IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. RUDY NINO PARRAS, Defendant-Appellant Petitioner on Review.	Crook County Circuit Court Case No. 19CR11103 CA A174543 SC S070409

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court for Crook County
Honorable Daina A Vitolins, Judge

Opinion Filed: June 7, 2023
Author of Opinion: Joyce, J.
Before Aoyagi, Presiding Judge, and Joyce, Judge, and Jacquot, Judge.

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STATEMENT OF THE CASE

Defendant contests his conviction for felon in possession of a firearm under ORS 166.270, which permanently prohibits him from possessing firearms. He contends that the trial court erred when it denied his motion for judgment of acquittal because as applied to him, a person with multiple drug-related felonies, ORS 166.270 violates Article I, section 27, of the Oregon Constitution and the Second Amendment to the United States Constitution.

Questions Presented and Proposed Rules of Law

First Question Presented

Does permanent firearm disarmament of a person convicted of drug-related felonies violate Article I, section 27, of the Oregon Constitution?

Proposed Rule of Law

Yes. The text, context, and history of Article I, section 27, demonstrate that the framers intended to protect the right of *all* Oregonians to bear arms, including people with prior drug-related felonies.

Second Question Presented

Does permanent firearm disarmament of a person convicted of drug-related felonies violate the Second Amendment to the United States Constitution?

Proposed Rule of Law

Yes. When the state enacts a law that infringes upon conduct that the text of the Second Amendment protects, the state must present historical evidence to show that the law is consistent with the nation's historical tradition of firearm regulation. Because defendant is a citizen and ORS 166.270 prohibits him from possessing firearms, ORS 166.270 infringes on conduct that the text of the Second Amendment protects. But historical evidence does not justify disarming him permanently because in the founding era, permanent disarmament of citizens was not a legal consequence of criminal activity. Moreover, even if historical evidence supports disarming people convicted of violent or common-law felonies, it does not extend to modern, drug-related felonies.

Summary of Argument

(1) Article I, section 27, protects the right of "the people" to bear arms in self-defense and defense of the state. Its text does not limit who constitutes "the people." Neither the constitutional or statutory context nor the relevant history demonstrate any intent on the part of the framers to authorize the legislature to strip that right from people convicted of drug felonies who have served their sentences. Rather, the historical circumstances affirmatively establish that, after a decade of bloody conflict with Indigenous tribes in an era

when Oregon's settlers understood firearms to be vital to their survival, the framers drafted Article I, section 27 to provide sweeping protection for the right to bear arms. Prohibiting the possession of firearms by people convicted of felony drug offenses like defendant violates Article I, section 27.

(2) In *District of Columbia v. Heller*, 554 US 570, 578, 128 S Ct 2783, 171 L Ed 2d 637 (2008), the United States Supreme Court recognized that the Second Amendment protects an individual's fundamental right to possess arms for self-defense. In *New York State Rifle & Pistol Ass'n v. Bruen*, 597 US 1, 142 S Ct 2111, 213 L Ed 2d 387 (2022), the Court announced a two-part test for evaluating whether a law violates the Second Amendment. First, a court determines whether law infringes on conduct that the text of the Second Amendment covers. If so, then second, the state must present historical evidence that proves that the law is consistent with the nation's history of firearm regulation. Whether a law meets that standard depends on whether it is relevantly similar to laws from the founding era. The focus of comparison is "how" and "why" the modern regulation and its historical analogs burden the right of armed self-defense.

ORS 166.270 meets *Bruen*'s initial threshold for infringing on conduct that the Second Amendment protects. The text of the Second Amendment protects the right of "the people" to "keep and bear arms." As in other provisions of the Bill of Rights, the "people" includes all citizens, without

limitation. Nothing in the text of the Second Amendment excludes any class of people, and it hardly fits the fundamental nature of the right to permit the legislature to use statutory definitions like "felon" to deny the right to broad segments of the population. And because ORS 166.270 restricts firearm possession, it on the right to "keep and bear arms."

There is no evidence that a prohibition on people with drug-related felonies is consistent with the nation's history of firearm regulation. Felon-in-possession laws were unknown to the founding era. In fact, if anything, the historical record suggests that felons were allowed to possess firearms after the completion of their sentences. And while laws from that era permitted temporary disarmament of people that a court individually determined to be dangerous, the few permanent disarmament laws excluded then-disfavored groups that the founding generation considered hostile, such as African Americans, British loyalists, and Indigenous people. And even so, some of those individuals could possess arms for self-defense.

Thus, application of ORS 166.270 to nonviolent drug felons fails both the how and why standards of comparison. It fails the "how" standard because it imposes a sweeping, permanent ban on firearm possession. And it fails the "why" standard because it burdens the right to armed self-defense without regard to a person's individualized dangerousness. As applied in this case, ORS 166.270 violates the Second Amendment.

Summary of Historical and Procedural Facts

Historical Facts

In 2006, defendant was convicted of two counts of manufacturing methamphetamine within 1000 feet of a school, ORS 475.892, and felon in possession of a firearm. Tr 51-52. In 2011, he was convicted of felony possession of methamphetamine, ORS 475.894. Tr 51-52.

On February 6, 2019, during a search of defendant's home, defendant told police that there was a gun in his bedroom. Tr 32. Police found an unloaded semiautomatic rifle in defendant's bedroom closet and a magazine with bullets under the mattress. Tr 8, 20-21. Police also found an unloaded handgun on the floor of defendant's bedroom and a loaded magazine for the gun under defendant's mattress. Tr 19-21.

Police found a pill bottle that contained methamphetamine residue in a shed in the backyard. Tr 35-37, 49.

Procedural Facts

The state charged defendant by indictment with felon in possession of a firearm, ORS 166.270 (Count 1);[1] obliteration or change of identification

[1] The indictment charges defendant with felon in possession of a firearm on account of his previous felony possession of methamphetamine:

number on a firearm, ORS 166.450 (Count 2); and misdemeanor unlawful possession of methamphetamine, ORS 475.894 (Count 3). The court dismissed Count 2 before his bench trial.

At the close of the state's evidence defendant moved for a judgment of acquittal, contending that the application of ORS 166.270 to defendant violated his rights to bear arms under both the state and federal constitutions. Tr 54-64.

The court denied the motion in the following ruling:

> "[THE COURT:] "Number one, I adopt the State's argument concerning the Second Amendment, and in terms of that the legislature has the ability to criminalize the possession of weapons by a felon, and I adopt their legal arguments. I also reject the as applied to [defendant] that the statute is unconstitutional under the Second Amendment of the U.S. Constitution.
>
> "Turning to Oregon law, I make the same finding. I do not find that as applied to [defendant], the statute is unconstitutional. * * * I think one of the arguments that's raised repeatedly is the right to self-defense, there are no facts to consider that any of these weapons were used for any self-defense purpose.
>
> "* * * * *

> "The defendant, on or about February 6, 2019, in Crook County, Oregon, having previously been convicted in Crook County Oregon on June 17, 2011, of the felony of Unlawful Possession of Methamphetamine in case number 11FE0073, did unlawfully and knowingly have in said defendant's possession, custody or control a firearm."

App Br at ER-1.

> "So, I do find as applied to [defendant], the statute is not unconstitutional, and I deny [defendant's] motion for judgment of acquittal on Count 1."

Tr 73-74.

The court found defendant guilty of Counts 1 and 3. On Count 1 it sentenced defendant to 25 months' incarceration with 24 months' post-prison supervision. It imposed 10 days' jail on Count 3. App Br ER-4-6.

Defendant renewed his arguments on appeal, contending that ORS 166.270 was unconstitutional under both Article I, section 27, and the Second Amendment. App Br at 7-8. The parties subsequently filed supplemental briefs to address *Bruen*, 597 US 1. App Supp Br at 2-17; Resp Supp Br at 2-10.

The Court of Appeals affirmed. *State v. Parras*, 326 Or App 246, 531 P3d 711 (2023). Addressing only the Second Amendment issue, the court concluded that it "agree[d] with defendant that the Second Amendment's plain text covers defendant's possession of a firearm," but that ORS 166.270 was consistent with the "'historical tradition that delimits the outer bounds of the right to keep and bear arms.'" *Id.* at 257 (quoting *Bruen*, 597 US at 19). Specifically, the court concluded that at the founding, "it was generally understood that those who were not 'virtuous' and law abiding fell outside the protections of the Second Amendment" and that '[t]here is little historical evidence that any differentiation was made between those who committed

serious violent versus non-violent offenses with respect to Second Amendment protections." *Id*. at 257-58.

Defendant sought review of the Second Amendment question. In its order allowing review, this court requested that the parties also address the issue under Article I, section 27.

ARGUMENT

ORS 166.270 prohibits felons from possessing firearms.[2] Because defendant has more than one prior felony conviction, ORS 166.270 makes it a felony for him ever to possess a firearm.

Both Article I, section 27, and the Second Amendment protect an individual's fundamental right to possess a firearm for self-defense. Those

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[2] ORS 166.270 creates a Class C felony and provides, in relevant part:

> "(1) Any person who has been convicted of a felony under the law of this state or any other state, or who has been convicted of a felony under the laws of the Government of the United States, who owns or has in the person's possession or under the person's custody or control any firearm commits the crime of felon in possession of a firearm."

Section (4) provides that the ban does not apply to persons who have been convicted of a single felony that "did not involve criminal homicide, * * * or the possession or use of a firearm or a weapon having a blade that projects or swings into position by force of a spring or by centrifugal force," provided that that the sentence for that felony terminated at least 15 years before the date of the alleged violation of ORS 166.270.

rights reflect the history and values of the founding generations that enshrined them. As explained below, neither of those constitutional provisions are so flimsy as to grant a legislature unfettered authority to deprive citizens permanently of those fundamental rights simply by affixing a "felony" label to conduct.

I. The text and context of Article I, section 27, indicate that the framers did not intend to exclude nonviolent drug felons from its protections.

Article I, section 27, of the Oregon Constitution states,

> "The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power[.]"

This court's methodology for constitutional interpretation is well-established: it considers a provision's "specific wording, the case law surrounding it, and the historical circumstances that led to its creation." *State* ex rel *Kristof v. Fagan*, 369 Or 261, 269, 504 P3d 1163 (2022) (internal quotation marks and citation omitted). In this case, the question is whether, under that interpretive framework, Article I, section 27, permits the legislature permanently to deprive a legislatively-created class of people—those convicted of drug felonies—of the right to bear firearms to defend themselves.

A. The text of Article I, section 27, does not allow the legislature to limit the right to bear arms for self-defense.

Article I, section 27, creates an individual right to bear arms, as its use of the word "[themselves]" demonstrates. *State v. Kessler*, 289 Or 359, 369, 371,

614 P2d 94 (1980). That right extends to weapons "commonly used" in self-defense and defense of the state. *Id.* at 368-69. "The people" enjoy that right, and Article I, section 27, contains no textual limitation on who the phrase "the people" comprises. And the legislature "'cannot * * * pass any law to * * * violate the popular privileges reserved by the declaration of rights'" enumerated in the Oregon Constitution. *Crawford v. Linn County*, 11 Or 482, 486, 5 P 738 (1885) (quoting *Sharpless v. Mayor of Philadelphia*, 21 Pa 147, 160 (1853)).

B. Other provisions of the Oregon Constitution demonstrate that the framers of the Constitution were explicit when they intended to limit a right or authorize the legislature to do so.

When interpreting a provision of the Oregon Constitution, this court considers its textual context—that is, the rest of the Oregon Constitution. *Kristof*, 369 Or at 270. In this case, several other provisions show that, when the framers intended to limit constitutional rights or give the legislature the authority to do so, they made that intention explicit.

1. The rights-granting provisions of Article I demonstrate a drafting approach that declares rights as well their limitations.

Article I, section 27, matches the other rights-granting provisions of the Oregon Constitution that define rights and then identify a specific limitation on, or qualification of, those rights:

- Article I, section 8, provides: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; *but every person shall be*

responsible for the abuse of this right." Or Const, Art I § 8 (emphasis added).

- Article I, section 9, provides: "No law shall violate the right of the people to be secure in their persons, house, papers, and effects, against *unreasonable* search, or seizure; and no warrant shall issue *but upon probable cause*, supported by oath, or affirmation, and *particularly describing* the place to be searched, and the person or thing to be seized." *Id.* § 9 (emphasis added).

- Article I, section 13, provides: "No person arrested, or confined in jail, shall be treated with *unnecessary* rigor." *Id.* § 13 (emphasis added).

- Article I, section 16, provides: "*Excessive* bail shall not be required, nor *excessive* fines imposed. *Cruel and unusual* punishments shall not be inflicted, but all penalties shall be proportioned to the offense." *Id.* § 16 (emphasis added).

- Article I, section 18, provides: "Private property shall not be taken for public use nor the particular services of any man be demanded *without just compensation*[.]" *Id.* § 18 (emphasis added).

- Article I, section 19, provides: "There shall be no imprisonment for debt, *except in case* of fraud or absconding debtors." *Id.* § 19 (emphasis added).

- Article I, section 22, provides: "The operation of the laws shall never be suspended, *except* by the Authority of the Legislative Assembly." *Id.* § 22 (emphasis added).

- Article I, section 23, provides: "The privilege of the writ of habeas corpus shall not be suspended *unless* in case of rebellion, or invasion the public safety require it." *Id.* § 23 (emphasis added).

- Article I, section 28, provides: "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, *except in the manner prescribed by law.*" *Id.* § 28 (emphasis added).

- Article I, section 31, provided: "White foreigners who are, or may hereafter become residents of this State shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native born citizens. And *the Legislative Assembly shall have power to restrain, and regulate* the immigration to this State of persons not qualified to become Citizens of the United States." Or Const, Art I, § 31 (1857) (emphasis added).

(Paragraph breaks omitted).

Like each of those provisions, Article I, section 27, identifies a set of rights—the right to bear arms for self-defense, and the right to bear arms for defense of the state—and a single limitation: "the Military shall be kept in strict subordination to the civil power." The constitution also enumerates how the legislature may regulate the military to keep it subordinate to the civil power in Article X, sections 1 and 5.[3] In other words, the framers considered limits to Article I, section 27, and specifically detailed those limits when they authorized

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[3] Article X, section 1, provided, "The Militia of the state shall consist of all able-bodied male citizens between the ages of eighteen and forty-five years, except such persons as now are, or hereafter may be exempted *by the laws of the United States, or of this state*." Or Const, Art X, § 1 (1857) (emphasis added.) Section 5 of that article further provided,

> "The Legislative Assembly shall fix by law, the method of dividing the militia, into divisions, brigades, regiments, battalions, and companies and *make all other needful rules, and regulations in such manner as they may deem expedient* not incompatible with the constitution, or laws of the United States, or of the constitution of this state, and shall fix the rank of all staff officers."

Id. § 5 (emphasis added).

the legislature to limit the right to bear arms for defense of the state. But they did not grant the legislature authority to limit the right to bear arms for *self*-defense.

No provision of the constitution permits the legislature to impose a *permanent* deprivation of a felon's other constitutional rights beyond the duration of the sentence, and defendant is not aware that the legislature has ever attempted to exceed those constitutional boundaries.[4] The legislature cannot strip a person's Article I, section 8, right to free expression after completing a felony sentence, even if the legislature believes that felons' speech might be dangerous. *Cf. State v. Robertson*, 293 Or 402, 416-17, 649 P2d 569 (1982) ("[L]aws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end."). The legislature cannot alter a person's Article I, section 9, right to be secure against unreasonable search or seizure after completing a felony sentence, even if the legislature believes that a felon is more likely to conceal the fruits and instrumentalities of new crimes. *Cf. State v. Maciel-Figueroa*, 361 Or 163, 184, 389 P3d 1121 (2017) (Article I,

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[4] *Cf. Special Project: The Collateral Consequences of a Criminal Conviction*, 23 Vand L Rev 929 (1970) (exhaustively reviewing sub-constitutional collateral consequences of convictions across the country throughout history); Office of the Pardon Attorney, *Civil Disabilities of Convicted Felons: A State-By-State Survey*, US Dept of Justice (1996).

section 9, requires that facts "give rise to a reasonable inference that the defendant has committed or is about to commit the crime that the officer suspects" before stop, not mere suspicion of general criminality). The legislature cannot curtail a person's Article I, section 11, rights to public trial by an impartial jury, to be heard by themselves and counsel, and to confront witnesses, even if the legislature believes that a felon is more likely to be guilty and so unworthy of those procedural protections. *Cf. State v. Cavan*, 337 Or 433, 448, 98 P3d 381 (2004) (holding that jury trial of felon at state prison violated Article I, section 11, right to trial by impartial jury).

The same is true for the rest of the rights protected by Article I: those Article I rights are fundamental, subject *only* to the exceptions that the framers wrote into the text.

In short, there is no evidence that the framers intended Article I, section 27, to be a second-class right, lesser than the others in Article I, that the legislature may strip away from a disfavored class. If anything, as the following history shows, they understood that right to be one of the most urgent and immediate rights held by Oregonians in the years leading to the enactment of the Constitution.

2. The framers were also explicit when they intended to authorize the legislature to restrict constitutional rights and privileges outside of Article I.

When the Oregon Constitution limits constitutional rights and privileges, it does so explicitly. Voting is one such privilege. Article II, section 3, provided that "[n]o idiot, or insane person, shall be entitled to the privileges of an elector, and *the privilege of an elector shall be forfeited by a conviction of any crime which is punishable by imprisonment in the penitentiary*." Or Const, Art II, § 3 (1857) (emphasis added). Article II, section 6, repealed in 1927, provided that "[n]o Negro, Chinaman, or Mulatto shall have the right of suffrage." *Id.* § 6 (1857). And Article II, section 13, authorizes the arrest of an elector who is "going to elections, during their attendance there, and in returning from the same" *only* if the arrest is for "treason, felony, and breach of the peace." Or Const, Art II § 13.

The constitutional limits on the right to hold office are similarly explicit. Article II, section 7, provides that "[e]very person shall be disqualified from holding office during the term for which he may have been elected, who shall have given, or offered a bribe, threat or reward to procure his election." *Id.* § 7. Article II, section 9, renders "ineligible to any office of trust, or profit," any person "who shall give, or accept a challenge to fight a duel, or who shall knowingly carry to another person such challenge, or who shall agree to go out of the State to fight a duel." *Id.* § 9. The fact that the framers wrote explicit

restrictions on constitutional rights based on criminal history or other misconduct shows that the framers considered how such past wrongs could forfeit constitutional rights. And it makes their omission of similar limitations in Article I, section 27, all the more indicative of their intent not to allow those limits to the right to possess arms for self-defense.

C. Debates at the Oregon Constitutional Convention do not demonstrate an intent to limit the scope of the right to bear arms in self-defense in Article I, section 27.

This court also considers relevant proceedings of the Oregon Constitutional Convention. *Kristof*, 369 Or at 270-72. In this case, the record of the proceedings on Article I, section 27, are minimally informative. There was no reported discussion or debate of Article I, section 27, at the Oregon Constitutional Convention, and the framers adopted it as introduced. Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857 - Part I (Articles I & II)*, 37 Willamette L Rev 469, 545-46 (2001).

Article II, section 3, which renders felons ineligible to vote, produced more discussion. The original text of that provision stated, "No idiot or insane person, shall be entitled to the privileges of an elector; and the privilege of an elector shall be forfeited, by a conviction of bribery, forgery, perjury, duelling [*sic*], fraudulent bankruptcy, larceny, or other offence, for which an infamous punishment is inflicted." Burton & Grade at 574. That original text appears to have been a combination of provisions of the Iowa and Connecticut

Constitutions. *Id.* at 574 n 623 (noting also that analogous Indiana constitutional provision vested authority to choose in the legislature).

After some dispute over whether to include dueling, the convention ultimately eliminated the enumerated list of crimes and instead rendered ineligible anyone convicted "of any crime which is punishable by imprisonment in the penitentiary." *Id.* at 574-75; Or Const, Art II, § 3. The record does not reflect why the framers chose that specific wording, but it further supports the idea that when the framers intended to limit felons' access to rights, they said so in the constitutional text.

D. Preexisting statutes and those statutes enacted shortly after the ratification of the Oregon Constitution demonstrate that felons were entrusted with the right to possess arms.

When discerning the framers' intent, this court considers territorial law in effect at the time of the founding as well as subsequently enacted legislation that is close in time. *E.g.*, *Lakin v. Senco Products, Inc*., 329 Or 62, 72, 987 P2d 463, *opinion clarified*, 329 Or 369, 987 P2d 476 (1999) *overruled on other grounds by Horton v. Oregon Health & Sci. Univ*., 359 Or 168, 376 P3d 998 (2016) (consulting territorial laws to discern constitutional framers' intent); *Jory v. Martin*, 153 Or 278, 296, 56 P2d 1093 (1936) (considering legislative actions from decades following the constitutional convention to interpret original provision). In this case, both the early territorial laws and subsequent legislation demonstrate an expectation that, once felons were released from the

penitentiary, they would not only be allowed to possess arms, but that they would sometimes be *required* to do so.

Oregon established its provisional government through the Organic Law of 1843. In doing so, it adopted the civil, criminal, and military laws of Iowa. Organic Law of the Provisional Government of Oregon, Art 12 (1843) in La Fayette Grover, *The Oregon Archives* 23-32 (1853). It was "the duty of *each* male inhabitant, over the age of sixteen years and under sixty, who wishes to be considered a citizen," to join the militia. Militia Law, Art 6 (1843) in Grover, *The Oregon Archives* at 33 (emphasis added). The militia was *required* to meet "well mounted, with a good rifle or musket." Militia Law, Art 4 (1843), in Grover, *The Oregon Archives* at 33. In 1844, the provisional government organized "a volunteer company of mounted riflemen * * * to bring to justice all the Indians engaged in [a March 1844 attack], and to protect our lives and property in future against any depredations that many be attempted." *Meeting at Larshapells, March 9, 1844*, in Grover, *The Oregon Archives* at 37. These provisions did not exempt people on account of past criminal history.

Oregon law explicitly protected the right to bear arms in self-defense in 1845. Article I, section 5, of the 1845 Organic Law listed the right to bear arms first among many of the rights that would eventually comprise Article I:

> "No person shall be deprived of the right of bearing arms in his own defence; no unreasonable searches or seizures shall be granted; the freedom of the press shall not be restrained; no person

> shall be twice tried for the same offence; nor the people deprived of the right of peaceably assembling and discussing any matter they may think proper; nor shall the right of petition ever be denied."

Organic Law of the Provisional Government of Oregon, Art I, § 5, pp 59-60 (1845) (Deady 1845–1864).

Before statehood, Oregon had no laws prohibiting possession of firearms by individuals who had been convicted of crimes. *State v. Hirsch/Friend*, 338 Or 622, 651, 114 P3d 1104 (2005) *overruled on other grounds by State v. Christian*, 354 Or 22, 307 P3d 429 (2013). It limited the death penalty to first-degree murder and violent crimes committed while incarcerated, so there undoubtedly were citizens who had committed prior felonies. *Id.* at 655.

After statehood, Oregon did not limit firearm possession or transfer except by prohibiting the sale or gift of firearms, ammunition, or liquor to Indigenous people without federal authority, thereby limiting firearm *trade*, but not firearm possession. *Id.* at 651. And the law explicitly declared that all white men over the age of 16 had the right to certain firearms and prohibited police from seizing firearms from an individual, *even after conviction*, for any reason other than for defense of the state. *Id.* at 655-56. Oregon continued to limit the offenses that could result in the death penalty, but it also established a criminal code that contained numerous violent and nonviolent felonies that carried sentences of anywhere from six months to 20 years in prison. *See*

generally General Laws of Oregon, Crim Code, ch XLIII (Deady 1845–1864). Further, although Oregon established a detailed penitentiary system, down to controlling the rate at which to reimburse the sheriff for transporting a convict to the penitentiary by horse or wagon, it did not provide for any kind of post-release supervision or other monitoring. *See Hirsch/Friend*, 338 Or at 654 (setting out laws enacted between 1856 and 1865 governing penitentiary system); General Laws of Oregon, Misc Laws, ch XLIV, §§ 29-30, p 607. (Deady & Lane 1843–1872) (1864) (rates for conveyance of convicts). As a result, most felony sentences would result in a person being released from prison—and free from supervision—well before the end of their life. *Hirsch/Friend*, 338 Or at 674 ("[S]ince statehood, Oregon has had a community of convicted felons living within its borders, many of whom have committed dangerous crimes.").

The early legislature enacted statutes that distinguished between people sentenced to terms of life imprisonment and people sentenced to lesser terms and restored the civil rights of felons who served less than a life sentence. Under § 702 of the 1864 Criminal Code, "[a] person sentenced to imprisonment in the penitentiary for life, is thereafter deemed civilly dead." General Laws of Oregon, Criminal Code, ch LIII, § 702, pp 575-76 (Deady 1845–1864) (effective Oct. 1864). By contrast, under § 701, a person sentenced to a lesser term lost their rights *while incarcerated*, but they regained those rights upon

release: "A judgment of imprisonment in the penitentiary for any term less than for life, suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority or power *during the term or duration of such imprisonment*." *Id.* § 701, pp 575-76 (emphasis added.)

Thus, although both the territorial and early state governments restricted constitutional rights while individuals were *in* the penitentiary system, nothing suggests that the framers, the legislature, or the voters contemplated a restriction of their rights once they completed their sentence unless, as with voting, the Constitution specifically addressed it. The early Oregon legislature understood the constitutional rights provided in Article I to accrue to every person not presently confined in the penitentiary; the legislature could otherwise deprive individuals of their constitutional rights when specifically authorized by the Constitution, as in the circumstance of preventing people previously convicted of felonies from voting upon release.

E. The historical context in which Article I, section 27, was enacted demonstrates that the framers would have intended to protect the right to bear arms for the broadest swath of people.

This court's methodology for interpreting the Oregon Constitution includes factual historical circumstances. *See, e.g., State ex rel. Caples v. Hibernian Sav. & Loan Ass'n*, 8 Or 396, 399-400 (1880) (interpreting Article XI, section 1, in light of the fact that "[a]s a matter of history, it is well known that during the whole time of the territorial government, the currency consisted

of gold and silver only"); *Rugh v. Ottenheimer*, 6 Or 231, 234-35 (1877) (interpreting Article XV, section 5, in light of the fact that "[t]he members of the constitutional convention were mostly farmers, who had acquired land under the act of Congress * * * granting land to settlers in Oregon").

Guns played a fundamental role in Oregon's territorial history.[5] As early as 1843, the nascent Oregon government recognized that "bears, wolves panthers, &c., &c. are destructive to the useful animals, owned by the settlers of this colony" and adopted a system of bounties to encourage settlers to "carry[ ] on a defensive and destructive war against all such animals." La Fayette Grover, *The Oregon Archives* 9 (1853). Settlers on the Oregon Trail feared attack from Indigenous people, both while traveling to and after arrival in Oregon. *See, e.g.*, Lansford Hastings, *The Emigrants' Guide to Oregon and California* 149 (1845) (warning about methods of attack on settler camps and advising that guns "should, always, be carried loaded and otherwise in order for action, upon a moment's warning."). Territorial Oregon saw numerous conflicts between white settlers and the Indigenous people, all reported in a sensationalized manner. *E.g.,* Rev. Gustavus Hines, *Oregon: Its History,*

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[5] To be clear, defendant does not argue that the facts underlying conflict with the Indigenous tribes during this era *established* a need for every settler to be armed. Rather, defendant argues that, given their personal experiences, the framers likely *believed* that to be necessary and so intended the broadest possible sweep of the right to bear arms.

Condition and Prospects 421-22 (1850) (describing 1842 attack in which tribe members "broke into the house, in the dead of the night, and even into the bed-chamber" of a missionary's wife); J.B.A. Brouillet, *Authentic account of the murder of Dr. Whitman and other missionaries, by the Cayuse Indians of Oregon, in 1847, and the causes which led to the horrible catastrophe* (1869) (describing 1847 massacre that triggered Cayuse War); "More Indian Murders," *Oregon Argus* (Oct. 15, 1855) (reporting "exciting news of "Indian Outbreak in Southern Oregon!---Dwellings Burned, and Families Murdered!!" noting "a petition to Gov. Curry for 500 volunteers to repel" the attackers and that Judge Matthew Deady had "confirm[ed] the intelligence"); J. G. Woods, "Rogue River Correspondence of the Statesman," *Oregon Statesman* at 2 (October 20, 1855) (narrating attack in which a woman's husband taught her to load his guns before dying and she took up his guns to defend their home and child); Frances Fuller Victor, *The Early Indian Wars of Oregon, Compiled from the Oregon Archives and Other Original Sources with Muster Rolls* 153 (1894) ("Many of the children of pioneers still revert with horror to nights * * * when the father of the household kept watch beside his arms, not knowing but their safety depended on his sleeplessness.").

From 1847 to 1855, settlers waged three major wars on the Indigenous people of Oregon: the Cayuse, Rogue River, and Yakama Wars. *See generally* Fuller, *Early Indian Wars*. Beyond those wars, there were also numerous raids

and skirmishes that fed settlers' ongoing perception of danger. *Id.* In the absence of a standing military or assistance from the federal government, settlers formed volunteer militias with their own guns, often depending on superior arms to win conflicts. John B. Horner, *Oregon: Her History, Her Great Men, Her Literature* 138-40 (1919). During the Cayuse War, the 45 volunteers who responded to the governor's call for men to defend the territory formed "the first military force organized for the protection of Oregon," which "was called the 'Oregon Rifles,' because the members of the company furnished their own rifles and equipment." *Id.* at 112. The same was true of the Rogue River Wars. *Id.* at 142.

In 1849, Congress passed a joint resolution that authorized the Secretary of War to provide people emigrating to Oregon with "such arms and ammunition, from the army stores, as they may require to arm themselves for such expedition[.]" *A Resolution Authorizing the Secretary of War to Furnish Arms and Ammunition to Persons Emigrating to the Territories of Oregon, California, and New Mexico* (March 2, 1849). Settlers filed applications under that provision, averring their "*bona fide* intention to emigrate to Oregon" and requesting specific arms and ammunition * * *." "Correspondence concerning request for arms under U.S. Congress joint resolution of March 2, 1849," Oregon Historical Society Research Library, Mss 988.

The framers of Oregon's constitution experienced armed frontier conflict firsthand. Almost one-third of the 60 framers of Oregon's Constitution fought in at least one of the three wars listed above, including two of the three justices of the territorial supreme court, four of the five future state supreme court justices, two future state governors, and multiple members of the territorial or state legislature.[6] The framers at the Oregon Constitutional Convention likely would have viewed permanent disarmament as nothing short of a death sentence.

Further, at the time of the Constitutional Convention, Oregon was "dominated by large, relatively isolated landholdings," with farm size averaging around 360 acres—double or triple that of most Midwestern states. David Alan Johnson, *Founding the Far West: California, Oregon and Nevada, 1840-1890* 46-47 (1992) (citing historical census data). Forty-five of the 60 framers held substantial land claims averaging 411 acres each. *Id.* at 143 nn 12-13. The vast

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[6] According to the official muster rolls of the volunteer militias, 18 framers either served in or commanded one of the volunteer militias during the Cayuse, Rogue River, and/or Yakama Wars. Fuller, *Early Indian Wars*, at 277 (Scott), 361 (Chadwick), 428 (Grover and Waymire), 455 (Williams), 503 (Applegate), 513 (Lovejoy), 527 (Farrar), 530 (Kelly), 545 (Campbell), 550 (Olney), 561 (Burch), 567 (Robbins), 603 (McBride), 656 (Cox), 659 (Kelsay), 683 (Packwood), 685 (Marple). Future Supreme Court justice Prim was appointed as counsel to represent several Indigenous people who were placed on trial as part of the wars. *Id.* at 321. *See* George H. Himes, *Constitutional Convention of Oregon*, 15 Q Or Hist Soc'y 217, 218 (1914) (listing delegates and their subsequent roles in Oregon government).

majority of Oregon's small population was scattered across the Willamette Valley and beyond, living on large land claims. By 1860, only six percent of the population lived in an "urban" area, defined as a place with 2,500 or more residents. *Id.* at 273 n 9, citing U.S. Census Bureau, *Historical Statistics of the United States* 33 (1975). In such relative isolation, access to guns was seen as necessary for survival.

Thus, the historical backdrop against which the framers drafted and the voters ratified Article I, section 27, was one in which firearms were a regular and necessary tool of frontier life. The framers would have intended that every free person have the right to bear arms in defense of themselves and the incipient state of Oregon.

F. This court's interpretations of Article I, section 27, either support defendant's analysis or do not address the as-applied challenge here.

There are three forms of constitutional challenge to a statute: overbreadth, facial, and as applied. An overbreadth challenge asserts that "although a statute constitutionally could apply in some circumstances, it impermissibly, and necessarily, impinges on a constitutional guarantee in other circumstances by prohibiting conduct that is constitutionally protected." *Hirsch/Friend*, 338 Or at 628. "[O]verbreadth challenges are not cognizable under Article I, section 27." *Christian*, 354 Or at 40.

A facial challenge must establish that the statute is "unconstitutional in all circumstances, *i.e.*, there can be no reasonably likely circumstances in which application of the statute would pass constitutional muster." *State v. Sutherland*, 329 Or 359, 365, 987 P2d 501 (1999).

An as-applied challenge, by contrast, turns on the specific factual circumstances of a particular defendant's case; it "asserts that a law has been applied in a manner that violates the rights of the person making the challenge even when a law is constitutional on its face." *Christian*, 354 Or at 24.

In this case, defendant presents an as-applied challenge to ORS 166.270. He argues that Article I, section 27, does not permit the legislature to deprive individuals like himself—who have been convicted of nonviolent drug felonies—of the right to bear arms for self-defense. This court's prior caselaw does not foreclose that argument.

This court's most recent case that addressed the constitutionality of felon-in-possession laws under Article I, section 27, involved a now-disallowed overbreadth challenge. In *Hirsch/Friend*, this court considered a facial overbreadth challenge to ORS 166.270 and held that it was not overbroad. 338 Or at 628. Defendant addresses the reasoning of *Hirsch/Friend* in greater depth in Section (I)(G), *infra*; however, *Hirsch/Friend* does not pose an obstacle here because this court subsequently rejected the applicability of overbreadth challenges to Article I, section 27, overruling that portion of *Hirsch/Friend*.

Christian, 354 Or at 40 (treating overbreadth challenge to concealed-weapons law as facial challenge). Neither this court's opinion in *Hirsch/Friend* nor the Court of Appeals decisions addressed the specific facts of those defendants' prior convictions.[7] Accordingly, *Hirsch/Friend* must be read as a failed facial challenge. Thus, it does not constitute *stare decisis* that precludes this court from holding that ORS 166.270 is unconstitutional as applied to defendant.

This court's older caselaw regarding felon-in-possession statutes also involved only facial challenges with passing *dicta* regarding nonviolent felons. In *State v. Robinson*, 217 Or 612, 618, 343 P2d 886 (1959), the defendant challenged an earlier version of ORS 166.270 that prohibited possession of machine guns or firearms "capable of being concealed upon the person" by aliens or felons. He argued that the statute violated Article I, sections 20 and 27, of the Oregon Constitution, and the equal protection clause of the Fourteenth Amendment. *Id*. at 618. Although *Robinson* mused on whether the legislature's apparent inclusion of nonviolent felons in that prohibition "lacks reason" and identified statutes from other states that had been upheld, it ultimately observed that defendant "does not say that his previous felony was of

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[7] The court specifically noted that the defendants had not raised as-applied challenges in *Hirsch/Friend* because "they did not argue that, in light of the individual circumstances of their respective crimes and backgrounds, the legislature could not constitutionally prohibit them from bearing arms in their own defense." *Id.* at 627 n 3.

a non-violent kind." *Id.* at 618-19. Accordingly, neither the *dicta* nor the holding regarding the defendant's facial challenge in *Robinson* controls this court's resolution of the as-applied challenge here.

This court has only once addressed an as-applied challenge to ORS 166.270, which did not involve a person with a prior nonviolent felony conviction. In *State v. Cartwright*, 246 Or 120, 135, 418 P2d 822 (1966), this court interpreted ORS 166.270 (1965), which prohibited possession by "[a]ny unnaturalized foreign-born person" or any felon of "any pistol, revolver, or other firearm capable of being concealed upon the person, or machine gun." *Cartwright*, 246 Or at 122 n 1. Cartwright had previously been convicted of attempted burglary. *Id.* at 140. Cartwright offered evidence that he obtained a pistol for self-defense because he feared that two men were going to rob him. *Id.* at 136. The court rejected his claim that, in such circumstances, application of ORS 166.270 would deprive him of his right to bear arms to defend himself under Article I, section 27. *Id*. However, the court relied significantly on the fact that the statute did not prohibit the defendant from possessing *all* firearms, just machine guns or ones that could be concealed:

> "* * * [T]he statute does not prohibit the possession by an exconvict of any and all firearms, but only a pistol, revolver, or other firearm capable of being concealed on the person, or a machine gun. It would have been perfectly legal, so far as the statute is concerned, for the defendant to have provided himself *with a rifle or shotgun* for the purpose of protection against a threatened robbery."

Id. (emphasis added). Thus, *Cartwright* does not address the total firearms ban at issue here; that passage suggests that if it had, it may have reached a different result.

Cartwright also relied on the "police power" source of constitutional authority, which this court has since rejected. *Hirsch/Friend*, 338 Or at 639 (describing *Cartwright* as "wrongly analyzed" but endorsing "the scope of the guarantee [as] limited to purposes of defense"). Further, the as-applied challenge in *Cartwright* did not address how the *nature* of his past felony conviction might affect the constitutional analysis. Thus, *Cartwright* is not *stare decisis* that bears on this case.

G. To the extent that *Hirsch/Friend's* analysis is inconsistent with defendant's proposed rule in this case, this court should clarify that *Hirsch/Friend* does not foreclose as-applied challenges.

In *Hirsch/Friend*, this court considered what was then described as an overbreadth challenge to ORS 166.270. It first determined that the text of Article I, section 27, "does not delineate any limit—or express any intention respecting legislative authority to delineate such a limit—as to the groups of persons falling within the constitutional guarantee." *Id.* at 636. It then observed that "[o]ther provisions of the Oregon Constitution of 1859 * * * demonstrate that the drafters knew how to exclude felons expressly from the exercise of another constitutional right and also knew how to reserve express

regulatory authority in the legislature respecting certain activity referred to within the Bill of Rights." *Id.*

Next, the court reviewed relevant caselaw and concluded that the legislature could not "prohibit[ ] the mere possession of constitutionally protected arms by 'any person'" but "permissibly may regulate the manner of possession and the use of constitutionally protected arms." *Id.* at 643. It noted that it had "intimated * * * that the right to bear arms may extend to certain defensive situations, even in the case of possession by a felon." *Id.* Finally, it acknowledged that its earlier caselaw "suggest[s] that the legislature permissibly may prohibit the mere possession of a constitutionally protected weapon based on one's status as a felon, although this court has abandoned the 'police power' rationale underlying those cases." *Id.*

The court then considered the historical circumstances, including the Oregon and Indiana Constitutional Conventions, and Article I, sections 32 and 33, of the Indiana Constitution of 1851, on which it determined that the framers had based Article I, section 27. *Id.* at 643-51. Because there was no caselaw regarding felon disarmament from 1851, it turned instead to another form of legislative restriction on the right to bear arms: concealed-weapon bans. It relied on the Indiana history to conclude that Article I, section 27, authorizes the Oregon legislature to impose *concealed-weapon* bans, but recognized that "the

Indiana history does not conclusively demonstrate whether that regulatory authority extends" to felon disarmament. *Id*. at 646.

In fact, there are several reasons to doubt that the Oregon framers intended to import Indiana caselaw on firearms into the Oregon Constitution. First, numerous state constitutions had virtually identical provisions regarding the right to bear arms in self-defense and defense of the state at the time of Oregon's constitutional convention, and the Oregon framers had many of those constitutions before them. *E.g.*, Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 Texas Rev Law & Politics 191 (collecting all historical state constitutional right-to-bear-arms provisions); Helen Leonard Seagraves, *Oregon's 1857 Constitution*, 30 Reed College Bulletin 3 n 1 (1951) (noting serious methodological flaws in "comparison of Oregon's constitutions with those of other states" in subsequent scholarship that failed to address intervening constitutional amendments).

Second, as the court acknowledged, the authors of sections 32 and 33 of the Indiana Constitution of 1851 likely drew upon the Kentucky Constitution. *Hirsch*, 338 Or at 646-48. But the Kentucky and Indiana courts had reached divergent conclusions about whether their respective right-to-bear-arms provisions circumscribed the authority of their legislatures to impose *any* firearms regulations. Kentucky's highest court held that the legislature lacked such authority. *See generally Bliss v. Com*., 12 Ky 90 (1822) (striking down

law prohibiting concealed weapons). And Kentucky subsequently *amended* its constitution to create legislative authority to regulate the right to bear arms before both the Indiana and Oregon Constitutional conventions. Accordingly, it is unclear why the Indiana understanding would control.

Third, this court acknowledged that no state constitution at the time of Oregon's founding "expressly prohibited felons or criminals from possessing arms [or] expressly demonstrated any intent respecting legislative authority to regulate the bearing of arms." *Hirsch/Friend*, 338 Or at 649. It determined that, at most, there was evidence that "a number of state courts had construed their constitutional provisions to authorize" restrictions on carrying concealed weapons. *Id.* at 650.

Moving to the laws in temporal proximity to the adoption of the constitution, the court concluded that Oregon had "limited the rights of felons in some circumstances," but that "nothing in those statutes expressly provided for the disarmament of felons after release from the penitentiary [and] the statutes in effect at that time expressly protected arms possession." *Id.* at 656. And as discussed below, *infra* at 56-57, the court found no support in English, colonial, and early American history except that generally, the philosophy of the era supported disarming "unvirtuous" citizens.

Ultimately, the court concluded that, under Article I, section 27, the legislature retains power "(1) to designate certain groups of persons as posing

identifiable threats to the safety of the community by virtue of earlier commission of serious criminal conduct and, in accordance with such a designation, (2) to restrict the exercise of the constitutional guarantee by members of those groups." *Id.* at 677. However, "such a designation must satisfy the permissible legislative purpose of protecting the security of the community against the potential harm that results from the possession of arms." *Id.* at 677-78.

Although *Hirsch/Friend* discussed significant portions of the relevant Oregon legal history, it entirely overlooks the historical context of the era: the decade of near-continuous war with Indigenous peoples and the demographic realities of the time. The court went directly from the *legal* context of the Oregon Constitution and adjacent statutes to 17th-century English legal history to colonial American legal history. *Hirsch/Friend*, 338 Or at 643-73. But, as stated above, this court considers *all* history when it interprets a constitutional provision, not just the history of laws or legal principles. *See, e.g., Rugh*, 6 Or at 234-35; *Caples*, 8 Or at 399-400.

In other words, this court has recognized that the framers did not write the constitution armed only with law books. They also brought to the Constitutional Convention their own *personal* experiences as settlers in Oregon Territory. When the white settlers who would write the constitution arrived in Oregon Territory, it was not empty; Indigenous tribes had lived there since time

immemorial. The early white settlers spent decades fighting those Indigenous people for the land, especially in the bloody decade that preceded the Constitutional Convention. *See generally* Fuller, *Early Indian Wars.* That decade encompassed three distinct wars as well as countless smaller conflicts. This court's interpretation in *Hirsch/Friend* wholly overlooked the historical backdrop that was central to the framer's lives and their enactment of Article I, section 27.

Further, *Hirsch/Friend* effectively held that older legal principles from other jurisdictions outweighed the overwhelming Oregon-specific evidence that demonstrated that the framers did not intend to authorize the legislature to limit the right to bear arms for people convicted of felony drug offenses. 338 Or at 675. *Hirsch/Friend* is also flawed because it relied heavily on Second Amendment principles that, as explained below, the United States Supreme Court has rejected, such as the notion that only "virtuous citizens" enjoyed the right to bear arms. *Infra* at 56-57.

Accordingly, that facial validation of ORS 166.270 should not be misread as precluding the as-applied challenge here. *Hirsch/Friend* acknowledged limits to the legislature's authority to use a "felon" label to disarm broad segments of the population. And its historical analysis, in-depth as it was concerning some aspects, ignored the lived history of Oregon's founding

generation. Thus, *Hirsch/Friend* should be limited to its holding, not extended to grant the legislature more authority than the constitution allows.

H. Because ORS 166.270 is unconstitutional as applied to people convicted of drug felonies, this court should reverse defendant's conviction.

A law that prohibits the possession of firearms by people convicted of felony drug offenses like defendant is plainly incompatible with the framers' vision of the right to bear arms for self-defense. Under ORS 166.270, the only circumstance in which a nonviolent felon *might* lawfully possess a firearm is when faced with an imminent or ongoing violent attack, when the felon might snatch up a nearby firearm. *See* ORS 161.200 (setting out justification defense). But barring that fortuity, a felon is generally foreclosed from having firearms for self-defense. Felons may not keep firearms in their home for purposes of future self-defense and may not carry them in public.

The effects are far-reaching in ways the legislature may not have even intended. A victim of domestic violence may be coerced into participating in felony drug trafficking activity. Upon conviction, that victim would lose the right to possess a firearm both for potential self-defense and as a deterrent, because the abuser would know that the victim could not possess a firearm. To prohibit possession or control of a firearm in such circumstances renders meaningless the protection of Article I, section 27, and illustrates why the

framers did not intend to grant the legislature the authority to disarm broad swaths of the population.

The legislature first banned certain groups from firearm possession in 1920, when it enacted the predecessor to ORS 166.270 that prohibited non-citizens from possessing firearms. Oregon Laws, title L, ch III, § 9692 (1920). The legislature banned felons' possession of concealable firearms in 1925. General Laws of Oregon 1925, ch 260, §§ 2, 5. And it was not until 1989 that the Oregon Legislature banned possession by felons of *all* firearms. *State v. Burris*, 370 Or 339, 356, 518 P3d 891 (2022) (citing Or Laws 1989, ch 839, §§ 4(1), 13(1)). By that time, 130 years had passed since the frontier days of the Oregon Constitutional Convention.

Oregon has changed over the last 130 years, to be sure. But the rights enshrined in 1859 have never been susceptible to legislative infringement because the times are changing—only constitutional amendment. Unless that occurs, the legislature cannot prohibit people with prior drug felonies from bearing firearms for self-defense.

II. ORS 166.270 violates defendant's fundamental Second Amendment right to bear arms.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The "operative clause" of the Second

Amendment is that "the right of the people to keep and bear Arms, shall not be infringed." *Heller*, 554 US at 578. It "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id*. at 592; *see also id.* at 599 ("[S]elf-defense had little to do with the right's *codification;* it was the *central component* of the right itself." (Emphasis in original)).

The "constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen*, 597 US at 70. It is one of the "fundamental rights necessary to our system of ordered liberty." *McDonald v. Chicago*, 561 US 742, 778, 130 S Ct 3020, 177 L Ed 2d 894 (2010). Just as with restrictions of other fundamental rights like speech, "'the Government bears the burden of proving the constitutionality of its actions'" that encroach upon an individual's Second Amendment rights. *Bruen*, 597 US at 24 (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 US 803, 816, 120 S Ct 1878, 146 L Ed 2d 865 (2000)).

A. Under *Bruen* and *Rahimi*, the state must prove that an infringement on the right to possess arms is consistent with the nation's history of firearm regulation.

In the 14-year period between *Heller*, which announced that the Second Amendment protected a fundamental individual right, and *Bruen*, the "consensus" among state and federal courts—including Oregon—was to apply a two-step "means-end" analysis. *Bruen*, 597 US at 17; *Christian*, 354 Or at

44-46 (adopting means-end analysis). The first step required a court to consider historical evidence to assess whether the regulated conduct at issue was within the scope of the Second Amendment's protection. *Id* at 18. If that evidence was inconclusive or it showed that the activity was not categorically outside that scope, then a court applied intermediate or strict scrutiny depending on the degree to which the regulation burdened a "core" Second Amendment right. *Id.* at 18.

"Then came *Bruen*." *Parras*, 356 Or App at 252. *Bruen* rejected means-end analyses. 597 US at 24. Instead, it announced the following two-part test that requires the government to prove that any restriction protected Second Amendment conduct is consistent with the nation's historical tradition of firearm regulation:

> "[T]he standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command."

The Court applied the same standard in its only Second Amendment opinion since *Bruen*, *United States v. Rahimi*, 602 US __, __, 144 S Ct 1889, 1897, 219 L Ed 2d 351 (2024).

B. ORS 166.270 infringes on conduct that the text of the Second Amendment protects.

This case satisfies *Bruen*'s threshold inquiry: the firearm disarmament imposed by ORS 166.270 infringes on an individual's conduct that the plain text of the Second Amendment protects. The Second Amendment protects "the individual right to *possess* and carry weapons in case of confrontation." *Heller*, 554 US at 592 (emphasis added). It "extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. ORS 166.270 restricts a person's "possession" or "custody or control" of any firearm once that person has been convicted of a felony. Thus, it infringes on the conduct that the text of the Second Amendment covers.

The text of the Second Amendment describes the individuals within its ambit: It protects to the right of "the people," which "unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 US at 580. It applies to "all Americans." *Bruen*, 597 US at 70 (quoting *id*. at 581). Nothing in the Second Amendment's text excludes felons from its protection. Moreover, the Second Amendment is not the only place where "the people" appears in the Bill of Rights. Both the First and Fourth Amendments apply to "the people" and "neither of those protections evaporates when the

claimant is a felon." *United States v. Williams*, 113 F4th 637, 649 (6th Cir 2024).

This court may not insert limitations into the text of the Second Amendment where none exist. The Second Amendment does not qualify the "people" to whom it applies. It says nothing of "virtuous" or "law-abiding" citizens. Although *Heller* and *Bruen* at times used the phrase "responsible law-abiding citizen" when discussing the Second Amendment, at no point did the Court use it to limit the scope of the right. And *Rahimi* clearly rejected the argument that the Second Amendment protects only select members of the citizenry:

> "[W]e reject the Government's contention that Rahimi may be disarmed simply because he is not 'responsible.' 'Responsible' is a vague term. It is unclear what such a rule would entail. Nor does such a line derive from our case law. In *Heller* and *Bruen*, we used the term 'responsible' to describe the class of ordinary citizens who undoubtedly enjoy the Second Amendment right. But those decisions did not define the term and said nothing about the status of citizens who were not 'responsible.' The question was simply not presented."

602 US at __, 144 S Ct at 1903. Although *Rahimi* does not address *Bruen*'s use of the phrase "law abiding," had the phrase "law abiding" meant anything more than that a person's possession and use of a gun must be lawful, it would have factored into *Rahimi*'s analysis. *See id.* at __, 144 S Ct at 1944 (Thomas, J, dissenting) ("[The Government] argues that the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-abiding.' Not a

single Member of the Court adopts the Government's theory."); *id.* at n 7 ("As for *Bruen*, the Court used the phrase 'ordinary, law-abiding citizens' merely to describe those who were unable to publicly carry a firearm in New York."). Put simply, as the Court "reiterated" in *Bruen*, "the standard" that *Bruen* announced is *the* test for the Second Amendment. 597 US at 24. When the text of the Second Amendment covers conduct at issue, no classes of citizens are excluded from *Bruen*'s historical analysis.

Heller, *Bruen*, and *Rahimi* recognize that the Second Amendment is a fundamental right that *all* citizens share. To permit the legislature to exclude classes of people—be it the "unvirtuous" or those who are not "law-abiding" or "responsible"—from "the people" whom the Constitution protects, is to risk granting "legislatures unreviewable power to manipulate the Second Amendment by choosing a label." *Range v. Attorney Gen. United States,* 69 F4th 96, 102-03 (3d Cir 2023), *cert. granted, judgment vac'd sub nom. Garland v. Range*, 144 S Ct 2706 (2024) (remanding for reconsideration under *Rahimi*).

"Felon" is a legislative label that derives from statute. *See* ORS 161.525 ("[A] crime is a felony if it is so designated in any statute of this state or if a person convicted under a statute of this state may be sentenced to a maximum term of imprisonment of more than one year."). Tying a legislative label to the constitutional right is not how fundamental rights work. Fundamental rights

draw independent authority from the Constitution and protect liberties so that a legislature *cannot* narrow them by statute.

Instead, a court must discover the scope of the Second Amendment in its history, discerning its original, intended meaning. *Bruen*, 597 US at 25 ("[R]eliance on history to inform the meaning of constitutional text * * * [is] more legitimate, and more administrable, than asking judges to make difficult empirical judgments about the costs and benefits of firearms restrictions * * *." (quotations omitted)).

C. *Bruen* and *Rahimi* require the state to present historical evidence that the purpose and burden of a contemporary firearms restriction is consistent with the nation's historical tradition of firearm regulation.

Because ORS 166.270 restricts conduct that the text of the Second Amendment protects, the state has the burden to show that it "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 US at 24.

The primary method for the state to meet its burden is reasoning by historical analogy. *Id.* at 28. The state must show that a historical analog is "relevantly similar." *Id*. at 29. And while *Bruen* does not "provide an exhaustive survey" of all the factors that might guide a court's historical reasoning, it emphasized that the primary metrics are "how and why" the respective regulations burden the right to possess arms for self-defense:

> "[I]ndividual self-defense is 'the *central component*' of the Second Amendment right. Therefore, whether modern and

> historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry."

Id. (emphasis in original) (internal citations omitted).

The Court further explained that analogical reasoning is "neither a regulatory straightjacket nor a regulatory blank check." *Id*. at 30. Courts should neither "uphold every modern law that remotely resembles a historical analog[,]" which would "endors[e] outliers that our ancestors would never have accepted," nor require the state to establish "a historical *twin*," as opposed to a "well-established and representative historical *analog*[.]" *Id*. (emphasis in original) (quotations omitted).

To illustrate an example, *Bruen* accepted that although "the historical record yields relatively few 18th- and 19th-century 'sensitive places' [such as legislative assemblies, polling places, and courthouses] where weapons were altogether prohibited," the Court was also "aware of no disputes regarding the lawfulness of such prohibitions," and thus, they could assume that the Second Amendment permits prohibiting arms at those places. *Id*. And a court "can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Id*. at 30-31 (emphasis in original). However, the analogy could not extend to "places where people

typically congregate and where law-enforcement and other public-safety professionals are presumptively available" because that would "exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense * * *." *Id*. at 31.

Rahimi upheld *Bruen*'s analytical model, explaining that a court must "consider[ ] whether the challenged regulation is consistent with the principles that underpin our regulatory tradition" and "ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" 602 US at __, 144 S Ct at 1898 (quoting *Bruen*) (citations omitted). As in *Bruen*, the "central" inquiry is "why and how" the regulations burden the right:

> "Why and how the regulation burdens the right are central to this inquiry. For example, if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations. Even when a law regulates arms-bearing for a permissible reason, though, it may not be compatible with the right if it does so to an extent beyond what was done at the founding. And when a challenged regulation does not precisely match its historical precursors, 'it still may be analogous enough to pass constitutional muster.' The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'"

Rahimi, 602 US at __, 144 S Ct at 1898 (quoting *Bruen*) (citations omitted).

The defendant in *Rahimi* was convicted of having violated 18 USC § 922(g)(8), which prohibits persons subject to domestic violence restraining orders from possessing firearms. *Id*. at __, 144 S Ct at 1895. The restraining order met three statutory requirements: Rahimi "'received actual notice and an opportunity to be heard before the order was entered'"; the order prohibited Rahimi from "'harassing, stalking, or threatening'" or "'engaging in other conduct that would place [the] partner in reasonable fear of bodily injury' to the partner or [the partner or Rahimi's] child"; and the order contained a finding that Rahimi represented "'a credible threat to the physical safety'" of the partner or his or her child," or prohibited the use, attempted use, or threatened use of "physical force" against those individuals. *Id*. (quoting 18 USC § 922(g)(8)).

The Court held that Section 922(g)(8) was consistent with the nation's historical tradition of firearm regulation, both on its face and as applied to Rahimi. *Id*. at __, 144 S Ct at 1898. The Court recounted that Colonial America inherited the English right to bear arms in self-defense, where the "Glorious Revolution [of 1688] cut back on the power of the Crown to disarm its subjects unilaterally" and the English Bill of Rights "guaranteed 'that the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." *Id*. at __, 144 S Ct at 1899 (quoting 1 Wm & Mary c 2, § 7, in 3 Eng Stat at Large 441 (1689)). English law limited

the right to Protestants and disarmed political opponents, brigands, and religious minorities. *Id*. But the same was not true here, where "state constitutions and the Second Amendment had largely eliminated governmental authority to disarm political opponents * * *." However, civil and criminal laws penalized those who threatened others. *Id*.

The Court identified two historical analogs which addressed gun and domestic violence. First, surety laws allowed magistrates to require people for whom the magistrate found probable cause of "suspected future misbehavior" to post bonds as assurance that they would not breach the peace. *Id*. at __, 144 S Ct 1899-1900. Significantly, "[w]ives also demanded sureties for good behavior, whereby a husband pledged to 'demean and behave himself well.'" *Id.*at __, 144 S Ct at 1900 (quoting 4 W. Blackstone, Commentaries on the Laws of England 253 (10th ed 1787)). And finally, but "importantly," at least nine early American jurisdictions permitted justices of the peace to arrest those who "go armed offensively," and, after a court heard complaints from those who had "reasonable cause to fear" that the arrestee would do the person harm, the court could impose a six-month surety against the arrestee's right to bear arms—though the arrestee could obtain an exception if he needed the arms for self-defense or other "legitimate reason." *Id*.

And second, "going armed" or "affray" laws, which originated in the fourteenth century and were incorporated into the common law as well as the

statutory law of at least four states, prohibited "'riding or going armed, with dangerous or unusual weapons, [to] terrify[ ] the good people of the land.'" *Id*. at __, 144 S Ct at 1901 (quoting 4 Blackstone 149) (alterations in *Rahimi*). The penalties for "going armed" included forfeiture of the arms used in the offense and imprisonment. *Id*.

The court identified four ways in which those analogs proved that the "prohibition on the possession of firearms by those found by a court to present a threat to others" in Section 922(g)(8) "fits neatly within the tradition the surety and going armed laws represent." *Id*. First, the surety and going-armed laws and the modern offense were "relevantly similar to those founding era regimes in both why and how it burdens the Second Amendment right" because they both restrict gun use to mitigate "demonstrated threats of physical violence" and do not broadly restrict the rights of the public generally. *Id*. Second, the "burden" that Section 922(g)(8) imposes on the right to bear arms "fits within our regulatory tradition" because like the surety and going-armed laws, it applies only "once a court has found that the defendant 'represents a credible threat to the physical safety' of another," *Id*. at __, 144 S Ct at 1901-02 (quoting 18 USC § 922(g)(8)I(i)). Third, like surety laws, which were of limited duration, Section 922(g)(8) applies only "so long as the defendant 'is' subject to a restraining order"; for Rahimi that period was one to two years. *Id*. at __, 144 S Ct at 1895, 1902. And fourth, the burden on the right to bear arms

fit the regulatory tradition in that "going armed laws provided for imprisonment and if imprisonment was permissible to respond to the use of guns to threaten the physical safety of others, then the lesser restriction of temporary disarmament that Section 922(g)(8) imposes is also permissible." *Id*.

Finally, the Court rejected Rahimi's argument that Section 922(g)(8) was unconstitutional because it prevented him from possessing guns in his home like the "absolute prohibition of handguns * * * in the home" that *Heller* invalidated. *Id*. (quoting *Heller*, 554 US at 636). The Court explained that *Heller* did not create a "categorical rule" that invalidated *every* law that restricted handgun possession in the home. *Id.* And it observed that *Heller* stated that "many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.'" *Id*. (quoting *Heller*, 554 US at 626, 627 n 6).[8]

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[8] The relevant portion of *Heller* states:

> "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Heller, 554 US at 626–27.

Rahimi's reference to *Heller*'s "presumptively lawful" phrasing does not even constitute *dicta* regarding the lawfulness of banning all felons from possessing firearms. *See id*. at __, 144 S Ct at 1910 (Gorsuch, J, concurring) ("Nor do we purport to approve in advance other laws denying firearms on a categorical basis to any group of persons a legislature happens to deem, as the government puts it, 'not 'responsible.'"). *Rahimi* merely used that passage to emphasize that *Heller*—a seminal Second Amendment case that first recognized the right to bear arms as a fundamental right on par with any other provision of the Bill of Rights—had been careful to limit its reach to the District of Columbia restriction before it.[9] Moreover, it is significant that the exhaustive majority opinion in *Bruen* did not discuss *Heller*'s "presumptively lawful" phrasing. New York attempted to justify its unconstitutional law as a restriction on bearing arms in "sensitive places," which *Heller* included with felons and the mentally ill in examples of restrictions that were beyond the scope of that opinion. Had the "presumptively lawful" passage from *Heller* carried any weight, the Court would have addressed it.

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[9] It would be another two years before the Court extended *Heller* beyond the District of Columbia restriction at issue in that case, and even then, it struck down a city handgun prohibition similar to the one at issue in *Heller*. *McDonald*, 561 US at 749.

D. No relevantly similar historical evidence supports permanently disarming felons.

Although *Rahimi* provides useful guidance about how to apply a *Bruen* analysis, the historical evidence underpinning its holding has less to offer to this case. The "how" and "why" does not match up. The surety and going-armed laws imposed *temporary* weapons restrictions on certain individuals and required a court to find that the defendant engaged in violent or threatening behavior. ORS 166.270 imposes a *permanent* ban against an entire class of people—felons—regardless of individual circumstances or behavior. In this case, it applies to defendant because of his prior nonviolent drug convictions. The surety laws permitted a person to retain their weapon for self-defense and the going-armed laws forfeited a person's weapons but did not necessarily prevent that person from obtaining new weapons with which to defend himself. ORS 166.270 does not permit a person with multiple drug-related felonies ever to possess a firearm or to regain his Second Amendment rights.

Bruen and *Rahimi* teach that an analog does not have to be a "historical twin," but the potential analogs to felon disarmament are not even historical relatives. This court discovered this problem when it analyzed how the Second Amendment informed Article I, section 27, in *Hirsch/Friend*, 338 Or at 622.

As *Hirsch/Friend* recognized, many colonies required the citizenry to maintain arms for the defense of their communities and arms were often

necessary for self-defense. *Id*. at 660-61. The restrictions that colonists placed on firearm ownership generally fell into three categories: prohibitions on Indigenous and Black people—and, after the Revolution, British loyalists—possessing firearms; prohibitions on hunting or shooting in urban areas; and going-armed laws. *Id*. at 661, 663. But, as the court recognized, "[i]t does not appear, however, that any laws of the colonial era expressly prohibited criminals from owning firearms or otherwise provided for the disarmament of that group." *Id*. at 662, 664. To the contrary, colonial militias were mandatory and died not exempt criminals; they also required all members to provide their own arms. *Id.* at 661-62.

Around the time of the ratification of the Bill of Rights, in 1791, many states proposed different versions of the Second Amendment, and some of those proposed disarming people who were not peaceable or engaged in rebellion. *Id*. at 667. But only a dissenting minority of the Pennsylvania ratifying convention proposed that the government could disarm people for having committed crimes. *Id*. at 666-67. This court concluded:

> "In short, the collective wording of the early proposed—and defeated—amendments to the United States Constitution did not clearly confirm a general understanding among the founders that criminals or felons were excluded from any traditional right to bear arms or that the government otherwise constitutionally could disarm them."

Id. at 668. If anything, the fact that only one minority delegation in one state even proposed that criminals would forfeit their right to bear arms demonstrates more than just the fact that disarming felons was not a part the historical tradition of firearm regulation. It shows that the founding generation contemplated disarming felons and rejected it because it was inconsistent with how they perceived the fundamental right to carry firearms in self-defense.

Hirsch/Friend next reviewed scholarship that attempted to link the framers' view of "citizen arms possession as a critical check on governmental tyranny and as necessary protection against outlaws and enemy attack" with the framers' concomitant philosophical ideals of "virtuous republican citizenship" to conclude that "historically, the Second Amendment guarantee excluded convicted felons." *Id*. at 668-69. But the scholarship that supported that theory "offer[ed] little by way of concrete historical example to support that conclusion." *Id*. at 670. As an example, this court discussed how, unlike the rest of a leading author's historical points, the author's assertion that "'[f]elons simply did not fall within the benefits of the common law right to possess arms' * * * bears no citation to any historical authority." *Id*. at 670-71 (quoting Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich L Rev 204, 266 (1983)). This court concluded: "[I]n light of the lack of definitive examples from the historical record, we find much of the conclusory scholarship respecting the right of felons to possess arms under

the Second Amendment to be unhelpful." *Id*. at 671. Nonetheless, this court reasoned that the "guiding philosophies" of European philosophers who opposed arming law breakers influenced the framers, and "demonstrate[d] the general view * * * that a certain criminal element—notably, 'outlaws' using weapons or otherwise committing injurious crimes * * * occupied a lesser status in the community than the responsible, law-abiding citizenry, particularly respecting the bearing of arms." *Id*. at 672-73.

Hirsch/Friend correctly concluded that no historical evidence supports disarming felons. The first law to prohibit felons from possessing firearms "was enacted in New York in 1897." Carlton F.W. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings LJ 1371, 1376 (2009). Such laws did not become widespread until several decades later. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?,* 32 Harv J L & Pub Pol'y 695, 708 (2009). That is the case in Oregon, which first prohibited felons from possessing guns in 1925. General Laws of Oregon 1925, ch 260, §§ 2, 5 (prohibiting felons from concealable firearms), and did not completely bar felons from possessing guns until 1989. *Burris*, 370 Or at 356.

As *Hirsch/Friend* observed, disarmament was a policy known to the founding generation, but they applied it in a discriminatory way that is antithetical to current jurisprudence. *See Ramos v. Louisiana*, 590 U.S. 83,

128-29 (2020) (Kavanaugh, J, concurring) (observing that the Court "has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice'" (quoting *Pena-Rodriguez v. Colorado*, 580 US 206, 221, 137 S Ct 855, 197 L Ed 2d 107 (2017)). Neither *Rahimi* nor *Bruen* discuss it despite it being before the Court. *See, e.g.*, Brief for *Amici Curiae* Second Amendment Law Scholars in Support of Petitioner at 15 n 4, Aug. 21, 2023, *United States v. Rahimi*, No. 22-915; Brief for *Amicus Curiae* National African American Gun Association, Inc. in Support of Petitioners at 4-11, July 16, 2021, *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, No. 20-843.

Those discriminatory laws do not meet *Bruen*'s "how" and "why" standards. As *Hirsch/Friend* discusses, colonial and early American laws restricted the arms possession of slaves, Indigenous peoples, Catholics who refused to swear loyalty during the French and Indian War, and loyalists following the Revolutionary War. But the "why" was different. The discriminatory laws targeted perceived "political threats to our nascent nation's integrity" during a period of war or "unprecedented social upheaval"; they did not target a class of citizens perceived to have "a lack of self-control," such as drug users. *United States v. Connelly*, 117 F4th 269, 278 (5th Cir 2024).

And the "how" was different too. For example, laws that targeted British loyalists "did not technically prohibit recusants from acquiring new arms." Marshall, 32 Harv J L & Pub Pol'y at 724. Similarly, English laws that

disarmed Catholics allowed them to keep "'such necessary Weapons as shall be allowed * * * by Order of the Justices of the Peace * * * for the defence of his House or Person.'" *Bruen*, 597 US at 45 n 12 (quoting 1 Wm & Mary c 15, § 4) (omissions in *Bruen*)). And these laws provided for restoration of the right to bear arms upon taking a loyalty oath. *Id*. at 683-84. By contrast, ORS 166.270 permanently deprives defendant of his Second Amendment right to possess a firearm for self-defense with the only exception being in the rare and limited circumstance where he might assert a justification defense against an imminent threat. *See* ORS 161.209, 161.219 (providing justification defense for use of force, limitations on use of deadly physical force).

As *Hirsch/Friend* recognizes, some writers have attempted to justify felon disarmament with an unsupported argument that the punishment for a felony was "usually" death, and thus, felons never regained their right to possess a firearm. 338 Or at 670. But capital punishment was not the regular punishment for common-law felonies in early years of the United States. 2 The Works of James Wilson 348 (Andrews ed 1896) ("At the common law, few felonies, indeed, were punished with death[.]"); *Kanter v. Barr*, 919 F3d 437, 458-61 (7th Cir 2019), *abrogated by Bruen*, 597 US at 1 ("Throughout the seventeenth and eighteenth centuries, capital punishment in the colonies was used 'sparingly,' and property crimes including variations on theft, burglary, and robbery 'were, on the whole, not capital.'") (Barrett, J, dissenting) (quoting

Lawrence M. Friedman, *Crime and Punishment in American History* 42 (1993)). And although the state stripped felons of their rights during their sentence, those rights "were suspended but not destroyed." *Id*. at 461. In short, "[t]hose who ratified the Second Amendment would not have assumed that a free man, previously convicted, lived in a society without any rights and without the protection of law." *Id*.

Not only is there no historical evidence that early American law countenanced disarming felons after they completed their sentences, but felons frequently bore arms. State and federal militia laws required men to keep and bear arms. 2 *Backgrounds of Selective Service: Military Obligation: The American*, Parts 1-14 (Vollmer ed, 1947). And exemptions to those laws did not relate to prior criminal status. *See, e.g.*, 1 Stat. 271, §2 (1792) (providing exemptions to militia act for elected officials, post officers, stage-drivers, ferrymen, inspectors, pilots, and mariners). Massachusetts law even protected the arms of some criminals, namely, officials found guilty of stealing public funds; it excluded arms from forced sales of their estates. 1786 Mass Acts 265.

Finally, *Hirsch/Friend* correctly understood the paucity of historical evidence to support the "virtual citizen" model. But what *Hirsch/Friend* could not have correctly analyzed was the import of that conclusion under the *Bruen*

standard.[10] *Bruen* burdens the government with providing historical "evidence" that justifies a Second Amendment infringement. 597 US at 24. The virtuous-citizen theory has no evidentiary support from historical laws or practice. Rather, the theory surmises what the framers might have thought based on their philosophical influences—despite the framers having left no trace that they shared those views about felon disarmament and despite disarming felons having been a policy option that the framers could have selected had they believed it consistent with their political philosophy.

Because this court did not have the benefit of *Heller* when it wrote *Hirsch/Friend*, it also could not evaluate the virtuous-citizen model in light of *Heller*'s watershed reassessment of the Second Amendment. As then-Judge, now Justice Barrett explained, the virtuous-citizen model does not fit with *Heller*:

> "The problem with this argument is that virtue exclusions are associated with civic rights—individual rights that 'require[ ] citizens to act in a collective manner for distinctly public purposes.' For example, the right to vote is held by individuals, but they do not exercise it solely for their own sake; rather, they cast votes as part of the collective enterprise of self-governance. Similarly, individuals do not serve on juries for their own sake, but as part of the collective enterprise of administering justice. Some

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[10] This court decided *Hirsch/Friend* without even the benefit of *Heller*'s recognition that the Second Amendment created an individual right. *See Hirsch/Friend*, 338 Or at 665 (observing "a lively, even acrimonious, debate as to whether [the Second Amendment] guarantees an individual right to bear arms").

> scholars have characterized the right to keep and bear arms as a civic right, because it was 'one exercised by citizens, not individuals * * *, who act together in a collective manner, for a distinctly public purpose: participation in a well regulated militia.'
>
> "* * * * *
>
> "*Heller*, however, expressly rejects the argument that the Second Amendment protects a purely civic right. It squarely holds that 'the Second Amendment confer[s] *an individual right* to keep and bear arms,' *Heller*, [554 US at 595] (emphasis added), and it emphasizes that the Second Amendment is rooted in the individual's right to defend himself—*not* in his right to serve in a well-regulated militia. The 'civic rights' approach runs headlong into both propositions. The parties have introduced no evidence that virtue exclusions ever applied to individual, as opposed to civic, rights. And if virtue exclusions don't apply to individual rights, they don't apply to the Second Amendment."

Kanter, 919 F3d at 462-63 (Barrett, J., dissenting) (first ellipsis and emphasis in original).

In short, as this court recognized in *Hirsch/Friend*, no relevantly similar historical evidence supports permanently disarming felons after they have completed their sentence. What is more, the few disarmament laws that existed satisfy neither the "how" nor the "why" standards of relevancy that *Bruen* and *Rahimi* require.

E. The state cannot meet its burden to show that a permanent disarmament of defendant—a person with prior drug-related felonies--is consistent with the Nation's history of firearm regulation.

Rahimi concluded that the history of firearm regulation supported a limited period of disarmament based on case-specific, judicially found facts (the

"how") that corresponded to historical evidence of such regulations to counteract the threat to civil peace that domestic abusers presented (the "why"). The same reasoning does not extend here, where the disarmament is permanent, there has been no judicial finding that defendant engaged in violent behavior, and the basis for the disarmament—prior drug felonies—did not exist at the founding.

What constituted felonies at the time of the Second Amendment remained "a good deal narrower than now." *Lange v. California*, 594 US 295, 311, 141 S Ct 2011, 210 L Ed 2d 486 (2021). "Many crimes classified as misdemeanors, or nonexistent, at common law are * * * [now] felonies." *Tennessee v. Garner*, 471 US 1, 14, 105 S Ct 1694, 85 L Ed 2d 1 (1985).

Drug offenses are a product of the twentieth century and were unknown to the framers. *See* Margarita Mercado Echegaray, *Note, Drug Prohibition in America: Federal Drug Policy and its Consequences*, 75 Rev Jur U P R 1215, 1218-19 (2006). They are "not closely analogous to founding-era smuggling crimes, which primarily focused on punishing importers who evaded customs duties." *United States v. Alaniz*, 69 F4th 1124, 1129 (9th Cir 2023). And it is not as though the framers were unaware of the dangers of substance abuse; there is just no evidence that they believed it would have justified something as drastic as permanently depriving someone of their right to possess firearms in self-defense.

The Fifth Circuit's recent analysis in *United States v. Connolly* is instructive. 117 F4th 269 (5th Cir 2024). *Connelly* concerned a marijuana user convicted of possessing firearms as an unlawful user of a controlled substance under 18 USC § 922(g)(3). *Id*. at 272. The Fifth Circuit rejected the government's reliance on the historical precedent for disarmament:

> "The government identifies no class of persons at the Founding who were 'dangerous' for reasons comparable to marijuana users. Marijuana users are not a class of political traitors, as English Loyalists were perceived to be. Nor are they like Catholics and other religious dissenters who were seen as potential insurrectionists."

Id. at 278.

The court also rejected the government's reliance on laws that restricted arms for persons who were actively under the influence of intoxicants because they were too broad:

> "These laws may address a comparable problem—preventing intoxicated individuals from carrying weapons—but they do not impose a comparable burden on the right holder. In other words, they pass the 'why' but not the 'how' test. Taken together, the statutes provide support for banning the *carry* of firearms *while actively intoxicated.* Section 922(g)(3) goes much further: it bans *all* possession, and it does so for an undefined set of 'user[s],' even while they are not intoxicated."

Id. at 281-82 (emphasis in original). Ultimately, the court concluded that while Section 922(g)(3) could be applied constitutionally in some instances—namely,

if the person was actively intoxicated *while carrying* a firearm, it was unconstitutional as applied to the defendant in that case. *Id*. at 283. [11]

So too in this case. Disarming *all* felons, regardless of the circumstances, expands the historical range of firearm regulation "far too broadly." *Bruen*, 597 US at 31. As the Ninth Circuit explained:

> "[T]here is no historical basis for Congress to effectively declare that committing any crime punishable by imprisonment for a term exceeding one year will result in permanent loss of one's Second Amendment right simply because that is how we define a felony today. To accept the Government's position would in effect exempt from Second Amendment protection entire categories of people whose crimes were misdemeanors or did not exist at the Founding. As one commentator put it, 'someone who shoplifts three times in seven years in West Virginia * * * twice operates a recording device in a movie theater in Utah * * * or releases a dozen heart-shaped balloons as a romantic gesture in Florida' will earn a lifetime ban on possessing a firearm under § 922(g)(1)

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[11] Since *Rahimi*, circuit courts have taken different analytical approaches to as-applied challenges to felon-in-possession laws. Some have applied a case-by-case approach that depends on the nature of the prior felony. *See United States v. Williams*, 113 F4th 637, 661–62 (6th Cir 2024) ("History shows that governments may use class-based legislation to disarm people it believes are dangerous, so long as members of that class have an opportunity to show they aren't. Through § 922(g)(1), Congress has decided to enact a class-wide disarmament of felons. As discussed above, that statute is constitutional as it applies to dangerous individuals. Because Williams's criminal record shows that he's dangerous, his as-applied challenge fails."); *see also United States v. Gailes*, 118 F4th 822, 828 (6th Cir 2024) (upholding categorical disarmament of individuals with valid, domestic-violence convictions); *United States v. Diaz*, 116 F4th 458, 467 (5th Cir 2024) (upholding conviction under § 922(g)(1) when prior felonies were for car theft, evading arrest, and possessing a firearm as a felon). Others have categorically upheld felon-in-possession laws because *Heller* did not "cast doubt on longstanding prohibitions on the possession of firearms by felons.'" *United States v. Jackson*, 110 F4th 1120, 1125 (8th Cir 2024) (quoting *Heller*, 524 US at 626-27)).

> because it is apparently a felony to do any of those things in those respective states.' That, in our view, is a bridge too far."

United States v. Duarte, 101 F4th 657, 690 (9th Cir 2024), *reh'g en banc granted, opinion vac'd*, 108 F4th 786 (9th Cir 2024) (quoting Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo L Rev 249, 269 (2020)) (other quotations, alterations, and citations omitted, ellipsis in *Duarte*).[12]

Even if *Rahimi* and the historical evidence of limited disarmament of dangerous people supported depriving *some* felons of their right to possess a gun for self-defense, *e.g.*, those convicted of crimes of violence or common-law felonies, no historical evidence supports extending potential disarmament to people convicted of modern, nonviolent felonies. Because the felonies upon which the state relied to convict defendant did not exist in the founding era and did not involve dangerous conduct for which a historical consequence was permanent disarmament, the "how" of ORS 166.270 is too broad and the "why" has no counterpart.

In sum, the framers drafted the Second Amendment in the wake of the Revolution against a Crown that tried to disarm its enemies. *Heller*, 554 US at

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[12] Although the Ninth Circuit vacated *Duarte* for rehearing en banc, defendant cites it because it provides relevant historical context.

594. The framers sought to protect a durable, individual "'right of self-preservation' so citizens could 'repel force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *Id*. (quoting "law professor and former Antifederalist" St. George Tucker's note to 1 Blackstone's Commentaries at 145-46 n 42 (alterations in *Heller* omitted)). It is antithetical to the framers' purpose to render the Second Amendment subordinate to the legislature's unfettered authority to label conduct a felony. *See Williams*, 113 F4th at 660 ("If courts uncritically deferred to Congress's class-wide dangerousness determinations, disarmament laws would most often be subject to rational-basis review. But that runs headlong into *Heller* * * *." (Citation omitted)). Instead, there is a line at felony disarmament the Second Amendment, and that line traces the historical record. Because the historical record does not support disarming people with drug-related felonies beyond the expiration of their sentence, ORS 166.270 violates the Second Amendment as applied to defendant.

CONCLUSION

This court should reverse the decision of the Court of Appeals and trial court's denial of defendant's motion for judgment of acquittal on Count 1, felon in possession of a firearm, and remand for further proceedings.

Respectfully submitted,

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Signed
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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that the word-count of this brief is 15,565 words. A motion to file extended brief on the merits is being filed along with this brief.

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on November 18, 2024.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Carson Whitehead #105404, Assistant Attorney General, attorney for respondent on review and email service to Andrew Flood #193011, and Henry Oostrom-Shah, Attorneys for Amicus Curiae, Metropolitan Public Defender.

Respectfully submitted,

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