further the court finds that the term "readily capable" has been defined by the caselaw in Oregon as applied to the felon in possession of a firearm under ORS 166.250(1)(c)(C). Gordon v. Rosenblum at 361. The legal standard is that a pistol which lacks a firing mechanism that could be replaced in three to four minutes by a gunsmith at a cost of $6 as "readily capable of use as a weapon". State v. Gortmaker, 60 Or. App. 723 (2008) cited by State v. Briney, 345 Or. 505 (2008). This same concept analytically links with the idea of changing a magazines capacity to be readily capable of holding ammunition. The prior holdings by Oregon courts are more persuasive than an adopted language analysis in determining what the phrase means. The court finds that these two cases define "readily capable" and that Mr. Springer's testimony demonstrated that almost all detachable and most fixed magazines are readily capable of holding more than ten rounds of ammunition, thus banned under Ballot Measure 114.

Additionally, none of the other statutes contain the language "including any such device joined or coupled with another in any manner". This language was demonstrated to be important in Mr. Springer's testimony because most semi-automatic pistols can be joined together at the magazines to increase the rounds capable of being fired from ten to twenty. The court finds the restraint on coupling is a far more restrictive concept than the

other statutes proffered since any detachable baseplate would allow for two ten-round magazines to be put together or coupled. This means since nearly all magazines have removable baseplates, they are banned under Ballot Measure 114.

Section 11 contains language that possessors of large capacity magazines are required to permanently alter an ammunition feeding device to be not capable, now or in the future, of accepting more than ten rounds of ammunition. Also, firearms dealers must dispose of their stock of large capacity magazines unless they can "permanently alters any large-capacity magazine in the gun dealer's inventory or custody so that it is not capable, upon alteration or in the future, of accepting more than 10 rounds of ammunition or permanently alter the magazine so it is no longer a (sic)"[17] Ballot Measure 114 Section 11(2)(a)(C). This language is not contained in any offered statutory language from other states. The court finds the concept of permanently altering large capacity magazines is a demonstrated impossibility based upon the testimonies of Mr. Springer and other plaintiffs' witnesses and Mr. Yurgealitis, the defendants' witness. There is no practical way to permanently alter large capacity magazines. All alterations can be quickly reversed well within six minutes. See Gortmaker.

The proffered statutes are not red apples to red apples comparisons to Ballot Measure 114, section 11. Since they are not identical copies, the court does not interpret them as having the same legislative effect. State v. Eggers, 326 Or. App. 337, 348-349 (2023). The court is directed that "when the Oregon version of a statute contains different wording from the uniform act, we presume that the difference is significant. State ex rel Juv. Dept. v. Ashley, 312 Or. 169, 179 (1991) ('We generally give meaning to the difference between an Oregon statute and the statute or model code from which it was borrowed.')". State v. Hubbell, 371 Or. 340, 355 (2023).

[17] The defendants want the court to ignore this typographical error or add language to correct. This the court cannot do "If the legislature has chosen language that creates unexpected and unintended results, the legislature can amend the statute to express its actual intent It is not the function of a court to insert language that should have been added and ignore language that should have been omitted ORS 174.010 " Cole v. Farmers Ins Co , 108 Or. App. 277, 280 (1991) cited by Wright v. State Farm Mut Auto Ins. Co., 223 Or App. 357, 367 (2008)

The court finds most firearms, except those specifically excluded by the definition in Ballot Measure 114, are banned under by Ballot Measure 114, because there is no effective way of limiting magazines to ten rounds or less by permanently alter them and the magazines are readily capable of alteration or changed to carry more than ten rounds within seconds.

These findings include fixed magazines on shotguns, a clear weapon of choice during the pre-statehood period for self-defense. The vast majority, if not all, standard shotguns sold on the market today have bolts that are removeable and replaceable with tubular magazine extensions. This capacity cannot be permanently altered because the bolts are necessary to disassemble the weapon for cleaning. Additionally, the evidence of Mr. Springer showed the advent of mini shells allows fixed magazines to contain more than ten rounds when they would have held less than ten rounds with regular sized shells. The language of Section 11 is an equivalent ban of shotguns because there is no practical way to permanently alter the fixed magazine to not accept ten rounds. The language does not adjust for modifications in ammunition that allows a firearm to hold more ammunition.

The court finds almost all rifles with fixed magazines can, like shotguns, have magazine extensions added readily to increase the capacity of the rifle well over ten rounds, because of the same cleaning necessity and easy adaptability.

The court finds that all semi-automatic handguns and rifles, the most popular forms of firearms for self-defense in country today, are banned under Ballot Measure 114, Section 11. The action, skeleton of the firearm, needs a magazine to be a gun. See State v. Goltz, 169 Or. App. 619 (2000). Each gun has a fixed magazine under the definition section because the gun has ammunition feeding device that lifts one bullet into the chamber at a time. There is no way to permanently alter that function to not accept magazines containing over ten rounds, and they are readily capable of accepting magazines of over ten rounds. According to the testimony, that each of magazines adapted by manufactures currently to hold only ten rounds are actually 10 + 1 rounds under the definitions of Ballot Measure 114, meaning they would be banned. This is because the semi-automatic firearms can take detachable magazines holds ten rounds and the fixed magazine holds one round. The court finds that if the firearm

has a functionality to allow a detachable magazine to be attached to the fixed magazine, it is illegal under Ballot Measure 114, Section 11 (1).

The court finds most detachable magazines sold on the market that have removable baseplates primarily for the ability to clean the magazines extending their useability. The other state statutes do not prevent those magazines from being sold on the market. Ballot Measure 114 does. Ben Callaway, Mr. Springer and Mr. Yurgealitis testified that removeable baseplate magazine on the market are all modifiable to hold more than ten rounds because of the baseplate allows for extensions to added, other magazines to be coupled, and can readily be changed to accept more than ten rounds. There is no functional application that will permanently alter those magazines which cannot be readily changed as described in footnote 16.

Under Oregon State Shooting Ass'n v. Multnomah Cnty., 122 Or. App. 540, 548--49 (1993), the Court of Appeals rejected the notion of modification to firearms to make them legal after the fact as a justification for legality:

> "While it is argued by the defendants the firearms can be modified to meet the requirements of…the law does not support the proposition. The dissent concludes that, because the 'semi-automatic firearms may be illegally modified to become automatic weapons * * * is not a reason to deprive them of section 27 protection under the tests adopted by the Supreme Court.' 122 Or. App. at 556, 858 P.2d at 1325. That is backwards. The weapons have been modified, ostensibly so that they will not be classified as military weapons, which, under the Supreme Court's tests are not entitled to the constitutional protection. Those 'modifications' cannot be used to bootstrap these weapons into personal defense weapons so that they come within the constitutional protection."

The court finds the statutorily distinct language of Ballot Measure 114, Section 11 regarding "change" and "permanently alter" unduly burdens the right to bear arms under Article I, § 27. The court concludes the definition of "large capacity magazine" with the definitions of "fixed" and "detachable" magazines effectively bans most of firearms currently within the possession of Oregon citizens and limits the market to only those firearms excepted

from the ban under Section 11. [18] The court finds that the large capacity magazine ban effectively bans all firearm magazines fixed or attached which is unconstitutional under any application of said law. Christian at 35-36.

B. The court finds the large capacity magazine ban does not enhance public safety to a degree necessary to burden the right to bear arms.

Limitations on the types of weapons usable for Self-Defense are normally an undue burden on the Oregon citizens. Christian at 40.

The court heard from two sworn officers who were elected Sheriffs in their counties. Both Harney County Sheriff Dan Jenkins and Union County Sheriff Cody Bowen testified that for their own protection and that of their deputies, they issue large capacity magazines. Sheriff Bowen issues Smith

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[18] The allowed magazines are contained in Ballot Measure 114 Section 11(1)(d)

(A) An ammunition feeding device that has been permanently altered so that it is not capable, now or in the future, of accepting more than 10 rounds of ammunition,

(B) An attached tubular device designed to accept, and capable of operating only with 0.22 caliber rimfire ammunition; or

(C) A tubular ammunition feeding device that is contained in a lever-action firearm

As shown above, the language "permanently altered so that it not capable, now or in the future" is not factually possible under any circumstance. Subsection (C) deviates from the magazine language of detached or fixed creating legal uncertainty as to what can be possessed seeming to freeze firearms at the Winchester Henry Rifle stage of 1860.

The defendants argued, and presented evidence, suggesting that semi-automatic technology is not constitutionally protected based upon the smokeless powder, detachable magazines, and automation after statehood. They argue, in essence, that the state could seize the most popular and effective weapons of self-defense based upon a historical record coupled with the law as they read it as excluding automation. Section 11(1)(d) supports their assertions by attempting to freeze out automation through exceptions. Applying the logic of the defendants, any firearm that uses smokeless powder, detachable magazines or automation within a firearm loading mechanism would not be protected under the Constitution. The defendants would freeze constitutionally protected firearms at the time of statehood, or put another way, allowing only for black powder antiques or replicas thereof.

However, the court finds that firearms development has continued in linear way since 1830 and semi-automation is another phase of repeater technology, smokeless powder the next phase of black powder, and detachable magazines as the next phase of fixed magazines. Each are successor technologies built on their ancestor technologies "The appropriate inquiry...is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon's constitution was adopted." State v. Delgado, 298 Or at 400–01

and Wesson 9MM firearms with a magazine capacity of 17 + 1. Seventeen rounds in the detachable magazine and one round in the fixed magazine. Additionally, they are issued two additional 17-round magazines. Sheriff Jenkins, who provides law enforcement protection for 10,000 square miles with six sworn officers, where it can take an hour and half to respond to an emergency, issues Glock model 22, 40-caliber pistols with 15 + 1 and two additional detachable magazines of 15 rounds. He also issued AR 15, 223' caliber with 25 to 30 capacity magazines with a couple of ten + 1 magazines.

Defendant Cody Codding, superintendent of the Oregon State Police, testified that the Oregon State Police Troopers are issued Smith and Wesson 9MM firearms with a magazine capacity of 17 + 1. Additionally, OSP issues two additional 17 round magazines and duty weapons consisting of shotguns and Smith and Wesson AR 15 rifles with multiple 20 and 30 round magazines.

Most of the deputies and troopers have their weapons with them when they are off-duty and have their vehicles and weapons with them at their home to improve response time to emergencies. Those weapon possessions are illegal under Ballot Measure 114.

Section 11(4)(c) states there is an exemption from enforcement of the large capacity magazine restriction for "[a]ny government officer, agent or employee, member of the Armed Forces of the United States or peace officer, as that term is defined in ORS 133.005, that is authorized to acquire, possess or use a large-capacity magazine provided that any acquisition, possession or use is related directly to activities within the scope of that person's official duties."

The court finds police officers would not be able to possess their duty weapons when at home because they would not be acting within the scope of their official duties. Sheriffs Bowen and Jenkins testified that they maintain the same magazines they issue to their deputies for their own personal protection when they are not on duty, because they face threats to their safety at home. Further, deputies are not always on call and within the scope of their official duties due to labor laws requiring that they be released from work obligations at the end of shifts. However, if called out to an emergent situation, they need to leave from their home to the scene. Stopping at the Sheriff's office to obtain their weapons creates substantial

delays and threatens to the safety of caller. Both were very clear they are providing law enforcement protections for vast geographic spaces and such a delay only compounds the significant response delay the residents already face in being protected by law enforcement when threatened with harm.

The court agrees with the National Police Association Amicus Curiae filed on January 31, 2023, at page 8:

> "Because police officers are defending themselves against the same criminals as citizens, their experience is highly relevant to the appropriate scope of self- defense. Over the years, police departments across the nation have abandoned service revolvers in favor of modern semi-automatic weapons with larger magazines. This is true even though police are often working together as a group, with even less need for higher capacity magazines than individual citizens attempting to defend themselves."

The testimony of Defendant Codding, Sheriffs Jenkins and Bowen convince the court to find Ballot Measure 114, Section 11 has negative public safety consequences on policing, increasing a safety risk to the public and the police's own ability to protect themselves from emergent harm.

Citizens use large capacity magazine firearms to defend themselves.

Defense witness, James Yurgealitis, maintains a high caliber handgun with a nine-round magazine for his self-defense because he does not have others sleeping in other rooms in the house, so use of a high caliber round is not a concern if that high caliber bullet pierce walls because there is no risk of killing an innocent on the other side of that wall and he has decades of training that allow him to use those weapons effectively. Nine rounds for a highly trained former law enforcement officer, with a heavy and dangerous caliber of round, only enhances the argument that less trained citizens need more rounds to make up for the deficits in stopping power of an aggressor from a lower caliber round firearm.

Both plaintiffs, Joseph Arnold, 52, and Cliff Asmussen, 76, own large capacity magazines for their own self-defense. Mr. Arnold is an Oregon state employee managing the Harney County state highway department.

Mr. Asmussen is a retired logger and car dealer. They are each concealed handgun licensees with appropriate training as required by ORS 166.291, they own many firearms, have had guns in their lives since their early childhood, been trained at a young age to properly handle and safely use firearms, and have purchased hundreds of firearms apiece. Each enjoy the use and possession of large capacity magazines for personal protection. The notion of being charged with a crime of possessing a large capacity magazine offends Mr. Asmussen since he does not think he has done something wrong that separates him from other "normal citizens". Mr. Arnold takes his large capacity magazine firearms with him when he is in public for personal protection. Neither have fired the firearms in self-defense, but they feel protected and are prepared to protect themselves and their community if necessary.

Sheriff Bowen described an incident when citizens brought their weapons to back up deputies in a high intensity situation with a criminal. Their backup was essential to the safety of the community. As he put it: "I depend on an armed citizenry".

These witnesses each demonstrate the idea that self-defense is first about having the ability to defend oneself and being able to burnish a weapon when necessary. The defendants' evidence from Mr. Jorge Baez, the statistician, who reviewed a very limited sample size within the National Rifle Association ("NRA") data base, supported this conclusion when he testified that most acts of self-defense with a firearm involve no shooting at all. The display of force terminates the aggressor's behavior. Mr. Baez also concluded that the average number of 2.2 rounds are fired in acts of self-defense and acts where over ten rounds fired in self-defense occurred in the database for .3% of all incidents. He testified there is no way to gauge how many shootings were prevented by the show of force that included events with large capacity magazine firearms.

The number of .3% of all acts of self-defense using ten rounds or more is significant statistically when weighed against the statistical significance of the actual impact of mass shootings in the United States.

In terms of overall types of events occurring in society causing death and causalities, mass shootings rank very low in frequency. However, as Mr. Joe Paterno's testimony highlighted, these terrible mass shooting events create extremely emotional, sensationalized moments in our society that

are highly sensationalized. As Mr. Paterno pointed out, after the Uvalde School Shooting horror, the number of people who signed up to help with Ballot Measure 114 campaign spiked. The mass shooting events have a significant impact on the psyche of America when they happen. People tend to believe these events are prolific and happening all the time with massive levels of death and injury. The court finds this belief, though sensationalized by the media, is not validated by the evidence.

The advocates for Ballot Measure 114 argue in the preamble and in the voters' guide that a restraint on the amount of ammunition as the key to preventing mass shootings. Nothing in the preamble, the voters' guide nor the defendants' evidence provide a rationale for why the rounds should be limited to ten as opposed to any other arbitrary number that could have been picked nor did they show the limitation of ten rounds has any demonstrable effect on negative outcomes to mass shooting events.

The proponents claim the delay in reloading can help with individuals getting away from the shooter. Ignoring that the larger the magazine, the higher chance of it jamming according to the testimony, the court finds the time to reload a ten-round magazine into a semi-automatic firearm is negligible at best.

Derik LaBlanc, the first witness for the plaintiffs and a firearms instructor, stated he could reload his firearm in 2.10 seconds and an elderly individual with proper training can reload in four to five seconds. Shane Otley, a Harney County Rancher, relies more heavily on large capacity magazines as he gets older and his reaction time and proficiency declines for reloading.

Mr. Springer, a competitive shooter, can reload in .7 of a second.

Sheriff Bowen and Sheriff Jenkins can reload in two seconds.
Mr. Yurgealitis can reload in one to two seconds. He testified that an untrained individual could reload in five to six seconds.

Exhibits 174 through 184 where different examples of 10-round magazines purchased by Mr. Yurgealitis. The court could easily carry every one of those exhibits, at the same time, in a single jacket pocket for easy retrieval. Many more of those magazines could be carried in other pockets and storage items attached to a normally sized adult.

Mr. Baez testified that there was an increase in casualties when large capacity magazines were used. The increase was ten deaths versus six deaths without large capacity magazine use and 16 injuries versus three. However, out of the 179 incidents he reviewed, he could not describe how many shooters used large capacity magazines or not, leading him to make approximate guesses as to how often they were used. Fundamentally, there is no clarity in the literature about how often large capacity magazines were used because it was not a point of data entry until a policy maker decided it should be point of data since 2004. The court cannot find that the restriction on large capacity magazines would affect these outcomes in with any scientific certainty as differentiated from an individual forced by statute to carry more magazines for reloading.

The court finds that 10-round magazine bans are no panacea to prevent a mass shooter based upon the evidence in this case. A motivated mass shooter could carry well over 100 rounds in 10 separate magazines and readily release a detachable magazine from a firearm and reload in two seconds offering none of the supposed protection promoted in the preamble or voter's guide for Ballot Measure 114 by banning large capacity magazines. The court can find no scientific or analytical reasoning on this record that a ten-round limitation will increase public safety in any meaningful way.

C. The Large Capacity Magazine ban is unduly burdensome

The court finds no proof offered demonstrated Large Capacity Magazine bans would reduce the number of causalities in the future. Any such conclusion would be mere speculation by the court which it will not engage in.

The defendants attempted to assert that the Section 11 ban would have a significant impact on mass shootings, but they failed to lay a proper scientific foundation. As the Oregon Supreme Court requires:

> "The function of the court is to ensure that the persuasive appeal [of scientific evidence] is legitimate. The value of proffered expert scientific testimony critically depends on the scientific validity of the general propositions utilized by the

> expert...[S]cientific assertions...should be supported by the appropriate scientific validation. This approach 'ensure[s] that expert testimony does not enjoy the persuasive appeal of science without subjecting its propositions to the verification processes of science.'"

Jennings v. Baxter Healthcare Corporation, 331 Or. 285, 304-305 (2000) quoting State v. O'Key, 321 Or. 285 (1995).

The defendants introduced Dr. Michael Seigel, an epidemiologist from Tufts University, to testify to his policy conclusions. His testimony was based upon four academic studies of 179 events he considered mass shootings without any consideration of the many variables that could impact those conclusions. Defendants failed to lay a scientific process for the court to be able to follow the analysis that led to the doctor's conclusions. As a result, the testimony was not allowed. For example, there was not even an agreed upon definition in those four studies for a definition of a mass shooting. If the science cannot agree on a definition, how can a court derive any conclusions from the data. The data conclusions were also derived against the backdrop of eight types of gun laws.[19] There was no attempt to extract a single policy option from the eight to identify its effect on mass shootings. The remaining concerns of the court were laid out on the record.

Essentially, the defendants wanted to come to court, say this person is an expert, and have the expert assert their legal conclusions as scientific evidence without the proper showing to the court of the scientific validation for the process or the way the process was used to come to that conclusion. The defendants failed to establish a factual, scientifically reliable record to allow Dr. Seigel's conclusions under OEC 702. See State v. Romero, 191 Or. App. 164 (2003) review denied 337 Or. 248 (2004) (litigant's claim of that a scientific theory is valid is a hypothesis that requires empirical proof).

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[19] In addition to Large Capacity Magazine bans, the articles considered assault weapons bans, permit-to-purchase laws, Mental health and domestic violence protections, universal background checks, may issue permits, and other violent misdemeanor laws. The conclusions in the studies only had validity when compared against these statutes' sans all these statutes. Oregon has mental health and domestic violence protections, universal background checks, and other violent misdemeanor laws and the defendants could not provide the court a delineation of how to evaluate the evidence without those laws being considered generally. In other words, the conclusions offered where not discretely on large capacity magazine bans but on an array of firearm restraints

Additionally, the court did not find Dr. Seigel's testimony credible. The doctor, in his initial testimony, was using statistics to further the agenda of the defendants, hyper-charging the impact of firearms in Oregon. For example, comparing 2001 to 2021, firearm related homicide deaths were 47 in 2001 as comparted to 146 in 2021. Dr. Seigel describes that as a 310% increase in mortality. The use of a comparison between 99 more deaths and 310% increase appears the court to be policy advocacy, not scientifically useful conclusions. While technically true, the statistical trick turning 99 into 310% was designed to enflame rather than educate. The court finds that Dr. Seigel is an advocate for gun control measures, who used data in a partisan manner to drive home his personal point of view rather than provide this court with a scientific way to evaluate policy decisions for their effectiveness in solving gun-related deaths. Such an analysis would have allowed the court to evaluate the policy's effectiveness on public safety against its burden on the right to bear arms, but none was offered.

Dr. Seigel's testimony offered one area of concurrence between the parties. There have been 155 mass shooting events from 1976 to 2018 under the definition of mass shooting which consists of over four deaths in the incident and the incident was not attributable to another crime or domestic violence. The total physical harm from those mass shootings was 1078 deaths and 1694 non-fatal casualties or 25.6 deaths and 40.3 injuries on average per year from mass shootings since 1976. Only two of those mass shooting events occurred in Oregon.

The court finds the total fatal and non-fatal casualties from those 155 mass shootings over the last 42 years is 2,772 people. The historic number of causalities from mass shooting events is staggeringly low in comparison the media's sensationalized coverage of the events.

By comparison, Harney County has a current population of 7,495 people and Oregon's population is 4,240,137 as of 2022.

Mass shooting events are tragic and often involved the most vulnerable sections of the population. However, the court finds that number of people killed and injured is statically insignificant compared to the number of lawful gun owners. As noted, Oregon has 38.3% of citizens who own firearms and of those, 49.8% are estimated to own magazines that hold 11 plus

rounds meaning Oregon has 1.6 million lawful gun owners, 808,000 of whom have large capacity magazines in their possession. The court finds the large capacity magazine ban directed at 155 to 179 criminals who used firearms that committed heinous crimes, sometimes with large capacity magazines, in the last 42 years, causing 808,000 lawful citizens in the state to become into presumed criminals with an affirmative defense, not reasonable and unduly burdensome under Article I, § 27 pursuant to Christian.

An affirmative defense places the burden on the accused to prove their right to possess the large capacity magazine by a preponderance of the evidence. See *Oregon State Bar Books*, Criminal Law in Oregon, section 19.1-2. Proof may consist of testimony subject to creditability determination by the fact finder. However, generally, proof is better bolstered by documentation. Mr. Springer noted in his testimony that none of the current large capacity magazine manufacturers place numbers on the magazine that can then be associated with a registry meaning the magazines are not serialized. The court finds that presumptively, that fact alone will require a defendant, currently a lawful citizen, to give up their right against self-incrimination and testify that they had a large capacity magazine in their possession, but they owned it before Ballot Measure 114 went into effect. If they are not believed by a jury, they could go to jail for up to 364 days and be fined $6,250.00.

In other words, the possession of a large capacity is presumed illegal until the accused owner of the large capacity magazine proves otherwise in a court of law after the state had established a prima facia case of guilty and survives a motion for judgment of acquittal.[20]

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[20] The court expressed significant concerns with the racial and socio-economic realities of this portion of the law including the indigent defense crisis and availability of lawyers along with the personal costs of being arrested and tried.

There are significant constitutional problems unexplored with the issues that were not properly plead.

There is real legal concern about the police being the initiators of prosecutions, a power generally left to a duly elected district attorney Also, the police are allowed to make that prosecutorial decision based upon unchecked discretion during roadside related to Section 11(5)(d) where an individual can avoid prosecution if they "permanently and voluntarily relinquished the large-capacity magazine to law enforcement or to a buyback or turn-in program approved by law enforcement, prior to commencement of prosecution by arrest, citation or a formal charge". The police decide who and for how long the person can have to handover the magazine before they initiate the prosecution by arrest or citation.

For those, and the other reasons outlined, the Large Capacity Magazine ban is unduly burdensome on gun rights when compared to the actual harm caused by those items.

D. The Large Capacity Magazine ban is not authorized under Christian.

The court is mindful the impact of mass shootings. The court finds that comparing that impact to the potential loss of liberty to currently lawful gun owners, this ban is unduly burdensome under Article I, § 27. The 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 caused the imposition of the large capacity magazine ban contained in Ballot Measure 114, Section 11.

The statutorily distinct language of Ballot Measure 114, Section 11 regarding "change" and "permanently alter" clearly unduly burdens the right to bear arms under Article I, § 27.

The conclusion the court made after the temporary injunction remains just as true after a full evidentiary hearing. The court cannot sustain a restraint on a constitutional right based upon a mere speculation the restriction could promote public safety. Certainly, a court cannot use a mere speculation in determining guilt in a criminal case, damages in a negligence case, future harm in a parole matter, or the many other legal matters where disallowing that outcome. See State v. Hedgpeth, 365 Or. 724, 733 (2019); Smith v. Providence Health & Servs – Oregon, 361 Or. 456, 475-76 (2017); Smith v. Bd. of Parole & Post-Prison Supervision, 343 Or. 410, 419 (2007); Lea v. Gino's Pizza Inn, Inc., 271 Or. 682, 688 (1975) ("Prosser on Torts (2nd ed), s 42, p. 200 expresses ... what is required is evidence from which reasonable men may conclude that, upon the whole, it is more likely that there was negligence than that there was not. Where the conclusion is a matter of mere speculation or conjecture, or where the probabilities are at best evenly balanced between negligence and its absence, it becomes the duty of the court to direct the jury that the burden of proof has not been sustained."). Any finding by the court that Ballot Measure 114, Section 11 permit-to-purchase program increases public safety would be merely speculative and were unsupported by the facts at trial.

The court finds the defendants did not present 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. The court further finds that the conduct of owning a large capacity magazine does not create an unreasonable and unjustified risk or harm to members of the public. Christian at 35.

Nearly all the people who own large capacity magazines are reasonable gunowners who are not identifiable risks to their community nor cast an unjustifiable risk or threat of harm to other citizens. Id.

Ballot Measure 114, Section 11 is facially unconstitutional by a finding of clear and convincing evidence as demonstrated above. The court's legal and factual conclusion is that Ballot Measure 114 does not increase public safety but diminishes it while creating nearly a million presumed misdemeanants. A result that is not reasonable under Article I, § 27 as defined by Oregon Supreme Court pursuant Christian.

VI. CONCLUSION

Declaratory judgment is preventive justice, designed to relieve parties of uncertainty by adjudicating their rights and duties before wrongs have actually been committed. Hale v. State, 259 Or. App. 379, review denied 354 Or. 840 (2013). This court is preventing the undue burden of Ballot Measure 114 from being imposed on current, and prospective, gun owners who have a right to lawfully possess firearms for the purposes of defending themselves and the state against imminent threats of harm.

Pursuant to ORS 28.010, et. al., the court, using its equitable power, DECLARES and ADJUDGES Ballot Measure 114 facially unconstitutional in all of its applications under Oregon Constitution, Article I, § 27. The court makes this declaration to settle and to afford relief from uncertainty and insecurity with respect to the right to bear arms in Oregon. ORS 28.120. Ballot Measure 114 is permanently enjoined from implementation.

The court orders costs upon a filing under ORCP 69 that are just and equitable for the plaintiffs. ORS 28.100.

Plaintiffs shall prepare the judgment in conformance with this letter, the statutes and the caselaw and submit the judgment to the defendants no later than December 1, 2023. Defendants shall review the judgment as to form and file any objections by December 8, 2023, at noon.

Without any objection as to form, the court will enter the judgment on December 8, 2023.

So Declared and Adjudged,

Robert S. Raschio
24th Judicial District (Grant/Harney)
Presiding Circuit Court Judge

WA STATE ATTORNEY GENERAL'S OFFICE, COMPLEX LITIGATION DIVISION

September 11, 2024 - 2:43 PM

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Appellate Court Case Title:	State of Washington v. Gator's Custom Guns, Inc., et al.
Superior Court Case Number:	23-2-00897-0

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