IN THE SUPREME COURT OF THE STATE OF OREGON

Joseph Arnold and Cliff Asmussen,
Plaintiffs-Respondents,
Petitioners on Review,

and

Gun Owners of America, Inc. and Gun Owners Foundation,
Plaintiffs,

v.

Tina Kotek, Governor of the State of Oregon, in her official capacity; Dan Rayfield, Attorney General of the State of Oregon, in his official capacity; and Casey Codding, Superintendent of the Oregon State Police, in his official capacity,
Defendants-Appellants,
Respondent on Review

Harney County Circuit Court No.
22CV41008

Oregon Court of Appeals
A183242

Oregon Supreme Court
S071885

REPLY BRIEF OF PETITIONERS ON REVIEW

Review of the decision of the Court of Appeals on Appeal from the Judgment of the Circuit Court of HARNEY County,
Honorable ROBERT S. RASCHIO, Judge.

Opinion Filed: March 12, 2025
Author of Opinion: ORTEGA, P.J.
Before Judges: Ortega, P.J., Hellman, J., and Mooney, Senior Judge

October 8, 2025

Continued…

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October 8, 2025

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REPLY BRIEF OF PETITIONERS ON REVIEW

III.

INTRODUCTION

Defendants fail to defend several dispositive issues including the *questions* which the Court accepted review to answer.

First, Defendants studiously avoid explaining how *Kessler*, *Blocker*, and *Delgado*, support Defendants' proposition that the Court's test merely assesses subjective *reasonability*. Defendants carefully avoid the *manner of use* and *manner of possession* limitation placed on government and disregard caselaw demanding historical analogues for modern restrictions. *E.g.*, *State v. Kessler*, 289 Or 359, 370, 614 P2d 94 (1980); *State v. Blocker*, 291 Or 255, 259-60, 630 P2d 824 (1981); *State v. Delgado*, 298 Or 395, 400, 692 P2d 610 (1984); *State v. Hirsch/Friend*, 338 Or 622, 643, 114 P3d 1104 (2005); *State v. Christian*, 354 Or 22, 30-31, 307 P3d 429 (2013).

Next, Defendants elide *Hirsch/Friend*'s narrow applicability to depriving certain criminals of the right to bear arms. Instead, Defendants extrapolate some unfettered authority to deprive all Oregonians of this right until they prove their *worthiness*. Conversely, Article I, section 27, belongs to all Oregonians unless government lawfully deprives them of that right through due process.

Last, Defendants distort the Court's undue frustration inquiry into market

research for *alternative weapons* and a question of whether Ballot Measure 114 ("BM114") *eventually* allows Oregonians to obtain firearms. This analysis is not prescribed by caselaw and should be rejected if Article I, section 27, means anything.

IV.

REPLY TO *ALTERNATIVE* QUESTIONS

A. DEFENDANTS RAISE NEW QUESTIONS.

Defendants raise a new *question*: are magazines protected arms? Despite responding to Plaintiffs' Petition, Defendants failed to include contingent requests for review. The Court should decline to address these unraised questions. Generally, the Court reviews "all questions properly before the Court of Appeals *that the petition or the response claims were erroneously decided* by that court." ORAP 9.20(2) (emphasized); ORAP 9.10(1). Defendants did not claim these questions were erroneously decided. *Arnold v. Kotek*, 338 Or App 556, 576, 566 P3d 1208, *rev allowed* 373 Or 738 (2025) ("Opinion"). The Court regularly refuses to answer questions not raised in the petition or response. *Parrott v. Carr Chevrolet, Inc.*, 331 Or 537, 541 n 3, 17 P3d 473 (2001); *Spearman v. Progressive Classic Ins. Co.*, 361 Or 584, 590 n 1, 396 P3d 885 (2017); *Miller v. City of Portland*, 356 Or 402, 410 n 4, 338 P3d 685 (2014).

Defendants argue the Court "may consider other issues that were before the Court of Appeals." ORAP 9.20(2). However, the rules distinguish *questions*,

which are raised in the petition and response, from *other issues* which sometimes arise based on the Court's ruling. *Id*. Caselaw provides that "other issues" include "subsidiary appellate issues… that may require resolution once the principal issue on review is resolved[.]" *State v. Castrejon*, 317 Or 202, 211-12, 856 P2d 616 (1993).

Additionally, below, Defendants failed to assign error to any material factual findings, failed to request *de novo* review of facts, and the factors cautioned against *de novo* review. (Plaintiffs' Answering Brief-5-7) ("PAB"). Therefore, whether so-defined large-capacity magazines ("LCMs") are "protected arms" was not *properly* before the Court of Appeals. *E.g.*, *State v. Wyatt*, 331 Or 335, 345, 15 P3d 22 (2000). Moreover, facts are reviewed for any evidence in the record. *E.g.*, *Muzzy v. Uttamchandani*, 250 Or App 278, 280, 280 P3d 989 (2012). The trial court's findings are consistent with precedent and the record.

Last, the *Delgado* analysis is unnecessary because BM114's magazine restrictions generally apply to all firearms regardless of action type (*e.g.*, bolt, pump, lever, semiautomatic), magazine type (*e.g.*, internal, tubular, revolving, detachable), origins (*e.g.*, military or civilian), or other characteristic. Courts analyze the history of arms for *specific* banned arms. *Kessler*, 289 Or at 371-72 (billys); *Delgado*, 298 Or at 401-03 (switchblades); *OSSA v. Multnomah County*, 122 Or App 540, 858 P2d 1315 (1993) (analyzing the 26 prohibited

firearms). However, courts do not apply *Delgado* when laws generally apply to all firearms, (PBOM, 13-14), and BM114 absolutely proscribes all firearms (except for listed exceptions) and magazines capable of holding more than 10 rounds now or in the future. (BM114, §11(1)(d), (2)).

B. SO-DEFINED "LCMs" ARE PROTECTED.

1. *Delgado* Test.

Article I, section 27, applies to *protected arms*. *Christian*, 354 Or at 30. Protected arms are, "as modified by [their] modern design and function, of the sort commonly used by individuals" pre-1859. *Delgado*, 298 at 400-01. This analysis seeks to determine "whether the drafters would have intended" the right to apply to the arm, *Id.* at 401; it does not seek to freeze the right to pre-1859 designs, technologies, capacities, and functions. Oregon's constitutional drafters were "aware that technological changes were occurring in weaponry" and drafted Oregon's constitution during "the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles." *Id.* at 403. Caselaw recognizes firearms are *protected arms* and has only intimated in dicta that "automatic weapons, explosives, and chemicals of modern warfare" may be unprotected. *Kessler*, 289 Or at 369. The semiautomatic firearms Defendants assert are unprotected are not before the Court now, but were legally owned by civilians since their inception, preceding *Kessler* by nearly a century.

2. Applying *Delgado*.

Modern magazines advanced in design and function from innumerable pre-1859 multishot and repeating magazine-fed firearms. (Tr-648-52) (defining "multishot" and "repeater"). These arms are "of the sort" commonly used for civilian defense and constitutionally protected. *Delgado*, 298 Or at 400-01.

Plaintiffs' expert, Ms. Hlebinsky, provided a fuller firearm history than previous cases, (ER-782), including a full overview of numerous firearms which were subsequently copied and improved. The first multishot firearms originated in the 1200s (Tr-642). Throughout the 1600s to early 1800s, many multishot and repeating firearms enjoyed success, including: Kalthoff-style repeaters, makes fired 30-rounds, (Tr-660-63); Lorenzoni-style repeaters, makes fired 9-12-rounds, (Tr-660-65; 728); 16-shot wheellock, (Tr-661-62); Chelembron-style repeaters, makes fired 20-rounds, (Tr-664); Pim revolvers, makes fired 11-rounds, (Tr-665); Belton, makes fired 8-16-rounds, (Tr-666-68); and others including Dafte revolvers, (Tr-665), Jennings-style repeaters, up to 12-rounds, (Tr-674), and Girardoni air rifles (and copies) which accompanied the Lewis and Clark expedition, makes shot 22-rounds, (Tr-668-69).[1]

Pre-1859 records were not reliably created or preserved, especially by the thousands of individual artisans, making "the notion of 'wide use' extremely

1. This is a non-exhaustive list. (Tr-672-77; 1221:15-22).

hard… to weigh[.]" (ER-782); (Tr-683-91; 694-97; 1215-19; 1221-23). The trial court adopted Hlebinsky's assessment that the prevalence of arms-makers copying and improving other makers' designs, including from Europe, demonstrates commonality. (ER-782 n 12). Hlebinsky demonstrated that multishot and repeating firearms, including 11-plus-round versions, were well-known and contemplated by the drafters. (Tr-683-91; 694-97; 1217-19; 1222-26). Hlebinsky also highlighted the relevance of global firearm development since Oregon experienced overseas travel, immigration, emigration, importation, trade, and technological exchange and duplication, (Tr-655-56; 659-61; 1217). Oregon experienced European immigration and settlement from the 1500s through statehood.

Additionally, all experts agreed that pepperbox-type and Colt revolvers, and copies, were magazine-fed repeater firearms, commercially successful, and commonly used for self-defense pre-1859. (TR-688; 690-95, 716; 1161-62; 1199-1200; 1203-04; 1208; 1221-22; 1361-62; 1372-74; 1380-82; 1385; 1391; 1409-11; 1413-14; 1423-24). Makers also designed workarounds to avoid Colt's patent (expired 1857), and repeating firearms became ubiquitous thereafter. (Tr-693-95). The drafters were also aware of other firearm technologies that improved over centuries to reach rapid and widespread development, and even perfection, around Oregon's founding, including: breechloading, improved rifling, metallic cartridges (replacing paper

cartridges), lever-action repeaters, percussion caps, pin-fire, and various magazine-fed firearms. (Tr-645-47; 648-50; 651-52; 659-69; 671-77; 690-91; 714-16; 717-18; 754-55; 779-81; 783-84; 785-86; 1154; 1164-68; 1199-1200; 1209-13; 1213-14; 1375-77; 1394-95). Defendants' expert conceded that 1857 Oregonians were "aware that they were living through dramatic changes" and had "firearms… their grandparents would have found astonishing" meaning they could have conceived of "reliable long arms that had a greater-than-ten capacity." (Tr-1186-87).

More importantly, Oregon's constitutional drafters were completely unconcerned with the arms Oregonians owned. (ER-759); (Tr-1200-01). Article I, section 27, was adopted without amendment or noted debate. (APP-22-23). Defendants cite no early Oregon laws proscribing any arm, including so-called *military arms*. (Tr-1200-01; 1370-73; 1419). There were certainly no laws restricting capacity or the number of firearms one could carry. (Tr-1208-10).

C. DEFENDANTS' TEST IS TOO NARROW.

Defendants' proposed test disregards *Delgado* and sends Oregonians back to the metaphorical stone-age for firearms. Neither the constitution's text, history, nor precedent justify treating Article I, section 27, as a right which **gradually diminishes** over time, or a second-class Article I right.

1. <u>Magazines are arms</u>.

Defendants claim magazines are not *arms* because they are not used

defensively *by themselves*. (DBOM-17). However, the Opinion agreed with *Defendants' expert* that magazines *were* and *are* an "integral part of the firearm[.]" (Tr-1227); (PAB-22-23); *Arnold*, 338 Or App at 576. However, neither bullets, firearms, magazines, nor other parts (barrels, triggers, stocks) are used defensively by themselves. The U.S. Supreme Court found that arms include anything "that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *District of Columbia v. Heller*, 554 US 570, 581, 128 S Ct 2783 (2008). The parts comprising the firearm (including magazines) and bullets are used together to *strike another*, and each meets this definition. (PAB-22-23).

2. Magazines are Protected Arms.

Below, Defendants relied exclusively on *OSSA*, which disregards the "as modified by [their] modern design and function" and "of the sort" language from *Delgado*, instead requiring the ancestral arm to "to seem a duplicate" to its descendant. *OSSA*, 122 Or App at 544-47. As warned by the dissent, this "is an example of judicial manipulation of the constitution" and gives "credence" to the "worst fears" of those concerned with "the 'expanding tentacles of government gun control[.]'" *Id.* at 554 (Edmonds, J., dissenting).

Defendants discount pepperbox-type and Colt revolvers, and workarounds, because 11-plus-round varieties were less preferred due to their weight and non-concealability. (Tr-1203-04). However, *Delgado* contemplated

adding springs to knives (switchblades) and improving from single-action to double-action revolvers, which are far more astonishing developments than improving standard 5-8-round to 11-plus-round magazines. Similarly narrow interpretations have been described as "bordering on the frivolous[.]" *Heller*, 554 US at 582. Indeed, "[j]ust as the First Amendment protects modern forms of communications… and the Fourth Amendment applies to modern forms of search… the Second Amendment extends… to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id. Delgado* prescribes a similar analysis, not a self-erasing right.

This is especially true considering state defense. All experts agreed that Oregon's constitutional drafters expected Oregonians to be capable of warring with, and defending against, native tribes, (Tr-1399-403), and other enemies. They certainly contemplated the arms wielded by enemies—and therefore protected for Oregonians—to advance. *Delgado*, 298 Or at 403. Indeed, shortly thereafter, Oregonians joined Union soldiers bearing their privately-owned *large-capacity* Henry Repeaters. (Tr-178-80). Then, during World War II, Oregon expected *civilians* in the Oregon State Guard to utilize their civilian-owned and then-modern firearms to defend Oregon from invasion. (SER-157-83); (Exs-6-8); (Tr-495-97; 1278-79; 1915-17). Defendants also disregard firearms outside the Oregon territory, including common European firearms, despite *Delgado*'s analysis considering the full history of the knife through

Europe, Colonial America, and the United States. 298 Or 401-03.

The opinions below correctly recognize that magazines are integral firearm parts and the direct descendants of common firearms known to Oregon's constitutional drafters.

V.

REPLY ARGUMENTS

A. REPLY SUPPORTING FIRST PROPOSED RULE OF LAW

Defendants deride the proposition that constitutional restrictions must have a historical analogue as rooted in federal caselaw. (DBOM-12-13). As an aside, Defendants overstate the Court's rejection of Second Amendment caselaw and history which the Court considered in *Hirsch/Friend*, 338 Or at 665-73. Regardless, the Court begins each Oregon case by seeking which types of laws Oregon's constitutional drafters understood were inoffensive to the constitution. This analysis yielded two types of constitutional laws: (1) laws restricting dangerous manners of possessing or using arms; and (2) laws restricting certain criminals from bearing arms.

Kessler "examined the historical roots of Article I, section 27[,]" *Delgado*, 298 Or at 398, and concluded that "legislative regulation of the manner of possession or of regulation of the use" of protected arms is constitutional but laws "written as a total proscription of the mere possession of certain weapons" are unconstitutional, *Blocker*, 291 Or at 259-60. Later, the

Court repeated this historical inquiry in *Hirsch/Friend*, 338 Or at 632-73. Unsurprisingly, the Court arrived at the same limitations, concluding that *Kessler* and *Blocker* provide that legislation restricting the "manner of possession or use of certain weapons" may be constitutionally permissible. *Id.* at 675. *Hirsch/Friend* added that the legislature may deprive certain criminals of the right to bear arms. *Id.* at 677. *Christian* did not alter but *reiterated* these holdings. 354 Or at 30-31.

Defendants propose subjecting Article I, section 27, to a wholly subjective *reasonability* analysis. Defendants fail to cite pre-*Christian* cases applying this test, identify where *Christian* purported to alter the analysis, outline any objective element, or otherwise explain how adopting a *reasonability* test would not leave the meaning and effect of Oregonians' constitutional rights subject to the whims of the judiciary.

1. Magazine Ban.

Defendants do not dispute that BM114's magazine restriction is an absolute proscription or that the Court has universally held similar bans unconstitutional. (PBOM-25); *Kessler*, 289 Or 359; *Blocker*, 291 Or 255; *Delgado*, 298 Or 395. Defendants do not justify abandoning this precedent. *State v. Ciancanelli*, 339 Or 282, 290, 121 P3d 613 (2005). Therefore, the Court should find Section 11 unconstitutional because it absolutely proscribes merely owning or possessing firearms with fixed magazines—and all detachable

magazines—which are capable, now or in the future, of exceeding 10 rounds. (BM114, §11(1)(d), (2)).

Additionally, Defendants ignore law enforcement's common use of these arms for self-defense, defense of others, and state defense, (ER-790-91), despite *Kessler*'s express consideration of law enforcement's use. 289 Or at 371-72.

2. <u>Permit to Purchase and Completed Background Check</u>.

Defendants claim *Christian* allows government to require permits before Oregonians exercise their right to bear arms. However, Defendants elide *Christian*'s conclusion that the ordinance regulated a *manner of possessing* firearms (while loaded). 354 Or at 29 ("the ordinance does not prohibit the mere possession of firearms… but specifically regulates only the manner of possession[.]"). *Christian* does not control because BM114 proscribes merely acquiring firearms for defense in public or at home. *Id.*

Next, Defendants cite *Hirsch/Friend* but disregard its reliance on history to justify disarming narrow groups of criminals. 338 Or at 677-78. Defendants fail to provide historical support for BM114's Permit requirements and inappropriately extend *Hirsch/Friend*'s "inch" into a "mile" allowing government to impose duplicate background checks, two firearm training courses, a so-called psychological examination, fees, and delay before Oregonians may exercise *their right* to bear arms. Moreover, Defendants do not dispute that *all Oregonians* are subject to BM114's prohibition on permit-less

firearm purchases, not just criminals. *Id.* Therefore, *Hirsch/Friend* does not support BM114's Permit requirement, and Defendants do not cite any historical analogue requiring Oregonians to request government permission and prove their worthiness before exercising other rights.

For the Completed Background Check requirement (BM114, §6-9) and duplicate background check imposed by the Permit (BM114, §3(1)(e)), Defendants argue that, because government may prohibit certain criminals from bearing arms, *e.g.*, ORS 166.270(2), it "is a logical and permissible means to a constitutional end" to subject all Oregonians to two duplicate background checks, including one with no time limitation. (DBOM-9). However, implicit in *Hirsch/Friend*'s historical inquiry is the authority to punish those who unlawfully possess firearms, not the authority to place duplicative hurdles between Oregonians and their right to bear arms with the *expressly stated purpose* of discouraging firearm ownership.

B. REPLY SUPPORTING SECOND PROPOSED RULE OF LAW

Defendants argue that laws must merely claim to promote public safety to be constitutional, (DBOM-13-16), with no historical support or evidence showing that the restriction is "necessary to protect the public safety[,]" *Hirsch/Friend*, 338 Or at 677. Defendants also reject the notion that "the legislature's authority to restrict the bearing of arms" is not "so broad as to be unlimited" but that "any restriction *must satisfy* the purpose of… protect[ing]

public safety." *Id.* (emphasized). In short, Defendants contend government may simply state that there exists a public safety threat and enact any policy that "reasonably relate[s] to that stated aim." (DBOM-8). Defendants disregard the Court's consistent appeal to *historic recognition* of certain persons or practices as dangerous to justify public safety claims and the complete absence of historical support for BM114's restrictions. (PBOM-38). Here, BM114 provides that deaths and injuries from "mass shootings, homicides and suicides" are "unacceptable at any level" and the mere "availability of firearms" poses "a grave and immediate risk to the health, safety and well-being" of Oregonians. (BM114, Preamble). By Defendants' logic, even a single firearm-related death—lawful or unlawful—justifies any firearm restriction.

If this is the analysis demanded by Oregon's constitution then, at a minimum, the public safety analysis is useless; at worst, Oregon's constitution no longer protects the right to bear arms because *all arms* can be used to commit mass violence, suicide, and murder.

1. Magazine Ban.

Defendants fail to identify any Oregon-specific public safety threat necessitating BM114. Oregon has experienced a total of two mass shootings according to Defendants' evidence (ER-796), neither of which occurred in the last decade. As evidenced below, these incidents are extremely rare and random, making it impossible to derive scientifically-reliable data. Indeed,

despite not imposing capacity restrictions, Oregon did not experience another mass shooting between Thurston (1998) and Umpqua Community College (2015). (ER-796).

Defendants also claim that Oregon's firearm-related *homicide* rate tripled from 2001 to 2021. Defendants' expert, Dr. Siegel, failed to define *homicide* or separate criminal homicide from self-defense, including by law enforcement. (Tr-1526:25-1527:8). Lastly, suicides are obviously unaffected by capacity restrictions.

2. Permit to Purchase and Completed Background Check.

Defendants argue that permits prevent "dangerous individuals from acquiring" firearms (presumably *lawfully*), (DBOM-46), but failed to demonstrate that dangerous individuals *are* obtaining firearms lawfully. Oregon already requires universal background checks to prevent disqualified criminals from acquiring firearms. ORS 166.412 (2021) (amended 2022); ORS 166.435 (2021) (amended 2022); ORS 166.438 (2021) (amended 2022). Likewise, Oregon law provides procedures for disqualifying persons for mental illness. *See* ORS 166.527; ORS 426.130. According to Defendants' evidence, neither imposing universal background checks (SB-941 (2015)), disarming dangerous people through extreme risk protection orders (SB-719 (2017)), nor disarming involuntarily committed persons (ORS 426.130) have benefited public safety.

As for training, Defendants produced no evidence or argument

supporting the proposition that those without state-mandated training are more likely to commit violence or injure others. Nor is there any indication that Oregon's constitutional drafters considered supposedly *untrained* citizens dangerous. Instead, BM114 lays bare its intent to create expensive and arduous processes to dissuade Oregonians from exercising their constitutional right.

For the Completed Background Check, Defendants misstate their expert to say that, in 2020, "at least 2,989 individuals with a disqualifying conviction" obtained firearms. (DBOM-56 (citing Tr-1597)). That stricken statistic does not specify that each supposedly disqualified individual was *correctly* disqualified or disqualified based on criminal convictions as opposed to other disqualifications (*e.g.*, citizenship). (Tr-1597). Defendants also omit that this is a *nationwide statistic* and there was no evidence of *any* Oregonian unlawfully acquiring firearms through legal mechanisms. Moreover, there were 24,994,000 firearm applications nationwide in 2020—50% more than 2019—meaning 0.012% were improper. (APP-3). Further, 2020 accounted for nearly half of all improper transfers from 2005-2020 (6,000 total) a range where 229,666,000 transactions were processed; this means only 0.0026% of nationwide transactions were improper. (APP-3). Regardless, Defendants can only cite one such transaction which resulted in violence a decade ago in Charleston, SC.

C. REPLY SUPPORTING THIRD PROPOSED RULE OF LAW

The correct analysis is that BM114 cannot "unduly frustrate the right to

bear arms guaranteed by Article I, section 27." *Christian*, 354 Or at 33, 38. It is not whether BM114 "unduly frustrate[s] armed self-defense[,]" (DBOM-2), or "the right to armed-self-defense[,]" *Arnold*, 338 Or App at 567.

This Court has not identified relevant criteria for assessing undue frustration. For Sections 1-10, the trial court considered delays, unavailability of Permits, unavailability and insufficiency of due process, and the burden of proof for denials; for Section 11, the trial court considered the scope of arms proscribed and the sufficiency of the affirmative defense. (PAB-15-16). The Opinion inappropriately disregarded these inquiries. Meanwhile, Defendants identify no objective criteria and just repeatedly say that there is no undue frustration.

1. Magazine Ban.

Defendants claim BM114 does not unduly frustrate the right to bear arms because alternative arms exist. (DBOM-32-33). However, *Kessler*, *Blocker*, and *Delgado* did not apply that analysis, despite the many alternatives for billys and switchblades, because the issue was whether the restriction unduly frustrates the right to bear *the arm* for self-defense. This analysis was expressly employed in *Christian* and *Boyce* when assessing restrictions on carrying loaded firearms. *Christian*, 354 Or at 40; *State v. Boyce*, 61 Or App 662, 666, 658 P2d 577 (1983). Moreover, Defendants do not cite caselaw supporting their contention that BM114 is constitutional because it does not ban all arms.

Next, Defendants claim that *statistically* Oregonians rarely require 11 rounds for self-defense. (DBOM-33). Again, Defendants cite no authority holding that arms must be statistically *necessary* or *indispensable* for self-defense to be protected. Indeed, a switchblade is no more *necessary* than other knives. Oregonians have the right to own and possess the arms they determine best meet their self-defense needs which vary based on the person (experience, disability, age, etc.), environment (urban versus rural, home versus public, concealed versus open-carry, etc.), and situation (number of assailants, cover, level of force allowed, etc.).

Last, *Christian* concluded that the ordinance did not unduly frustrate the right to bear arms because it was not "directed in any way to the manner of possession or use of firearms for self-defense within the home" and did not prohibit "the mere possession of" any arm. 354 Or at 29. However, BM114 restricts firearm and magazine possession at home and in public and prohibits merely possessing so-defined LCMs.

2. Permit to Purchase and Completed Background Check.

Defendants argue that the Permit does not unduly frustrate the right to bear arms because those "with a permit may purchase a legal firearm." (DBOM-46). Likewise, Defendants might argue that requiring a license to worship does not interfere with Oregonians' religious freedoms because any Oregonian with a permit may worship any state-authorized deity. If Oregonians

have the right to bear arms, requiring government permission is contrary to that right. Moreover, Defendants discount the significant delay, expense, and arduous process BM114 imposes on merely acquiring firearms.

For background checks, Defendants argue that delaying firearm transfers does not unduly frustrate the right to bear arms because those who complete a background check may exercise their right. However, Defendants do not dispute that BM114 imposes indefinite delay without due process as a matter of law. (PBOM-6-8). Defendants argue that delays must be challenged as-applied, (DBOM-56), but there is no such challenge available. Oregonians can only challenge denials, *see* ORS 183.484, not the unwillingness or inability of government to timely process background checks. Facially, the Court cannot speculate that background checks will be immediate; therefore, the Court should assess the delay allowed under BM114 without due process when assessing constitutionality.

Moreover, self-defense was understood to be an immediate right by the drafters. *Goodall v. State*, 1 Or 333, 337-38 (1861). This is now codified. *State v. Sandoval*, 342 Or 506, 511-12, 156 P3d 60 (2007). Defendants provide no support for imposing any delay on bearing arms, let alone indefinite delay.

VI.

CONCLUSION

Defendants claim Oregonians can be denied their right to bear arms

whenever government, a bare majority of voters, or a handful of judges or justices agree it is subjectively *reasonable*. If that is true, then Oregonians have lost this fundamental right. Instead, Plaintiffs have re-articulated the Court's five-step test, as well as the limitations imposed on government through those rulings. Each case, from *Kessler* through *Christian*, consistently acknowledged the strict limitations Article I, section 27, imposes on government. Because BM114 exceeds those limitations, it is unconstitutional.

Respectfully submitted,

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