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 No. 19CR11103 CA A174543 SC S070409

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on 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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Continued…

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INTRODUCTION

Oregon—like most states and the federal government—prohibits persons convicted of felonies from possessing firearms. Twenty years ago, this court upheld that prohibition against a challenge under Article I, section 27, of the Oregon Constitution, which protects the right to bear arms for self-defense. In the time since then, the United States Supreme Court has repeatedly stated that laws prohibiting felons from possessing firearms are presumptively valid under the Second Amendment.

Defendant challenges that long-standing case law, arguing that it overlooked pertinent history and has been superseded by recent decisions under the Second Amendment. But this case does not require the court to break new ground on the right to bear arms. As a matter of history and tradition, state legislatures have always had the power to restrict the possession of firearms by those, like convicted felons, whom the legislature deemed a risk to social order and public safety. Here, defendant has multiple felony convictions for drug possession and manufacture, as well as being a felon in possession of a firearm. The Oregon and United States Constitutions do not prohibit restricting his right to possess firearms.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

Does application of ORS 166.270(1), which bars possession of a firearm by a person who has been convicted of a felony, to defendant violate Article I, section 27?

First Proposed Rule of Law

No, ORS 166.270(1) does not violate Article I, section 27, as applied to defendant. Under Article I, section 27, the legislature may enact reasonable regulations to promote public safety as long as the enactment does not unduly frustrate the individual right to bear arms for the purpose of self-defense. Because the legislature may reasonably regard firearm possession by persons who have been convicted of felonies as a risk to public safety, Article I, section 27, allows the legislature to bar that possession.

Second Question Presented

Does application of ORS 166.270(1) to defendant violate the Second Amendment?

Second Proposed Rule of Law

No, ORS 166.270(1) does not violate the Second Amendment, as applied to defendant. Laws prohibiting felons from possessing firearms are presumptively valid under the Second Amendment. Moreover, gun-control laws are constitutional under the Second Amendment if they are relevantly

similar to the nation's historical tradition of firearm regulation. That historical tradition includes the disarmament of (1) groups who threated social order or posed a risk to public safety and (2) individuals who did not follow the law. ORS 166.270(1) is consistent within that historical tradition for all felonies, including defendant's.

BACKGROUND

A. Overview of Statutory Scheme

Like most states and the federal government, Oregon limits the ability of a convicted felon to possess firearms.[1] Oregon's statutes reflect the legislature's intent to disarm all felons—in some instances permanently, but in almost all instances for at least one year after a felony sentence is complete—

[1] 18 USC § 922(g)(1); Ariz Rev Stat §§ 13-904(A)(5), 13-3101(A)(7)(B), 13-3102(A)(4); Ark Code Ann § 5-73-103; Cal Penal Code § 29800(a); Colo Rev Stat § 18-12-108(1); Conn Gen Stat § 53a-217(a); DC Code § 22-4503(a); Del Crim Code Ann tit 11, § 1448(a)(1); Fla Stat §§ 790.23(1)(a), 790.23(1)(c); Ga Code Ann § 16-11-131(b); Haw Rev Stat § 134-7; 430 Ill Comp Stat 65/4(a)(2)(ii), 65/8(c); Iowa Code § 724.26(1); Ky Rev Stat Ann § 527.040(1); Me Stat tit 15, § 393(1)(A-1); Md Code Ann, Pub Safety § 5-133(b)(1), 5-101(g)(2); Mass Gen Laws ch 140, §§ 131, 129B(1)(i)-(ii); Minn Stat § 624.713, subd (1)(10)(i); Miss Code Ann § 97-37-5(1); Mo Rev Stat § 571.070(1); Neb Rev Stat § 28-1206(1)(a)(i); Nev Rev Stat § 202.360(1)(b); NY Penal Law §§ 400.00, 265.01(4); NC Gen Stat § 14-415.1; Okla Stat tit 21, § 1283(A); Tenn Code Ann § 39-17-1307(f)(1)(C); Va Code Ann. § 18.2-308.2; Wash Rev Code §§ 9.41.040(1)(a), 9.41.040(2)(a); W Va Code § 61-7-7(a)(1); Wis Stat §§ 941.29(1m)(a), 941.29(1m)(b); Wyo Stat §§ 6-8-102(a), 6-8-102(c).

based on its determination that a person convicted of a felony presents a threat to public safety.

ORS 166.270(1) provides that "[a]ny person who has been convicted of a felony * * * 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." A violation of ORS 166.270 by possessing a firearm is a class C felony. ORS 166.270(5). Subsection (4) sets out two exceptions to that prohibition. First, the prohibition does not apply to a person who has been convicted of only one felony—other than criminal homicide as defined in ORS 163.005—and who has been discharged from prison, parole, or probation for 15 years. ORS 166.270(4)(a). Second, the prohibition does not apply to a person who had their firearm rights restored under ORS 166.274 or 18 USC § 925(c) or had their record expunged. ORS 166.270(4)(b).

ORS 166.274 establishes the process and standards for restoration of firearm rights following one or more felony convictions. A person is not eligible for restoration if the underlying conviction was a person felony that involved use of a deadly weapon or an offense listed in ORS 137.700, which establishes mandatory minimum sentences for certain felonies. ORS 166.274(11)(a), (b). Further, the person is not eligible within one year of completing a felony sentence. ORS 166.274(11)(c). Otherwise, a person can petition for restoration annually by filing a petition with the circuit court.

ORS 166.274(3). The court is required to grant the petition if "the petitioner demonstrates, by clear and convincing evidence, that the petitioner does not pose a threat to the safety of the public or the petitioner." ORS 166.274(7). Under federal law, 18 USC § 925(c) establishes a similar process whereby a felon can make a showing that they are not dangerous and have their firearm rights restored.

Taken together, those statutes[2] reflect the legislature's intent to temporarily disarm all individuals convicted of a felony under Oregon law for a period of at least one year after a felony sentence is complete. After that period, a person can have their firearm rights restored by demonstrating that they are not a threat to public safety, unless the underlying crime involved a deadly weapon or was a particularly egregious person crime. And if the person has a single felony conviction that is not criminal homicide, that person is not subject to the felony prohibition in ORS 166.270 after 15 years.

B. Historical and Procedural Facts

In 2019, police officers executed a search warrant at defendant's home, where they found a rifle and a handgun, as well as methamphetamine. (Tr 7–11, 19–23, 35–37). The state charged defendant with being a felon in

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[2] A separate statute, ORS 166.250(1)(c)(C), also prohibits felons from possessing firearms, but that crime is a class A misdemeanor. Like ORS 166.270, ORS 166.250 does not apply to individuals who have had their firearm rights restored under ORS 166.274. ORS 166.250(1).

possession of a firearm, ORS 166.270(1), and unlawful possession of methamphetamine. In the indictment, the state alleged that defendant had a predicate felony for possession of methamphetamine from 2011. (ER 1). At his bench trial, the state submitted judgments showing four previous felony convictions: the 2011 conviction for methamphetamine possession, two convictions for manufacture of methamphetamine within 1,000 feet of a school in 2006, and a conviction for felon in possession of a firearm in 2006. (Exs 14, 15, 16).

At the close of the case, defendant moved for a judgment of acquittal, arguing that ORS 166.270(1) was unconstitutional as applied to him under Article I, section 27, and the Second Amendment because his prior felony convictions were not crimes of violence.[3] (Tr 54–65). The trial court denied the motion. In doing so, the trial court found that defendant's prior felony convictions (and the additional conviction for methamphetamine possession in this case) show that he was "persistently involved in criminal activity" and that he was a "risk to the public" based on his "inability to follow the law." (Tr 74). At sentencing, the record showed that defendant had 25 prior convictions, including a conviction for second-degree manslaughter in 1994. (Tr 96; TCF part 2 at 80–81 (amended criminal history worksheet)).

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[3] Defendant did not assert that he had his firearm rights restored.

Defendant appealed, arguing that ORS 166.270(1) could not be constitutionally applied to him under Article I, section 27, and the Second Amendment because his prior convictions were for non-violent felonies. After briefing was complete, the United States Supreme Court issued its decision in *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 US 1, 142 S Ct 2111, 213 L Ed 2d 387 (2022), and the parties submitted supplemental briefing to address the Second Amendment analysis. The Court of Appeals rejected defendant's Second Amendment argument, concluding that history and tradition supported the legislature's ability to disarm those it considered dangerous, including convicted felons. *State v. Parras*, 326 Or App 246, 254–57, 531 P3d 711 (2023). The court also rejected defendant's distinction between violent and non-violent felonies. *Id*. at 256. The court rejected defendant's Article I, section 27, argument without discussion.

SUMMARY OF ARGUMENT

Under ORS 166.270(1), a person with felony convictions cannot possess a firearm. In *State v. Hirsch/Friend*, 338 Or 622, 114 P3d 1104 (2005), *overruled on other grounds by State v. Christian*, 354 Or 22, 307 P3d 429 (2013), this court held that ORS 166.270 was facially valid under Article I, section 27, of the Oregon Constitution after conducting an exhaustive review of the text, case law, and history regarding that provision. This court concluded that Article I, section 27, permits reasonable regulations of firearms when the

regulation seeks to promote public safety and does not unduly restrict the right to armed self-defense. Under the Second Amendment, the United States Supreme Court—in *Heller*, *McDonald*, *Bruen*, and *Rahimi*—has repeatedly stated that laws prohibiting felons from possessing firearms are presumptively valid. Under its case law, the Second Amendment protects the right of "law abiding, responsible citizens" to bear arms for self-defense. Laws that restrict the right to bear arms must be consistent with the principles that underlie the historical tradition of firearms regulations.

In this case, defendant accepts the facial validity of ORS 166.270(1) but asserts that Article I, section 27, and the Second Amendment bar the state from applying the statute to him. Defendant is wrong.

As a matter of history and tradition, state legislatures have always had the power to restrict the possession of firearms by those, like convicted felons, whom the legislature deemed a risk to social order and public safety. This court's decision in *Hirsch/Friend* recognized that principle when it upheld ORS 166.270(1) under Article I, section 27. Further, although they would undoubtedly violate other constitutional provisions today, historical laws that disarmed groups like religious and racial minorities and those who refused to swear loyalty oaths to the United States show that the Second Amendment did not preclude legislatures from restricting firearm possession when the legislature believed the group to pose a threat. Additionally, at the time of the

adoption of the United States Constitution, the severe penalties for felony crimes—estate forfeiture and death—show that restrictions on the possession of firearms are also permissible.

In short, there is a robust historical tradition of disarmament for groups that the legislature deems dangerous. The legislature's classification of defendant's prior crimes as felony offenses is enough, standing alone, to prohibit his possession of firearms.

Nevertheless, if this court looks at defendant's specific convictions for methamphetamine possession, methamphetamine manufacture, and felon in possession, those convictions are serious crimes showing that defendant presents a risk to public safety. ORS 166.270(1) is valid as applied to him.

ARGUMENT

A. The record on review is limited to the evidence before the trial court at the time of defendant's motion for judgment of acquittal.

The evidence of defendant's criminal history was more limited at trial than it was at sentencing. Because this case involves a motion for judgment of acquittal at trial, this court reviews only the record that was before the trial court at the time of defendant's motion. *See State v. Beauvais*, 357 Or 524, 532, 354 P3d 680, 686 (2015) ("[T]he scope of the record on review is limited to the record before the trial court when it made the challenged ruling."). That record affects how this court reviews defendant's as-applied challenge to ORS 166.270(1).

At trial, the state submitted judgments of four previous felony convictions: a 2011 conviction for methamphetamine possession, two convictions for manufacture of methamphetamine within 1,000 feet of a school in 2006, and a conviction for felon in possession of a firearm in 2006. (Exs 14, 15, 16). The state did not introduce evidence of defendant's numerous convictions that predate 2006. Those convictions, including his conviction in 1994 for second-degree manslaughter, were not mentioned until sentencing. (Tr 86). In his motion for judgment of acquittal, defendant's argument focused on the judgments the state had introduced and asserted that those convictions provided an inadequate basis for permanent disarmament. (Tr 58–60).

This court's consideration of defendant's as-applied challenge is limited by the record developed at trial, which means that the court should not consider defendant's conviction for second-degree manslaughter. Limiting the record in that manner, however, cuts both ways. A person whose only convictions are felony drug offenses and felon-in-possession of a firearm would be eligible to seek restoration of their firearm rights under ORS 166.274. Accordingly, the question presented here is whether ORS 166.270(1) is constitutional as applied to a person who would be eligible to apply for restoration of his firearm rights under ORS 166.274. Although defendant's manslaughter conviction would prevent restoration, he did not make a record in the trial court that he was ineligible for restoration based on that conviction, and so it is not properly

considered on appeal.[4] *See* ORS 166.274(11)(b) (excluding persons convicted of crimes listed in ORS 137.700 from restoration); ORS 137.700(A)(f) (listing second-degree manslaughter).

B. Article I, section 27, does not bar application of ORS 166.270(1) to defendant.

Article I, section 27, provides: "The people shall have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." That right is not absolute. It permits "reasonable regulations to promote public safety as long as [an] enactment does not unduly frustrate the individual right to bear arms for the purpose of self-defense." *State v. Christian*, 354 Or 22, 33, 307 P3d 429 (2013) (citing *State v. Hirsch/Friend*, 338 Or 622, 640, 114 P3d 1104 (2005), *overruled on other grounds by Christian*, 354 Or at 40).

In *Hirsch/Friend*, this court upheld the constitutionality of prohibiting a convicted felon from possessing firearms under ORS 166.270(1). *Christian* then relied on *Hirsch/Friend* in applying a reasonableness standard to Article I, section 27, challenges, a standard that defendant does not address. Those cases remain good law and foreclose defendant's challenge in this case.

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[4] Should this court agree with defendant that ORS 166.270(1) cannot be constitutionally applied to individuals whose only convictions drug-related felonies, this court should remand to the trial court to consider defendant's full criminal history.

1. *Hirsch/Friend* established the facially validity of ORS 166.270(1), and *Christian* did not disturb that part of the case's holding or analysis.

In *Hirsch/Friend*, this court construed Article I, section 27, to determine whether that provision "protects the possession of a firearm by a person who has been convicted of a felony." 338 Or at 632. Using the methodology set out in *Priest v. Pearce*, 314 Or 411, 415–16, 840 P2d 65 (1992), the court conducted a thorough examination of the text of the Oregon Constitution, including other provisions of the Oregon Bill of Rights and provisions limiting the rights of felons, *Hirsch/Friend*, 338 Or at 632–36; the case law construing Article I, section 27, *Id*. at 636–43; and the historical circumstances relevant to the right to bear arms. *Id*. at 643–73.

Based on that examination, this court concluded that the right to bear arms is "not absolute" and identified a tradition of restrictions on the right. *Id.* at 675. For example, this court pointed to the longstanding prohibitions in Oregon and elsewhere on the concealed carry of firearms as reflecting "the state's role in ensuring public safety." *Id*. at 675. Turning to colonial history, this court highlighted that colonial governments prohibited hunting or shooting near urban areas and prohibited the carrying or brandishing of arms in a way that caused fear. *Id*. at 661. Near in time to the adoption of the Second Amendment, colonial governments disarmed individuals that posed a security

threat, like those who refused to swear a loyalty oath to the United States. *Id*. at 677.

From that tradition, *Hirsch/Friend* concluded that permissible restrictions on the right to bear arms share a "common thread * * * of protecting the public from identifiable threats to the public safety, such as serious criminal conduct and various harms resulting from the possession of arms." *Id.* at 678. The legislature thus has authority to "assess the threat to public safety that a particular group poses," and restrict the right to bear arms by members of such a group for the "purpose of protecting the security of the community against the potential harm that results from the possession of arms." *Id.* at 677.

Applying those principles to ORS 166.270(1), the court held that the legislature had permissibly restricted the possession of arms by convicted felons. The court first noted that the legislature "punishes felonies only as the result of a criminal prosecution" and that felonies are the most serious tier of crimes in Oregon. *Id.* at 678. Thus, a felony conviction "signifies a breach of society's most essential rules for obligatory conduct—rules that are central to the legislative task of protecting the public from violence and various forms of abuse." *Id.* at 679. Accordingly, a felony conviction places an individual within "a group whose conduct demonstrates an identifiable threat to public safety," and the legislature has authority to prohibit the possession of firearms by that group. *Id*.

In *Christian*, this court reiterated its holding in *Hirsch/Friend* and emphasized that permissible regulations of arms need only be reasonable. *Christian* upheld the facial constitutionality of a Portland ordinance that required a concealed-carry license to carry a loaded firearm in public. *Christian*, 354 Or at 41. The court explained that "the drafters of Article I, section 27, did not intend to deprive the legislature of the authority to specifically regulate the manner of possession or use of arms when it determines that such regulation is necessary to protect public safety." *Id.* at 31. To the contrary, "[i]t is a well-recognized function of the legislature * * * to restrain dangerous practices and to regulate the carrying and use of firearms and other weapons in the interest of public safety." *Id.* at 32 (quoting *State v. Robinson*, 217 Or 612, 618, 343 P2d 886 (1959)). As a result, *Christian* held "that the legislature has wide latitude to enact specific regulations restricting the possession and use of weapons to promote public safety." *Id.* at 33. Specifically, Article I, section 27, permits "reasonable regulations to promote public safety as long as [an] enactment does not unduly frustrate the individual right to bear arms for the purpose of self-defense." *Id.* Article I, section 27, thus allows "a contemporary legislative response to identifiable threats to public safety" so long as "the exercise of legislative authority reasonably restrict[s] the right to bear arms." *Id.* at 34.

To be sure, *Christian* also overruled one aspect of *Hirsch/Friend* and a prior case, *State v. Blocker*, 291 Or 255, 630 P2d 824 (1981). Both of those cases had permitted overbreadth challenges under Article I, section 27, without any argument or analysis as to why such challenges were appropriate. *Christian*, however, held that "the justification for recognizing overbreadth challenges in freedom of expression and assembly cases does not apply in the context of Article I, section 27." 354 Or at 40.

But *Christian* did not disturb the holdings in *Hirsch/Friend* concerning the meaning of Article I, section 27, or the facial validity of ORS 166.270(1). The court's rejection of the defendant's overbreadth challenge in *Hirsch/Friend* followed from the meaning of Article I, section 27, and the facial validity of the statute, not the other way around:

> [I]n enacting ORS 166.270(1), the legislature acted within its proper authority to restrict the possession of arms by the members of a group whose conduct demonstrates an identifiable threat to public safety. *It follows that ORS 166.270(1) is not unconstitutionally overbroad,* as defendants contend.

Hirsch/Friend, 338 Or at 679 (emphasis added). Accordingly, *Hirsch/Friend* remains good law, except on the narrow issue of overbreadth challenges under Article I, section 27. *Hirsch/Friend* and *Christian* are binding precedent on what Article I, section 27, means and how the legislature can regulate the possession of firearms under the Oregon Constitution.

2. Defendant's as-applied challenge is foreclosed by *Hirsch/Friend* and *Christian*.

Defendant's as-applied challenge is generalized. He argues that the statute is unconstitutional as applied to "felony drug offenses" because the framers would have viewed that application as an impermissible limitation on the right to self-defense. (BoM 36).

That generalized argument is easily disposed of by this court's cases. Under the test from *Hirsch/Friend* and *Christian* there are two considerations in determining whether the legislature's restriction on the right to bear arms is reasonable: (1) does the law reasonably seek to promote public safety, and (2) does the restriction unduly frustrate the right to armed self-defense? *Christian*, 354 Or at 33.

As to the first question, a felony conviction "signifies a breach of society's most essential rules for obligatory conduct—rules that are central to the legislative task of protecting the public from violence and various forms of abuse." 338 Or at 679. Accordingly, felons constitute "a group whose conduct demonstrates an identifiable threat to public safety" and the legislature can restrict their access to firearms. *Id*. Necessarily, a person who commits a felony-level drug offense fits within that group. Defendant makes no effort to explain why his felony drug convictions (or his prior conviction under

ORS 166.270(1)) do not pose the threat to public safety identified in *Hirsch/Friend*.

This court does not need to perform any additional analysis as to the first question. Nothing in *Hirsch/Friend* suggests that Article I, section 27, requires a court to second-guess the legislature's assessment that a given felony is sufficiently serious to warrant a prohibition on possessing firearms. Performing that kind analysis would entangle the courts in policy decisions about the relative severity of crimes—decisions that are entrusted to the legislative department, not the judicial department. It is entirely reasonable for the legislature to restrict a person's possession of firearms when that person has shown a willingness to commit a serious crime.[5] *See State v. Beeman*, 290 Or App 429, 434, 417 P3d 541 (2018), *rev den*, 363 Or 119 (2018) (noting that the legislature "can determine that having felons in possession of weapons has an obvious relationship to public safety").

As to the second question, prohibiting defendant from possessing firearms does not unduly frustrate his right to armed self-defense. This question

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[5] In any event, numerous courts have observed that "offenses relating to drug trafficking * * * are closely related to violent crime." *United States v. Barton*, 633 F3d 168, 174 (3d Cir 2011); s*ee also United States v. Torres-Rosario*, 658 F3d 110, 113 (1st Cir 2011); *United States v. Diaz*, 864 F2d 544, 549 (7th Cir 1988); *United States v. Stone*, 608 F3d 939, 947 n 6 (6th Cir 2010).

concerns the scope of the restriction on the right as it relates to public safety. *See Hirsch/Friend*, 338 Or at 677–78; *State v. Kessler*, 289 Or 359, 372, 614 P2d 94 (1980) (concluding that a complete ban on possession of a billy club in the home violated the right to armed self-defense); *State v. Delgado*, 298 Or 395, 403–04, 692 P2d 610 (1984) (reaching the same conclusion regarding a complete ban on switch-blade knives). For a restriction like ORS 166.270(1), the second question is effectively answered by the first. Under *Hirsch/Friend*, the legislature may disarm those who "pos[e] identifiable threats to the safety of the community by virtue of the earlier commission of serious criminal conduct." 338 Or at 678. As discussed above, defendant's felony convictions place him within the class of individuals the legislature has determined pose a safety risk and so restricting his right to bear arms serves the purpose of protecting public safety.

Additionally, the scope of the restriction imposed by ORS 166.270(1) on the right to armed self-defense is reasonable. First, firearms are not the only "arms" that can be used for self-defense. Defendant is not barred from possessing a variety of other weapons that could be used for defensive purposes. *See Delgado*, 298 Or at 400–01 (explaining that "arms" under Article I, section 27, include handheld weapons like clubs and knives that were "commonly used by individuals for personal defense" when the Second Amendment and Article I, section 27, were adopted). By prohibiting defendant

from possessing firearms, the legislature has limited his access to a class of weapons that pose a particular threat to public safety while allowing him to possess other weapons, ones that do not pose the same threat.

Second, those who have only felony drug offenses can apply to have their firearm rights restored. Under the process set out in ORS 166.274—which is available unless the underlying felony was a person crime committed with a deadly weapon or one of the egregious person crimes listed in ORS 137.700—a person can establish that they do not pose a threat to public safety and regain their right to possess firearms. ORS 166.274(3); ORS 166.274(11)(a), (b). Accordingly, the restriction on defendant's possession of firearms—based on the record developed at the trial court—is not absolute.

In short, ORS 166.270(1) is a reasonable restriction on the right to bear arms; it does not violate Article I, section 27, as applied to defendant.

3. Defendant's attempts to limit *Hirsch/Friend* fail.

Defendant does not ask this court to overrule *Hirsch/Friend* but argues that the case is not "*stare decisis* that precludes this court from holding that ORS 166.270 is unconstitutional as applied to defendant." (BoM 28). Defendant asserts that *Hirsch/Friend* should be read as a "failed facial challenge" owing to *Christian*'s disavowal of overbreadth challenges under Article I, section 27, and "limited to its holding." (BoM 28, 36).

Hirsch/Friend, of course, did not decide whether Article I, section 27, bars application of ORS 166.270(1) to individuals like defendant; that was not the issue presented. But the decision's construction of Article I, section 27, and how the court analyzes a law challenged under that provision were not overruled by *Christian*. As noted, *Christian* relied on *Hirsch/Friend* in examining the facial validity of Portland's ordinance barring public carry of a loaded firearm without a license. Both of those cases remain good law.

Although defendant asserts that *Hirsch/Friend* should be limited to its holding, which appears to mean accepting that ORS 166.270(1) is facially valid but disregarding the case's analysis, none of defendant's arguments show that *Hirsch/Friend* was wrongly decided. "[T]he principle of *stare decisis* dictates that this court should assume that its fully considered prior cases are correctly decided. Put another way, the principle of *stare decisis* means that the party seeking to change a precedent must assume responsibility for affirmatively persuading us that we should abandon that precedent." *State v. Ciancanelli*, 339 Or 282, 290, 121 P3d 613 (2005). To meet that burden, the party must show that the court erred because it was "not presented with an important argument or failed to apply [the] usual framework for decision or adequately analyze the controlling issue." *Farmers Ins. Co. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011).

Defendant has not carried that burden. First, *Hirsch/Friend* applied the accepted methodology for analyzing original provisions of the Oregon Constitution; the discussion of the text, case law, and historical circumstances occupies dozens of pages. 338 Or at 632–673. There are no methodological flaws that warrant revisiting the court's analysis of Article I, section 27.

Second, defendant has not presented the court with any new arguments. The briefing in *Hirsch/Friend* contained nearly identical arguments to those in defendant's brief, including the argument that other provisions of the Oregon Constitution do not support restriction of the right to bear arms; the argument that the constitutions of Kentucky and Indiana cast doubt on the ability of the state to prohibit firearm possession; the argument that Oregon territorial law did not prohibit felons from possessing firearms; and the argument that felons were not disqualified from militia service. *See* Defendant's Opening Brief on the Merits, *State v. Hirsch/Friend*, S49370, at 8–28 (Nov 19, 2002). The opinion in *Hirsch/Friend* considered—and rejected—all of those issues. 338 Or at 634–36 (discussing other provisions of the Oregon Constitution); 338 Or at 643–50 (discussing Kentucky and Indiana constitutions); 338 Or at 651 (discussing Oregon territorial laws); 338 Or at 651–52, 664 (discussing militia service).

Nor did *Hirsch/Friend* "wholly overlook[] the historical backdrop" of daily life in nineteenth century Oregon, as defendant asserts. (BoM 34). In defendant's view, the lived experience of framers—settlers in a remote and

hostile land—shows that firearms were "a regular and necessary tool of frontier life" and that the framers would not have condoned disarming felons. (BoM 21–26). But that point, too, was argued by the defendant in *Hirsch/Friend*. *See* Defendant's Opening Brief on the Merits, *State v. Hirsch/Friend*, S49370, at 13 ("By the beginning of the nineteenth century firearms were common and essential on the frontier. * * * The federal government encourage settlers to have firearms." (citations omitted)). A related point from colonial law was discussed by this court in *Hirsch/Friend*. 338 Or at 661 ("Many early colonial statutes required the citizenry to arm itself, largely for the defense of their isolated and endangered communities.") (citation and quotation marks omitted). And this court noted in *State v. Kessler*, also discussed in *Hirsch/Friend*, that "the justification for a right to bear arms in defense of person and home probably reflects the exigencies of the rural American experience." *Kessler*, 289 Or at 368. In short, the arguments that defendant now makes were considered in previous cases.

Third, defendant has not shown that this court failed to adequately analyze a controlling issue. In addition to asserting that *Hirsch/Friend* did not adequately consider Oregon's historical circumstances, defendant asserts that the decision "relied heavily on Second Amendment principles," like the "virtuous citizen" theory, that have now been rejected by United States

Supreme Court. (BoM 35, 56–57). That is a misreading of *Hirsch/Friend* and the Second Amendment case law.

In *Hirsch/Friend*, the court engaged in a detailed, nuanced discussion of the "virtuous citizen" theory that some Second Amendment scholars had advanced, which asserted that "the framers never intended felons to obtain the benefit of the Second Amendment guarantee because they did not qualify as 'virtuous citizens.'" *Hirsch/Friend*, 338 Or at 670. The court concluded that the historical evidence in that scholarship was lacking and rejected the conclusion that felons were categorically excluded from the Second Amendment. *Id.* at 669–71, 671 n 47. The court then discussed the related "political view of the 'virtuous citizen,'" which asserted that the right to bear arms carried a corresponding duty to act virtuously. Under that notion, "by committing serious crime, the lawbreaker's right to bear arms is subject to restriction. *Id*. at 676. That idea—that the framers would have considered a lawbreaker's right to bear arms to be subject to restriction—has not been rejected by the United States Supreme Court. To the contrary, and as discussed below, the United States Supreme Court case law holds that the Second Amendment protects the right of "law-abiding, responsible citizens" to bear arms for self-defense and declares that laws restricting the right of felons to

possess firearms are presumptively constitutional.[6] *District of Columbia v. Heller*, 554 US 570, 626–27 & n 26, 635, 128 S Ct 2783, 171 L Ed 2d 647 (2008); *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 US 1, 80, 142 S Ct 2111, 213 L Ed 2d 387 (2022) (Kavanaugh, J., concurring).

In short, defendant has provided no sound reason to overrule *Hirsch/Friend* or disregard its analysis. And defendant has not challenged *Christian* at all. Those cases remain good law and defeat defendant's as-applied challenge.

4. Even if *Hirsch/Friend* and *Christian* did not control, defendant's arguments would not be well taken.

This court does not need to consider defendant's arguments about the meaning of Article I, section 27, to affirm, for all the reasons discussed above. If it were to consider them, they do not support a contrary result.

Defendant's textual argument highlights the lack of any express constitutional authority for the legislature to restrict the possession of firearms by those who commit felony offenses. (BoM 9–16). That misses the point. The fact that the framers did not limit the possession of firearms by felons in the text of the constitution says little about whether they believed that the

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[6] In *Rahimi*, the court rejected "the Government's contention that Rahimi may be disarmed simply because he is not 'responsible.'" *United States v. Rahimi*, 602 US 680, 701, 144 S Ct 1889, 1903, 219 L Ed 2d 351 (2024). But that does not undercut *Hirsch/Friend*, which did not uphold disarming felons merely because they were not "responsible."

legislature could create such limitations by statute. As with the United States Constitution, the core provisions of Oregon's Bill of Rights were intended to embody preexisting rights. *See Hirsch/Friend*, 338 Or at 644–73 (discussing preexisting views of the right to bear arms)*; Ciancanelli*, 339 Or at 299–310 (discussing preexisting views of the right to free expression). Accordingly, it is not enough to say that the text of Article I, section 27, fails to expressly authorize limitations on the right to bear arms. As shown in *Hirsch/Friend*, the historical scope of the right permits such limitations. That is the case even for constitutional provisions that seem absolute. Article I, section 8, for example, provides that "no law shall be passed restraining" speech. That absolute command, however, does not apply to laws that fall within an historical exception to free speech protections. *See State ex rel Rosenblum v. Living Essentials, LLC*, 371 Or 23, 47, 529 P3d 939 (2023) (discussing the historical exceptions to Article I, section 8).

Defendant's arguments about the historical regulation of firearms also fail to show that ORS 166.270(1) is unconstitutional under Article I, section 27. In reviewing such regulations, the point of the historical inquiry is not to determine whether the framers themselves intended to prohibit felons from possessing firearms, or even to determine whether the framers themselves believed—back in 1859—that armed felons necessarily posed a significant social threat. The correct inquiry is whether the framers believed that the

legislature would possess authority to prohibit felons from possessing firearms, should it decide that such a prohibition was warranted. *See Hirsch/Friend*, 338 Or at 644, 646, 677 (discussing whether the framers intended to "deprive the legislature of authority" to regulate the bearing of arms in adopting Article I, section 27). Defendant's arguments do not show that the framers intended to deprive the legislature of that authority.

Reduced to its essence, defendant's view of history is that firearms were simply too important in territorial Oregon for the framers to approve of disarming felons. (*See, e.g.*, BoM 22 ("Guns played a fundamental role in Oregon's territorial history."); BoM 25 ("The framers at the Oregon Constitutional Convention likely would have viewed permanent disarmament as nothing short of a death sentence."). Defendant calls particular attention to the framers' individual experiences in armed conflict and their status as rural property owners. (BoM 25–26). Accepting the fact that firearms were an important tool for the framers and other settlers in territorial Oregon, however, does not show that the framers intended to prohibit legislation that would restrict firearm possession.

For example, an 1868 statue "entitled" only white, male citizens over the age of 16 to possess certain firearms:

> Every white male citizen of this state above the age of sixteen years, shall be entitled to have, hold, and keep, for his own use and defense, the following firearms, to wit: either or any one of the

> following named guns, and one revolving pistol: a rifle, shotgun (double or single barrel), yager, or musket; the same to be exempt from execution, in all cases, under the laws of Oregon.

General Laws of Oregon, Misc Laws, ch XXII, § 1, p 613 (Deady & Lane 1843–1872) (effective Oct 1868). That provision, like other early laws and constitutional provisions, reflects the harmful racial and gendered prejudices that were then prevalent, which the state now disavows in the strongest terms. The statute, however, also shows that any "entitlement" to possess firearms for the purposes of self-defense was not universal in the view of legislators close in time to the adoption of Article I, section 27. The legislature instead possessed authority to decree—as it implicitly did by creating the quoted statute—that some segments of the population were not "entitled" to possess firearms exempt from execution for the satisfaction of judgments.

In sum, there is no reason to look past *Hirsch/Friend* and *Christian* to decide defendant's Article I, section 27, challenge. But if the court does, defendant's arguments about the text, context, and history of that provision fail.

C. The Second Amendment does not bar application of ORS 166.270(1) to defendant.

Defendant's Second Amendment argument fares no better than his Article I, section 27, argument. 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."

That provision protects the right of "law-abiding, responsible citizens" to bear arms for self-defense. *District of Columbia v. Heller*, 554 US 570, 635, 128 S Ct 2783, 171 L Ed 2d 647 (2008). Under the Second Amendment, the court performs an historical analysis to determine "if the challenged regulation is consistent with the principles that underpin our regulatory tradition." *United States v. Rahimi*, 602 US 680, 692, 144 S Ct 1889, 219 L Ed 2d 351 (2024) (citing *New York State Rifle & Pistol Assn., Inc. v. Bruen*, 597 US 1, 142 S Ct 2111, 213 L Ed 2d 387 (2022)). In performing that analysis, a court must determine whether the challenged 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.'" *Rahimi*, 602 US at 692 (quoting *Bruen*, 597 US at 29).

Although the United States Supreme Court has yet to directly address the constitutionality of a felon-in-possession statute, *Heller* and the Court's subsequent cases have all assured the lower courts that such laws are presumptively valid. *See Heller*, 554 US at 626–27 & n 26; *Rahimi*, 602 US at 699 (quoting *Heller*). This court should take those assurances at face value and reject defendant's challenge to ORS 166.270(1). Defendant has multiple felony convictions; the Second Amendment does not prohibit restricting his right to bear arms.

But even if this court looks beyond those assurances, ORS 166.270(1) is consistent with historical regulation of firearms under the test from *Bruen* and *Rahimi* and is valid as applied to defendant. Much of the relevant history is set out in *Hirsch/Friend*, and that history has been discussed extensively in post-*Bruen* cases. The history reveals that legislatures have always had authority to restrict the right to bear arms for groups who threaten social order or pose a risk to public safety. And legislatures have always had authority to restrict the right to bear arms by those who did not follow the law. ORS 166.270(1) does not violate the Second Amendment by restricting defendant's right to possess a firearm based on his previous felony convictions.

1. ORS 166.270(1) is presumptively valid.

Although the United States Supreme Court has struck down some gun-control laws in recent years, it has never struck down—or even questioned—the constitutionality of felon-in-possession laws. On the contrary, every single one of its decisions has said that such laws are permissible and that nothing in the post-*Heller* line should be thought to suggest otherwise. Beginning with *Heller*, the Court declared that laws prohibiting felons from possessing firearms are "presumptively lawful." *Heller*, 554 US at 626–27 & n 26. *Rahimi* repeated those assurances. *Rahimi*, 602 US at 699 (quoting *Heller*). So did Justice Kavanaugh's concurrence in *Bruen*, 597 US at 80 (Kavanaugh, J., concurring)

(quoting *Heller*), and the plurality opinion in *McDonald v. City of Chicago*, 561 US 742, 786, 130 S Ct 3020, 177 L Ed 2d 894 (2010) (quoting *Heller*).

In *Heller*, the Court considered the constitutionality of a District of Columbia law that banned the possession of handguns in the home and required any lawful firearm to be rendered inoperable. The Court engaged in a lengthy analysis of the adoption of the Second Amendment, beginning with the text of the provision and then considering analogous state constitutional provisions that predated ratification of the Second Amendment. *Heller*, 554 US at 579–603. The Court then considered post-ratification commentary and laws that reflected how the Second Amendment was interpreted in the 19th century. *Id*. at 605–19. The Court concluded that the Second Amendment protects an individual right to bear arms for self-defense. *Id.* at 595. Turning to the challenged law, the Court held that it failed under "any of the standards of scrutiny" the Court would employ in cases concerning constitutional rights. *Id*. at 628. First, the law operated as a *complete ban* on the most common type of weapon used for self-defense in the home—the handgun. *Id*. at 629. Second, the law required rendering any lawful firearm inoperable, which prevented its use in home for self-defense. *Id*. at 630.

In announcing its construction of the Second Amendment, *Heller* was careful to limit the reach of the decision and made clear that felon-in-possession laws remained valid. The Court explained:

> 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 (citations omitted). The Court repeated those assurances in *McDonald*, which held that the Second Amendment is applicable to the states. 561 US at 786, 791 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill[.]'").

In *Bruen*, the Court addressed the constitutionality of a New York law that prohibited possessing a firearm—whether openly or concealed or within the home—without a license. 597 US at 11–12. To receive a license to carry a firearm outside the home, the applicant had to prove that "proper cause exists," a standard which gave the state discretion over who could exercise the right to bear arms. *Id*. at 11–14. As in *Heller*, the Court explained that the Second Amendment protects the right of "ordinary, law-abiding citizens" to public carry of firearms for self-defense. *Id*. at 9–10. The Court then articulated a new test, one that does not permit constitutional balancing. "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id*. at 17. For a regulation of the right to bear arms to be constitutional, the state "must demonstrate that the

regulation is consistent with this Nation's historical tradition of firearm regulation." *Id*.

After examining laws that restricted the public carry of firearms at the time the Second Amendment was ratified, as well as post-ratification laws, the Court concluded that New York had not identified "an American tradition justifying the State's proper-cause requirement." *Id*. at 70. Although historical restrictions "limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials," that tradition did not justify New York's broad restriction of public carry, a restriction that turned on an exercise of discretion by state officials. *Id*. In his concurrence, Justice Kavanaugh, joined by Chief Justice Roberts, reiterated the Court's declaration from *Heller* and *McDonald* that felon-in-possession laws and other longstanding restrictions on the right to bear arms are presumptively lawful. *Id*. at 80–81 (explaining that the Second Amendment allows a "variety" of gun regulations and quoting *Heller* and *McDonald*).

In *Rahimi*, the Court considered a challenge to 18 USC § 922(g)(8), which prohibits a person from possessing a firearm if that person is subject to a domestic violence restraining order and the order contains a finding that the person poses a credible threat of violence to a family member. 602 US at 684–86. Following the analysis set out in *Bruen*, the Court examined historical laws

that authorized disarmament, emphasizing the longstanding surety laws and "going armed" laws of the 18th and 19th centuries. The Court concluded that "[o]ur tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others." *Id*. at 700. In rejecting the defendant's argument that the Second Amendment forbade prohibitions on firearms in the home, the Court explained that "*Heller* never established a categorical rule" barring such prohibitions and emphasized, again, "that many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.'" *Rahimi*, 602 US at 699 (quoting *Heller*, 554 US at 626–27).

Although the repeated declarations regarding the presumptive validity of felon-in-possession laws are dicta, they are dicta of the strongest sort. *See McCoy v. Mass. Ins. Of Tech.*, 950 F2d 13, 19 (1st Cir 1991) ("We think that federal [ ] courts are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when * * * a dictum is of recent vintage and not enfeebled by any subsequent statement."). The Court's statements directly limit the scope of the Court's holdings on the exact topic of this case, explaining that "nothing" in *Heller*, *McDonald*, *Bruen*, or *Rahimi* "cast[s] doubt on longstanding prohibitions on the possession of firearms by felons." 554 US at 626–27.

In reliance on those statements, the Eighth, Tenth, and Eleventh Circuits have rejected as-applied challenges to 18 USC § 922(g)(1), the federal statute prohibiting felons from possessing firearms, and have concluded that the federal statute is constitutional in all applications. *United States v. Jackson*, 110 F4th 1120 (8th Cir 2024); *Vincent v. Garland*, 80 F4th 1197 (10th Cir 2023), *cert granted, judgment vac'd*, 144 S Ct 2708 (2024) (remanded for reconsideration under *Rahimi*); *United States v. Dubois*, 94 F4th 1284 (11th Cir 2024), *pet for cert filed* Oct 8, 2024 (No. 24-5744).

The most helpful case is *Jackson*. There, the Eighth Circuit viewed the Court's assurances in *Heller*, *McDonald*, *Bruen*, and *Rahimi* as sufficient to uphold § 922(g)(1) but also reviewed the historical record. Based on that review, the court concluded that the right to bear arms was "subject to restrictions that included prohibitions on possession by certain groups of people" and identified two underlying historical principles. 110 F4th at 1126. First, legislatures "traditionally possessed discretion to disqualify categories of people from possessing firearms to address a danger of misuse by those who deviated from legal norms, not merely to address a person's demonstrated propensity for violence." *Id*. at 1127. Second, and relatedly, legislatures "historically prohibited possession by categories of persons based on a conclusion that the category as a whole presented an unacceptable risk of danger if armed." *Id*. at 1128. Given the Supreme Court's declarations that

felon-in-possession laws were valid and in light of the historical record, *Jackson* determined that "there is no need for felony-by-felony litigation regarding the constitutionality of § 922(g)(1)." *Id*. at 1125.

In *Vincent*, the Tenth Circuit adhered to its pre-*Bruen* precedent, which had relied on the assurances in *Heller* to conclude that § 922(g)(1) was constitutional in all applications. *Vincent*, 80 F4th at 1201–02 (discussing *United States v. McCane*, 573 F3d 1037 (10th Cir 2009). In *Dubois*, the Eleventh Circuit relied on its post-*Heller* but pre-*Bruen* precedent, which had concluded that felons were not qualified to possess firearms, as a class, because they were not law-abiding citizens. 94 F4th at 1292 (discussing *United States v. Rozier*, 598 F3d 768 (11th Cir 2010). Both *Vincent* and *Dubois* concluded that *Bruen* did not abrogate circuit precedent upholding § 922(g)(1).

The state discusses the historical tradition of firearms regulation that supports ORS 166.270(1) below, but resort to that history is not necessary. This court can take the Supreme Court's repeated assurances at face value: none of its Second Amendment cases call into question prohibitions on felons possessing firearms. Here, the record at the trial court showed that defendant had four such convictions and so disarming him does not violate the Second Amendment.

2. The historical principles underlying the Second Amendment show that legislatures retained authority to disarm groups that posed a threat and individuals who violated the law.

Under *Bruen*, as clarified in *Rahimi*, a regulation of firearms is constitutional "if the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Rahimi*, 602 US at 692. Importantly, *Bruen* and *Rahimi* do not require the state to identify a historical regulation that is identical to the modern one. *Id*. In determining whether the contemporary regulation is consistent with tradition, "[w]hy and how the regulation burdens the right [to possess firearms] are central" to the question of its constitutionality. *Id*. (citing *Bruen*, 597 US at 30).

The federal circuit courts, before *Rahimi* and after, have engaged in an extensive survey of historical disarmament laws. Much of that survey is broadly consistent with what this court examined in *Hirsch/Friend*. Although the circuit courts diverge on how they have addressed as-applied challenges and what level of specificity they require to satisfy *Bruen* and *Rahimi*, they agree on at least three historical principles. One, legislatures commonly disarmed groups that the legislature perceived to be a threat to social order or public safety—including wrongfully persecuted groups like Catholics and other religious minorities, racial minorities, slaves, Native Americans, and those unwilling to swear loyalty oaths. Although laws classifying those groups as threats would obviously be unlawful under other constitutional provisions today, their long

history reflects that the Second Amendment permits group-based safety restrictions. Two, legislatures commonly imposed severe penalties on convicted felons, including death and estate forfeiture, that support disarmament for felons now. Three, the ratification debates show an understanding of the right to bear arms that included the ability of legislatures to restrict the right for those who committed crimes.

a. At the founding, legislatures regularly disarmed classes of individuals that the legislature determined to be threatening to social order or public safety.

The history of firearm restrictions before and at the time the Second Amendment was adopted shows that legislatures regularly disarmed classes of individuals that the legislature determined to be threatening to social order or public safety.

As discussed in *Hirsch/Friend*, *Heller*, and *Bruen*, the English Bill of Rights, adopted by Parliament in 1689, is the predecessor to the Second Amendment. It declared that "Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." 1 W & M, 2d sess, ch 2, (1689). At the same time, Parliament passed a law disarming Catholics, as a group. An Act for the Better Securing the Government by Disarming Papists and Reputed Papists, 1 W & M, 1st sess, ch 15 (1688); *see* Joyce Lee Malcom, *To Keep and Bear Arms* 18–19, 122–23 (1994) (explaining that Protestants feared revolt, massacre, and counter-revolution

from Catholics); C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv J L & Pub Pol'y 695, 723 (2009) ("In short, the stated principle supporting the disability was cause to fear that a person, although technically an English subject, was because of his beliefs effectively a resident enemy alien liable to violence against the king."). Those laws reflect the principle that the right to bear arms was limited from the beginning, and the right could be restricted based on group membership. *See Bruen*, 597 US at 44 (The right to bear arms was "initially limited—it was restricted to Protestants and held only against the Crown, but not Parliament.").

The American experience also reflects limitations on the right to bear arms based on membership in a group perceived to be threatening. In colonial America, governments disarmed religious minorities. In Massachusetts in 1630, the colonial government disarmed supporters of Anne Hutchinson, a religious dissident who had been banished from the colony for her critique of the clergy. Joseph G.S. Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 Wyo L Rev 249, 263 (2020). Later, Maryland, Virginia, and Pennsylvania confiscated firearms from Catholic residents during the French and Indian War in the 1750s. *See* Michael A. Bellesiles, *Gun Laws in Early America: The Regulation of Firearms Ownership, 1607-1794*, 16 Law & Hist Rev 567, 574 (1998); Greenlee, 20 Wyo L Rev at 263.

In colonial America, legislatures disarmed Native Americans or restricted the sale of arms to them. *Jackson*, 110 F4th at 1126 (citing Bellesiles, 16 Law & Hist Rev at 578–79); *United States v. Williams*, 113 F4th 637, 652–53 (6th Cir 2024); *Hirsch/Friend*, 338 Or at 661–62. Legislatures also disarmed slaves, indentured servants, and "persons of African descent." *Hirsch/Friend*, 338 Or at 661–62; Bellesiles, 16 Law & Hist Rev at 578–79.

At the time of the Revolutionary War, colonial governments disarmed those who did not support the revolution. In 1775, Connecticut adopted a law providing that any person convicted of "libel[ing] or defam[ing]" any acts or resolutions of the Continental Congress or the Connecticut General Assembly "made for the defence or security of the rights and privileges" of the colonies "shall be disarmed and not allowed to have or keep any arms." An Act for Restraining and Punishing Persons Who Are Inimical to the Liberties of This and the Rest of the United Colonies, *The Public Records of the Colony of Connecticut From May, 1775 to June, 1776*, 192–93 (Charles Hoadly ed., 1890). In 1776, the Continental Congress recommended that the colonial governments disarm those who were "notoriously disaffected to the cause of America" or who simply "have not associated" with the colonial governments in the war effort. Resolution of March 14, 1776, *Journals of the Continental Congress 1774–1789*, Vol 4, 205 (Worthington Ford ed., 1906). Subsequently, colonial legislatures in Pennsylvania and Virginia disarmed citizens who

refused to swear a loyalty oath to the state or the United States. The Pennsylvania law required any person who "refuse[d] or neglect[ed] to take the oath or affirmation of allegiance to the state" to "deliver up his arms to agents of the state" and thereafter was prohibited from "carry[ing] any arms about his person or keep[ing] any arms or ammunition in his house or elsewhere." *Hirsch/Friend*, 338 Or at 663 (alterations in *Hirsch/Friend*, internal quotation marks and citation omitted). In 1777, Virginia law disarmed "all free born male inhabitants of this state, above the age of sixteen years, except imported servants during the time of their service" who refused to swear their "allegiance and fidelity" to the state. An Act to Oblige the Free Male Inhabitants of this State Above a Certain Age to Give Assurance of Allegiances to the Same, *The Statutes at Large, Being a Collection of All the Laws of Virginia*, Vol 9, 281 (William W. Hening ed., 1821). Massachusetts followed suit, disarming those who "are notoriously disaffected to the Cause of America, or who refuse to associate to defend by Arms the United American Colonies." *Hirsch/Friend*, 338 Or at 663–64 (citation omitted).

Taken together, English and colonial history demonstrate that legislatures commonly disarmed groups whom the legislature determined to pose a threat to social order or public safety. *Williams*, 113 F4th at 657.

To be clear, the laws that disarmed groups based on religious affiliation and race are abhorrent. They reflect our country's long history of prejudice and

discrimination, a history that continues to impact society today. Now, we recognize that legislatures cannot stereotype on the bases of race, religion, or other protected classifications in determining whether a group poses a threat to social order or public safety, and the state in no way condones the discriminatory intent that animated those historical laws.

Those laws, however, do have a role to play in determining how the scope of the right to bear arms was viewed at the time the Second Amendment was adopted. Although historical laws that disarmed groups based on religious affiliation or racial identity are clearly impermissible under modern jurisprudence, those laws reflect a well-established principle that the right to bear arms was subject to status-based regulation and that legislatures had broad authority to identify the groups that posed a risk worthy of disarmament.

b. At the founding, felonies were serious crimes that could be punished by death or estate forfeiture.

The historical practice of imposing severe punishments for felony crimes also supports principle that legislatures retained broad authority to disarm those who pose a risk to social order or public safety.

In 1769, Blackstone defined a felony as "an offence which occasions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other punishment may be superadded, according to the degree of guilt." William Blackstone, 4 *Commentaries on the Laws of England* 95 (1st

ed 1769) (reprint ed 1979). Capital punishment and estate forfeiture were commonly authorized punishments in America around the time of the founding. *See Folajtar v. Attorney General*, 980 F3d 897, 904-05 (3d Cir 2020). Capital punishment for felonies was "ubiquit[ous]" in the late eighteenth century and was "'the standard penalty for all serious crimes.'" *Baze v. Rees*, 553 US 35, 94 (2008) (Thomas, J., concurring in the judgment) (quoting Stuart Banner, *The Death Penalty: An American History* 23 (2002)). In 1790, Congress made a variety of felonies punishable by death, including treason, murder on federal land, forging or counterfeiting a public security, and piracy on the high seas. An Act for the Punishment of Certain Crimes Against the United States, 1 Stat 112-15 (1790).

The colonies commonly punished felony crimes with death, estate forfeiture, or both. Although many of those crimes involved overt violence, others did not. For example, in 1788, New York passed a law providing for the death penalty for crimes such as burglary, robbery, arson, malicious maiming and wounding, and counterfeiting. An Act for Punishing Treasons and Felonies, 2 *Laws of the State of New York Passed at the Sessions of the Legislature 1785–1788*, 664–65 (1886). The act established that every person convicted of such an offense was "liable to suffer death, shall forfeit to the people of this State, all his, or her goods and chattels, and also all such lands, tenements, or hereditaments" the person possessed "at the time of any such

offence committed, or at any time after." *Id.* at 666. For all other felonies, the authorized punishment for "the first offence" was a "fine, imprisonment, or corporal punishment," and the punishment "for any second offense or felony committed after such first conviction" was "death." *Id.* at 665. In 1777, Virginia adopted a law that anyone convicted of forging, counterfeiting, or presenting for payment a wide range of forged documents "shall be deemed and holden guilty of felony, shall forfeit his whole estate, real and personal, shall receive on his bare back, at the publick whipping post, thirty nine lashes, and shall serve on board some armed vessel in the service of this commonwealth, without wages, for a term not exceeding seven years." An Act for Preventing the Forgery of Certain Warrants and Certificates, *The Statutes at Large, Being a Collection of All the Laws of Virginia,* Vol 9, 302–03 (William W. Hening ed., 1821).

At the time of ratification, then, legislatures imposed the most severe punishments—ones that were of similar or greater magnitude to disarmament—for felony convictions, including felonies that did not involve violence. If legislatures could impose the greater punishment of death for felonies, that supports the principle that the legislatures have authority to impose the lesser restriction of disarmament. *See Rahimi,* 602 US at 699 ("[I]f 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.").

c. The ratification history of the United States Constitution confirms that legislatures retained the power to disarm groups of individuals who pose a threat to social order or public safety.

The history of United States Constitution also supports the view that legislatures retained the power to disarm groups of individuals who pose a threat to social order or public safety. As discussed in *Hirsch/Friend*, proposed amendments from the ratifying conventions in Pennsylvania, Massachusetts, and New Hampshire contemplated express limitations on the right to bear arms. 338 Or at 666–67. In Pennsylvania, the proposed amendment established the right to bear arms and provided that "no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of public injury from individuals." *Id*. at 667 (citation omitted). In Massachusetts, the convention recommended that the "Constitution be never construed to authorize Congress * * * to prevent the people of the United States, who are peaceable citizens, from keeping their own arms[.]'' *Id*. (citation omitted). The New Hampshire convention proposed an amendment providing that ''Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.'' *Id*. (citation omitted).

Although those proposals were not adopted, the provide useful information about the how the framers of the Constitution viewed the right to bear arms. *See Heller*, 554 US at 604 (relying on the Pennsylvania, Massachusetts, and New Hampshire proposals to conclude that they "plainly" and "unequivocally referred to individual rights"). As this court noted, the Pennsylvania proposal "expressly would have permitted the disarming of criminals." *Hirsch/Friend*, 338 Or at 667. The Massachusetts and New Hampshire proposals were "not so explicit." *Id*. Nevertheless, the proposals reflect a belief at the founding that that the right to bear arms applied to "peaceable citizens" and those who followed the law. *See United States v. Diaz*, 116 F4th 458, 470 (5th Cir 2024) (concluding that the convention proposals supported the view that "the government could prevent people who had committed crimes or were 'quarrelsome' from accessing weapons"). While those proposals may not "clearly confirm" that the Second Amendment permits the disarmament of felons, *Hirsch/Friend*, 338 Or at 668, they support the principle that legislatures retained authority to disarm those who posed a risk to public safety by demonstrating an inability to follow the law.

3. Application of ORS 166.270(1) to defendant is consistent with the historical principles underlying the Second Amendment.

As discussed above, the Supreme Court's repeated assurances that laws prohibiting felons from possessing firearms are presumptively valid is sufficient

to affirm defendant's conviction. But if this court resorts to historical analysis, ORS 166.270(1) is valid as applied to defendant. As reiterated in *Rahimi,* the Second Amendment does not require a "dead ringer" or an "historical twin" for a contemporary law to comport "with the principles underlying the Second Amendment." 602 US at 692. *Heller* and *Bruen* "were not meant to suggest a law trapped in amber." *Id*. at 691. Rather, in determining whether a contemporary law is "relevantly similar" to the underlying principles, the court considers why and how the law burdens the right to bear arms. *Id*. at 692.

a. *Rahimi* does not require the level of precision defendant suggests in reviewing history and tradition.

In his brief, defendant asserts that the historical tradition of firearms regulation does not provide a match for this case—"permanent disarmament" of a "person with prior drug-related felonies." (BoM 59). That framing of the issue is incorrect, as previously noted. First, a person with drug-related felonies is not permanently disarmed. That person may seek restoration of their firearms rights under ORS 166.174. Second, the record at the time of defendant's motion for judgment of acquittal showed that he had prior felony convictions for possession of methamphetamine, manufacture of methamphetamine within 1,000 feet of a school, and felon-in-possession of a firearm. Defendant's characterization of his convictions as merely "drug-related felonies" obscures

the seriousness of his prior misconduct and omits entirely that he had previously disregarded the legislature's prohibition on firearm possession.

More fundamentally, defendant is incorrect that the state must identify a precise match—a history of disarming those who committed similar crimes in 1791—in order to satisfy *Rahimi*.

Among the circuit court cases that have entertained as-applied challenges to 18 USC § 922(g)(1), the federal statute barring felons from possessing firearms, there is a split as to how *Rahimi* (and *Bruen*) apply to specific underlying felony convictions. The better-reasoned decisions, however, recognize that any crime designated by the legislature as a felony is sufficiently serious to warrant disarmament. The Third, Fifth, and Sixth Circuits have issued decisions on various applications of § 922(g)(1) after *Rahimi*. *Range v. Attorney Gen. United States*, __F4th__, 2024 WL 5199447, at *8 (3d Cir Dec 23, 2024); *United States v. Diaz*, 116 F4th 458 (5th Cir 2024); *United States v. Williams*, 113 F4th 637 (6th Cir 2024). *Range* concluded that the statue was unconstitutional as applied to the plaintiff in that case, who had a single felony conviction from more than two decades ago for food stamp fraud. *Diaz* and *Williams* concluded that the statute could be applied to the convictions for car theft (*Diaz*) and robbery and attempted murder (*Williams*). The Ninth Circuit, in a decision that is currently being reconsidered *en banc*, struck down § 922(g)(1) as applied to a defendant with underlying convictions for vandalism,

drug possession, felon in possession of a firearm, and evading a peace officer. *United States v. Duarte*, 101 F4th 657, *vac'd for rehearing en banc*, 108 F4th 786 (9th Cir 2024).

Range and *Duarte* demanded a detailed level of specificity in looking for historical analogues to the defendants' specific crimes and found the government's proffered history to be too general. *Range*, 2024 WL 5199447 at *6–*8; *Duarte*, 101 F4th at 679, 690.

Diaz took a broader view, recognizing that there need not be a precise analogue for the specific crime at issue—there, car theft. Though the court relied on the severe punishments for theft that existed historically—which included death and estate forfeiture—it also held that disarming the defendant was consistent with the historical tradition of limiting the rights of those who had committed crimes or were dangerous. *Diaz*, 116 F4th at 469–70, 471. First, the court relied on proposals from the state constitutional conventions in Pennsylvania and Massachusetts[7] to explain that "the right to bear arms at the time was not unlimited, and that the government could prevent people who had committed crimes or were 'quarrelsome' from accessing weapons." *Id*. at 470. Second, the court relied on the "colonial-era statutes that prohibited going

[7] This court discussed those same proposals in *Hirsch/Friend*, 338 Or at 666–67.

armed offensively and authorized forfeiture of weapons as punishment." *Id*. at 470. The court concluded that "the size of these laws' burden on the right to bear arms is comparable to that of § 922(g)(1)." *Id*. at 471.

Williams took a broader view still, recognizing that any felony is by definition a serious crime that warrants significant consequences. After a lengthy discussion of historical regulation of firearms in England and colonial America, including pre- and post-ratification laws, the court concluded that "governments in England and colonial America long disarmed groups that they deemed to be dangerous. Such populations, the logic went, posed a fundamental threat to peace and thus had to be kept away from arms. For that reason, governments labeled whole classes as presumptively dangerous." *Williams*, 113 F4th at 657. The historical analysis also showed that "individuals could demonstrate that their particular possession of a weapon posed no danger to peace" and thus regain the ability to bear arms. *Id*. From that tradition, *Williams* concluded that "legislatures may disarm groups of people, like felons, whom the legislature believes to be dangerous" but that there must an opportunity for an individual to demonstrate that they do not fit within the group.[8] *Id*. at 663. *Williams* then considered defendant's prior convictions—

[8] *Williams* opined that a defendant's opportunity to contest his dangerousness could happen via an as-applied challenge or through a civil or administrative action. 113 Fth at 661. When the underlying felony conviction

Footnote continued…

which included aggravated robbery and attempted murder—and readily concluded that the defendant could be disarmed under the Second Amendment. *Id*. at 662–63.

The level of specificity employed in *Diaz* and *Williams* is more consistent with *Rahimi* than that in *Range* and *Duarte*. In *Rahimi*, the Court emphasized that "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition," 602 US at 692, and that those principles "permit[] more than just those regulations identical to ones that could be found in 1791." *Id*. Although a felony that was subject to the death penalty or estate forfeiture in 1791 would certainly be sufficient to support disarmament now, that kind of precision is not required by *Rahimi*. The more important point is whether disarmament is consistent with the underlying principles. As discussed above, the historical tradition shows that legislatures have always had the power to restrict the possession of firearms by those, like convicted felons, whom the legislature deemed a risk to social order and public safety.

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is for a person crime, like murder, rape, or assault, "dangerousness will be self-evident." *Id*. at 660. Similarly, a crime like drug trafficking or burglary "inherently poses a significant threat of danger," and so a defendant is unlikely to be able show that he is not dangerous. *Id*.

b. The restrictions imposed by ORS 166.270(1) comport with the principles underlying the Second Amendment.

Here, ORS 166.270(1) restricts defendant's right to possess firearms because he has multiple felony convictions, including methamphetamine possession, methamphetamine manufacture within 1,000 feet of a school, and felon in possession of a firearm. In the words of *Hirsch/Friend*, those convictions signify "a breach of society's most essential rules for obligatory conduct—rules that are central to the legislative task of protecting the public from violence and various forms of abuse." 338 Or at 679. For that reason, defendant is a member of "a group whose conduct demonstrates an identifiable threat to public safety." *Id.* And as the trial court found, defendant is a "risk to the public" based on defendant's "inability to follow the law." (Tr 74). Disarming defendant for those reasons is consistent with the historical practice of disarming groups who were deemed by the legislature to be a risk to social order or public safety. And it is consistent with the severe punishments that could be imposed for felony convictions.

As for how ORS 166.270(1) burdens defendant's right to bear arms, it does so only after conviction for a felony offense, with the full procedural protections of a trial. And the prohibition on firearms is not necessarily permanent based on defendant's convictions presented to the trial court; ORS 166.274 provides a process for a person with drug offenses and a felon-in-

possession conviction to have his firearm rights restored. The magnitude of the restriction is consistent with the historical status-based restrictions on firearm possession that allowed for a particular individual to demonstrate that they did not pose a threat. *See Williams*, 113 F4th at 657 (discussing principle).

In sum, defendant is not a law-abiding, responsible citizen. He possessed firearms despite having multiple felony convictions, which placed him in class of individuals who pose an identifiable risk to public safety. He did not seek restoration of his firearm rights under ORS 166.274. Applying ORS 166.270(1) to him does not violate the Second Amendment.

CONCLUSION

This court should affirm the Court of Appeals' decision and the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 17, 2025, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Erik M. Blumenthal, attorneys for petitioner on review, by using the court's electronic filing system.

I further certify that on January 17, 2025, I directed the Brief on the Merits of Respondent on Review, State of Oregon to be served upon Henry Sewall Udayan Oostrom-Shah and Andrew Flood, attorneys for amicus curiae, and upon Nora E. Coon, attorney for petitioner on review, by mailing a copy, with postage prepaid, in an envelope addressed to:

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