

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,
Respondents on Review.

Harney County Circuit
Court No. 22CV41008

CA A183242

SC S071885

BRIEF ON THE MERITS OF RESPONDENTS ON REVIEW

Petition for review of the decision of the Court of Appeals on appeal
from a judgment of the Circuit Court for Harney County
Honorable ROBERT S. RASCHIO, Judge

Continued...
9/25

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Before: Ortega, P. J., Hellman, J., and Mooney, S. J.

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BRIEF ON THE MERITS OF RESPONDENTS ON REVIEW

INTRODUCTION

Article I, section 27, of the Oregon Constitution codifies a right to “bear arms” for self-defense. The right is not absolute. It protects only the types of weapons commonly used for self-defense at statehood in 1859; and as to those weapons, the constitution 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).

Amidst rising gun violence, the people of Oregon used the initiative power to enact Ballot Measure 114. Broadly, the law limits magazine capacity to 10 or fewer rounds; requires a permit to purchase a firearm; and closes the so-called “Charleston Loophole,” requiring the completion, not just initiation, of a background check to transfer a firearm.

The Court of Appeals correctly rejected plaintiffs’ challenge to the facial constitutionality of those provisions. Plaintiffs’ arguments misapprehend well-settled case law governing both the standard for a facial challenge and the substantive requirements of Article I, section 27. This court should adhere to its established precedent and affirm the decision of the Court of Appeals.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented:

Is Measure 114 facially constitutional under Article I, section 27, of the Oregon Constitution?

Proposed Rule of Law:

Yes: 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.” *Christian*, 354 Or at 33. Measure 114 reasonably seeks to prevent identified threats to public safety from gun violence. And the law does not unduly frustrate armed self-defense: Under the law’s three principal components, Oregonians remain free to purchase and use magazines with 10 or fewer rounds; permit holders can purchase any legal firearm; and any firearm transfer may proceed once a background check clears.

BACKGROUND

A. The voters enact Measure 114.

The people of Oregon enacted Measure 114, the “Reduction in Gun Violence Act,” in the November 2022 general election. Measure 114 (“M114”) § 2.¹ The measure sought “to enhance public health and safety” amidst “a sharp increase in gun sales, gun violence, and raised fears in Oregonians of armed

¹ The text of Measure 114 is at ER-28–39. For simplicity, the brief will refer to the provisions by their statutory section and subsection.

intimidation.” *Id.*, Preamble. The measure also sought to forestall “horrific deaths and devastating injuries due to mass shootings, homicides and suicides,” viewed as “unacceptable at any level.” *Id.*

To further those aims, Measure 114 has three principal components. First, the law restricts magazine capacity to 10 or fewer rounds of ammunition. *Id.* § 11(1)(d), (2). Second, it requires a permit to purchase a firearm. *Id.* §§ 3(3), 6(2), 7(3)(a), 8(2), 9(1)(a)(A). Third, it requires the completion of a point-of-transfer background check to transfer a firearm, closing what is commonly referred to as the Charleston Loophole; current federal law allows a transfer to proceed if the check does not complete within three business days. *Id.* §§ 6(3)(c), 6(14), 7(3)(d)(B), 8(3)(c), 10; 18 USC 922(t)(1)(B)(ii).

The measure made several findings. M114, Preamble. For one, the law found that large-capacity magazines “increase casualties by allowing a shooter to continue firing for longer periods of time before reloading,” which “explain[s] their use in all 10 of the deadliest mass shootings since 2009,” as well as in “the 2015 shooting at Umpqua Community College in Roseburg, Oregon in which 10 people were killed and 7 more were injured.” *Id.* Further, the use of such magazines in a mass-shooting event dramatically increases both fatalities and injuries, while magazine restrictions in other states “have been found to reduce the number of fatalities and injuries in shooting incidents.” *Id.*

On permits and background checks, the measure similarly made several findings. First, the law found that an unfettered availability of firearms “pose[s] a grave and immediate risk to the health, safety and well-being of the citizens of this State, particularly our youth.” *Id.* In addition, ready “access to firearms triples the risk of suicide and doubles the risk of homicide when compared to someone who does not have access.” *Id.* At the same time, “studies have shown that permits-to-purchase reduce firearm-related injuries and deaths” by keeping firearms “out of dangerous hands,” in part by requiring a firearm safety course and a completed background check to obtain such a permit. *Id.*

B. The trial court rules that Measure 114 facially violates Article I, section 27, and permanently enjoins enforcement of the law.

Plaintiffs, two Oregon gun owners, sued in Harney County Circuit Court the week before Measure 114 was to take effect.² They challenged the law under Article I, section 27, expressly disclaiming any reliance on the Second Amendment. (ER-13). They sued three state officials: the Oregon Governor, Attorney General, and Superintendent of the Oregon State Police (“state”).

The trial court granted plaintiffs’ emergency request to enjoin enforcement of the law. The state petitioned for a writ of mandamus from this

² Plaintiffs initially were joined as co-plaintiffs by two Virginia-based organizations: Gun Owners of America, Inc., and the Gun Owners Foundation. Those groups were voluntarily dismissed from the case before trial. (*See* ER-812 (entry of limited judgment on June 5, 2023)).

court, which the court denied without prejudice to future filings. *Arnold v. Brown*, No. S069923 (Or, Dec 17, 2022). The trial court held two preliminary-injunction hearings, ultimately extending its injunction pending a bench trial. The state again petitioned for mandamus, which this court again denied without prejudice. *Arnold v. Kotek*, 370 Or 716, 524 P3d 955 (2023).

The trial court held a six-day bench trial in September 2023. At the start, the court granted the state’s motion to exclude evidence about possible future implementation of the law; the court also granted plaintiffs’ motion to exclude, as irrelevant, victim-impact testimony and evidence about the efficacy of permit programs in other states. (Tr-475–85). During trial, the court further excluded evidence about closing the Charleston Loophole. (Tr-1102, 1466).

The trial therefore focused on the law’s magazine restrictions. Plaintiffs presented seven lay witnesses and four expert witnesses on firearms self-defense, gunsmithing, sales, and history. The state presented one lay witness and five expert witnesses on quantitative social sciences, gun-violence epidemiology, firearms sales and history, and Oregon’s material culture.³

After the proceedings, the trial court issued an amended letter opinion. The court ruled that any application of Measure 114 would facially contravene

³ Material culture is a field of archeology that studies artifacts in relation to their cultural and historic contexts. (Tr-1329–30; *see* Ex 201 (presentation on the material culture of the Oregon territorial period)).

Article I, section 27, and permanently enjoined the law's enforcement. (ER-757–800). The court later entered a supplemental judgment awarding plaintiffs \$202,269.89 in attorney fees and costs as the prevailing party. (ER-803).

C. The Court of Appeals reverses the trial court's judgments.

The Court of Appeals reversed. *Arnold v. Koteck*, 338 Or App 556, 580, 566 P3d 1208, *rev allowed*, 373 Or 738 (2025). To begin, the Court of Appeals framed plaintiffs' facial challenge as posing the legal question of whether the law is a reasonable regulation to promote public safety that does not unduly frustrate armed self-defense. *Id.* at 563–67. And the court held that the answer was “yes” for each component of Measure 114. *Id.* at 574, 580.

In particular, the court held that the law's magazine restrictions facially pass constitutional muster. *Id.* at 580. The court explained that the restrictions were “a contemporary legislative response to identified public safety concerns stemming from the advancements in technology and the availability of those advancements to the public that have created observable threats to public safety.” *Id.* at 578. That is, “the use of large-capacity magazines presents a clear public safety threat to the welfare of the public” due to “the great increase in capacity to cause death and injury when a person may fire a firearm more than 10 times without having to reload,” and limiting magazine capacity is reasonably “directed at the specific, observable public safety concern that the people of Oregon sought to address.” *Id.* at 579. At the same time, the

restrictions did not unduly frustrate armed self-defense because the law did not restrict any person’s “right to use a firearm in defense of self or property”; rather, the law limited only “an individual’s ability to legally fire more than 10 rounds of ammunition without reloading while doing so.” *Id.*

The court also upheld as facially constitutional the law’s provisions requiring permits and completed background checks to transfer a firearm. *Id.* at 574. The court noted that the provisions were not a complete ban on firearm transfers because all “[p]ersons who meet the qualifications for a permit and do not have any disqualifying criminal convictions may obtain a firearm.” *Id.* at 571. The court reasoned that, instead, the provisions were “a legislative response to identified public safety concerns stemming from dangerous individuals obtaining firearms and the dangerous practice of individuals untrained in firearm safety obtaining firearms”; they were reasonably “directed at and drafted to address those identifiable threats”; and they did not unduly frustrate the right to armed self-defense because any “qualified individual will be able to obtain a firearm for the purposes of self-defense” by obtaining a permit and passing a background check. *Id.* at 572–74.

SUMMARY OF ARGUMENT

Measure 114 has three principal components. Each is constitutional.

The law’s restrictions on large-capacity magazines are facially constitutional. Large-capacity magazines are not “arms” protected by Article I,

section 27, at all. They are not themselves weapons, and their functionality derives from military developments that emerged decades after the adoption of that constitutional provision in 1859. The restrictions also are reasonable, which is all that the state constitution requires. The law seeks to forestall rising gun violence, and the restrictions reasonably relate to that stated aim. The use of large-capacity magazines increases the lethality of mass shootings, while state magazine restrictions significantly reduce those harms. Nor do the restrictions unduly frustrate self-defense. Capacity-compliant magazines are widely available, and more than 10 rounds are virtually never needed for armed self-defense.

Measure 114's permit-to-purchase requirements also are facially constitutional. This court already has upheld a concealed-carry license requirement and process that largely mirror those under Measure 114. *Christian*, 354 Or at 40–41. The policy also is reasonable. The statute requires a background check, an assessment of psychological state, and a demonstration of firearm-safety skills. Such permit programs lead to significant decreases in both homicides and mass shootings. And the requirements do not unduly frustrate armed self-defense: Anyone who meets the criteria may obtain a permit, and any permit holder can acquire any legal firearm.

Closing the Charleston Loophole is facially constitutional too. This court has held that the state may promote public safety by disarming convicted felons.

Hirsch/Friend, 338 Or at 677. Requiring a completed background check at the point of transfer is a logical and permissible means to that constitutional end. In addition, the policy is reasonable. Previous law required only the *initiation* of a point-of-sale background check, but a completed check can identify any disqualifying conviction, including those incurred since any previous background check. Further, armed self-defense is not unduly frustrated, as any purchaser whose background check has cleared is free to complete a transfer.

ARGUMENT

The central dispute between the parties appears to be the legal standards that govern a facial challenge under Article I, section 27. As a result, the state first provides an overview of those legal standards before addressing each of the law's three components in turn. As the Court of Appeals correctly held, to the extent that the law's provisions implicate Article I, section 27, they reasonably seek to promote public safety without unduly frustrating the right to armed self-defense. Measure 114 is thus facially constitutional in its entirety.

A. Legal Overview

Plaintiffs challenge the facial constitutionality of Measure 114 under Article I, section 27. (Petr's Br on the Merits (PBOM) 9). Such a challenge turns on several controlling legal principles—both for facial challenges, and for laws that implicate Article I, section 27. Those principles frame the questions of law before the court, and plaintiffs misapprehend each.

1. The facial constitutionality of a law presents a legal question that this court examines anew, and the court reviews for reasonableness laws that implicate Article I, section 27.

At the outset, it bears noting that the Court of Appeals correctly identified the principles discussed below. *See Arnold*, 338 Or App at 563–67 (citing this court’s case law). Beginning with the contours of a facial challenge, plaintiffs face a high hurdle: They must show that the law is not “capable of constitutional application in any circumstance.” *Christian*, 354 Or at 40. That is, “[f]or a statute to be facially unconstitutional, it must be unconstitutional in all circumstances, *i.e.*, there can be no reasonably likely circumstances in which application of the statute would pass constitutional muster.” *Id.* (quoting *State v. Sutherland*, 329 Or 359, 365, 987 P2d 501 (1999)).

On review, this court then considers anew whether a law is constitutional. The interpretation of a statute, and the statute’s concomitant constitutionality, are both questions of law. *Matter of Comp. of Muliro*, 359 Or 736, 742, 380 P3d 270 (2016). And this court examines lower court rulings on questions of law for legal error. *E.g.*, *State v. Wiltse*, 373 Or 1, 10, 559 P3d 380 (2024).

In doing so, the court’s review is plenary. In particular, “[a] statute is presumed to be supported by facts known to the legislative body.” *Fed. Cartridge Corp. v. Helstrom*, 202 Or 557, 565, 276 P2d 720 (1954) (quoting *City of Portland v. Goodwin*, 187 Or 409, 416, 210 P2d 577 (1949)). Further, “[i]f a state of facts could exist which would justify legislation, it would be

presumed that it did exist.” *State v. Bunting*, 71 Or 259, 266, 139 P 731 (1914), *aff’d*, 243 US 426, 37 S Ct 435, 61 L Ed 830 (1917). Nor is the court “limited to examining the material presented” for the law’s backdrop. *Payless Drug Stores Nw. v. Brown*, 300 Or 243, 247, 708 P2d 1143 (1985).

For example, this court examined several historical treatises in assessing the constitutionality of a state ban on switchblades in *State v. Delgado*, 298 Or 395, 401, 692 P2d 610 (1985). That plenary scope of review is “because almost all laws are written to govern numerous concrete situations under circumstances that may change over time.” *Payless Drug Stores Nw.*, 300 Or at 247. Yet a facial challenge attacks the validity of a law “in principle,” seeking to strike down the law beyond the facts of any individual case. *Id.* at 248.

Turning to Article I, section 27, the text of that constitutional provision states: “The people shall have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.” Or Const Art I, § 27. This court long ago held that it “is not an absolute right.” *Christian*, 354 Or at 33. As such, “[t]he constitutional guarantee that persons have the right to ‘bear arms’ does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances.” *State v. Kessler*, 289 Or 359, 369, 614 P2d 94 (1980).

Rather, Article I, section 27, protects the right to bear only the types of weapons commonly used for self-defense at statehood. *Hirsch/Friend*, 338 Or

622 at 671. Precisely, the right protects the “kind of weapon, as modified by its modern design and function, [that] is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon’s constitution was adopted.” *Delgado*, 298 Or at 400–01 (footnote omitted). In turn, the right to bear arms does not extend to “advanced weapons of modern warfare [that] have never been intended for personal possession and protection.” *Kessler*, 289 Or at 369.

When a law regulates a weapon that falls within the ambit of Article I, section 27, courts then review the law under a reasonableness test. Specifically, the state legislative power 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.” *Christian*, 354 Or at 33.

2. Plaintiffs’ arguments to the contrary lack merit.

Plaintiffs misapprehend the above legal principles in two primary ways. First, plaintiffs contend that, to be constitutional under Article I, section 27, a regulation must have a “historical analogue” to firearm restrictions that predate statehood. (PBOM 2, 4, 10, 37). Plaintiffs cite no legal authority for that proposition, and such an analogue requirement has no basis in Oregon law.

To be sure, the United States Supreme Court recently adopted a historical-analogue test to assess the constitutionality of firearm regulations under the Second Amendment. *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*,

597 US 1, 30, 142 S Ct 2111, 213 L Ed 2d 387 (2022). But plaintiffs expressly disavowed bringing a claim under the Second Amendment. (ER-13). And *Bruen* has no bearing on the legal standard under Article I, section 27.

Under longstanding principles of state constitutionalism, this court “has made it clear that the Oregon Constitution has a content independent of that of the federal constitution.” *State v. Soriano*, 68 Or App 642, 645, 684 P2d 1220, *aff’d and adopted*, 298 Or 392, 394, 693 P2d 26 (1984). As such, “a United States Supreme Court majority is no more binding in Oregon than is a United States Supreme Court minority, a decision of the Supreme Courts of Hawaii, California, or Georgia, or a well-reasoned law review article.” *Id.* Indeed, specifically as to Article I, section 27, the court has emphasized that “[t]he decisions construing the second amendment to the United States Constitution are not particularly helpful because the wording of the second amendment differs substantially from our state provision.” *Kessler*, 289 Or at 361–62. *Bruen*’s historical-analogue test is therefore inapt.

Second, plaintiffs propose a five-part test with mixed questions of law and fact that they contend this court adopted in *Christian*. (PBOM 13–14). In their view, that multi-part test requires showing that a law “is necessary to protect, and satisfies the purpose of protecting, public safety,” and also that the law does not “infringe[] or unduly frustrate[] the right to bear arms,” both of

which they assert are questions of fact on which this court must defer to the trial court. (PBOM 14). Plaintiffs’ argument cannot be reconciled with Oregon law.

In *Hirsch/Friend*, this court held that the state can regulate protected arms to promote public safety. In doing so, the court conducted an extensive historical survey of the right to bear arms. 338 Or at 643–73. And the court distilled from that history the legal principle that the right to bear arms is “not absolute.” *Id.* at 675. Instead, permissible legal restrictions 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 court thus recognized “the permissible legislative purpose of protecting the security of the community against the potential harm that results from the possession of arms.” *Id.* As pertinent there, the court held that the legislature had permissibly disarmed convicted felons, as 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.

In *Christian*, the court then emphasized that permissible regulations need only reasonably seek to promote public safety without unduly frustrating armed self-defense. 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.” 354 Or 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, the Oregon Constitution 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 (emphasis added).

Put another way, the court explained that “the legislature has wide latitude to enact specific regulations restricting the possession and use of weapons to promote public safety.” *Id.* at 33. Courts then examine such regulations for reasonableness, assessing whether the law is a “reasonable regulation[] to promote public safety” that “does not unduly frustrate” armed self-defense. *Id.* at 33. In *Christian*, the court upheld the facial constitutionality of an ordinance that required a concealed-carry license to carry a loaded firearm in public; the court explained that the law did not unduly frustrate self-defense because any license holder could exercise their rights unimpeded by the law. *Id.* at 40–41.

Plaintiffs further contend that such a reasonableness inquiry “mirrors” federal rational basis review, presumably impermissibly so. (PBOM 13, 23). Plaintiffs are mistaken. Rational basis review asks whether a law rationally

relates to any legitimate governmental purpose. *E.g.*, *Delta Air Lines, Inc. v. Dep’t of Rev.*, 374 Or 58, 77, 573 P3d 856 (2025) (so stating). By contrast, the reasonableness standard articulated by this court in both *Christian* and *Hirsch/Friend* is more exacting, examining the reasonableness of the law’s relationship with the promotion of public safety, as well as its impact on armed self-defense. *See Arnold*, 338 Or App at 566–67 (so stating).

In short, this court’s precedents do not elucidate a five-factor test with mixed questions of fact and law. Instead, case law firmly establishes that the state legislative power may regulate protected arms to promote public safety, and the concomitant constitutionality of a law under Article I, section 27, presents a question of law that this court reviews for reasonableness. *Christian*, 354 Or at 33; *Hirsch/Friend*, 338 Or at 678. “[T]he principle of *stare decisis* dictates that this court should assume that its fully considered prior cases are correctly decided.” *State v. Ciancanelli*, 339 Or 282, 290, 121 P3d 613 (2005). Moreover, “the party seeking to change a precedent must assume responsibility for affirmatively persuading [the court] that [it] should abandon that precedent.” *Id.* Plaintiffs fail to correctly identify the legal principles in the above precedents, much less carry the burden to persuade the court to change them.

B. Measure 114’s restrictions on large-capacity magazines are facially constitutional.

Turning to Measure 114, plaintiffs first challenge the law’s restrictions on large-capacity magazines. M114 § 11. For the reasons discussed below, such magazines are not protected “arms” under Article I, section 27—or arms at all. Even if they were, the large-capacity magazine restrictions reasonably seek to promote public safety without unduly burdening armed self-defense.

The Court of Appeals addressed only the latter, assuming without deciding that large-capacity magazines constitute protected arms. *Arnold*, 338 Or App at 576. The court then found that the law’s restrictions are, in any event, reasonable. *Id.* at 580. That legal conclusion is correct. This court also can affirm on the alternative threshold ground, which was fully argued below.

1. Large-capacity magazines are not protected “arms.”

As discussed above, the right to bear arms “is not an absolute right.” *Christian*, 354 Or at 33. Rather, the right protects only the types of weapons commonly used for self-defense at statehood. *Hirsch/Friend*, 338 Or at 640; *Delgado*, 298 Or at 400–01. Nothing like a large-capacity magazine was commonly used for self-defense in 1859.

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

As an initial matter, large-capacity magazines are not arms at all. Such magazines are not, by themselves, commonly used for self-defense, now or in

1859. Magazines are a component of many firearms for feeding ammunition into the firearm. (Tr-1748). But a *large-capacity* magazine is not necessary for a firearm to function. In other words, the capacity of a magazine does not impact the operability of a firearm; it changes only the number of shots that can be fired without pausing to reload. (Tr-857, 1094, 1763–66, 1769, 1807). That alone warrants rejecting plaintiffs’ challenge.

More fundamentally, no firearm commonly used for self-defense in 1859 had a large-capacity magazine or anything like a large-capacity magazine. Instead, the practicality and functionality of such magazines derive from three separate innovations in the 1880s, two of them for military purposes. The pertinent firearms history, recounted below, was undisputed at trial.

Until the 1850s, firearms generally were single-shot and muzzle-loading; a single round was loaded from the open end of the gun barrel. (Tr-1149). The user poured gunpowder down the barrel, put a projectile ball on a grease patch, and used a rod to ram the ball to the barrel’s bottom; additional gunpowder then was used with a flintlock ignition system to ignite the powder charge. (Tr-717, 1149–51). A percussion-cap ignition system enabled the development of “cap-and-ball” ammunition by the 1830s, but this system still required that each round be loaded individually. (Tr-1150–56, 1164, 1021).

By the 1850s, five types of firearms were common: the musket, military musket, rifle, shotgun, and pistol. (Tr-1146–48). Two pistol-type weapons had

developed that were referred to as “repeaters” because they could store and fire more than one round of ammunition. (Tr-1157). One was the pepperbox pistol, which used a single axis with multiple barrels, typically 4-to-8. (Tr-674–75, 1158–61). The other was the revolver, popularized by Samuel Colt, which had a single barrel with multiple chambers, typically 5-to-8. (Tr-676, 1161–63).

In the 1850s, the Oregon territory was at the end of the nation’s supply chain. (Tr-1353–55). As explained by Dr. Mark Tveskov—an anthropology professor and historical archeologist at Southern Oregon University who has studied Oregon’s territorial period extensively—this created a culture of independence and self-reliance, with a preference for tried-and-true rather than experimental technology. (Tr-1360, 1384–86, 1391). That preference extended to firearms. Those in the territory commonly used single-shot muzzle-loading firearms for self-defense, and some even eschewed newer percussion-cap rifles for older, single-shot, flintlock rifles. (Tr-1248–49, 1371–73, 1381–86, 1391).

Only in the 1860s did the nation see its first commercially successful firearms with a capacity of more than 10 rounds: the Henry and Winchester rifles. (Tr-1169–70). Both depended on recent advancements from the Industrial Revolution. Metallic cartridges provided pre-assembled, self-contained ammunition of primer, propellant, and projectile; and breech-loading technology loaded ammunition from the back (breech) of the barrel, rather than from the front (muzzle). (Tr-1164–67). Both rifles used a lever action with a

tubular magazine; the user fed ammunition one-by-one into a tube, and then manually ejected and chambered each round with a lever. (Tr-1170–72).

Henry and Winchester rifles initially were rare. By the early 1870s, they constituted at most 0.2% of firearms in the United States, as the vast majority were sold and shipped overseas. (Tr-1173–75). More to the point, there is no evidence that any firearm with a capacity of more than 10 rounds appeared in Oregon until after the Civil War. (Tr-1393–97).

In the 1880s, three innovations dramatically altered the form and functionality of firearms. First, Hiram Maxim, a British inventor, invented automatic fire for military use. (Tr-1182, 1251). He perfected a team-operated gun that sat on a tripod, harnessing the explosive power from each ignition to eject and rechamber a round automatically using ammunition fed from a crate. (Tr-1182). Second, James Paris Lee, a Canadian inventor, invented the first successful detachable magazine, also for military use; it held eight rounds that were loaded one-by-one using a lever. (Tr-1181, 1251). Third, Paul Vieille, a French chemist, invented nitrocellulose, a smokeless gunpowder three times stronger than black powder that left virtually no residue; the residue of black powder quickly fouls a barrel, rendering a firearm inoperable. (Tr-1185–86).

Those innovations allowed large-capacity magazines to become useful; they also would have been unforeseeable to those living in the 1850s. As explained by Dr. Brian DeLay—a history professor and scholar at UC Berkeley

who has published several peer-reviewed articles and studied the international firearms trade in the 1700s and 1800s—the technologies, separately and combined, constituted “profound ruptures in the history of firearms technology.” (Tr-1187). Before, a firearm user had to expend time and energy to manually remove and rechamber a spent round of ammunition; a firearm’s capacity was limited by its dimensionality, where the size of the firearm dictated its capacity; and the rate of repeat fire was limited by the quick fouling of the barrel caused by black powder. (Tr-1184–89). As a result, large-capacity firearms were not practical in 1859. Unsurprisingly then, they were not common anywhere in the United States, much less commonly used for self-defense. (Tr-756–58, 1167–75, 1393–97).

Again, none of the above history is disputed. Large-capacity magazines therefore bear no relation to the rudimentary firearms commonly used for self-defense in 1859, in Oregon or anywhere else in the country. That is, firearms equipped with such magazines are not “of the sort” of weapons then-common, much less commonly used for self-defense. *Delgado*, 298 Or at 400 (so requiring). Rather, modern-day large-capacity magazines derive utility and practicality from three innovations in the 1880s, two of them military. And military innovations that post-date statehood fall outside the ambit of protection under Article I, section 27. *Kessler*, 289 Or at 369. Measure 114’s magazine restrictions thus do not implicate, much less violate, Article I, section 27.

b. The trial court's ruling to the contrary was error.

Instead of responding to the above, plaintiffs contend that the “arms” issue is not before the court because the Court of Appeals held that large-capacity magazines constitute protected arms within the ambit of Article I, section 27, and the state did not petition for review of that holding. (PBOM 14). Plaintiffs are doubly mistaken. As noted, the Court of Appeals expressly assumed the issue without deciding it. *Arnold*, 338 Or App at 576. But even if that court had decided the merits of the question, this court still would have the discretion to address it. When this court allows review and, as here, does not limit the questions on review, “the questions before [this court] include all questions properly before the Court of Appeals,” any of which this court “may consider.” ORAP 9.20(2). That includes the “arms” issue here, which was fully argued before both the trial court and the Court of Appeals.

Before the Court of Appeals, plaintiffs adopted the trial court's reasoning on the issue. (Resp Br 22–31). The trial court had ruled that such magazines constituted protected arms for two separate, conflicting reasons. (ER-780–83). Neither has merit.

First, the trial court concluded that the general interest of gunmakers in 1859 to develop the nonexistent technology—“the drive for larger capacity magazines”—was enough to confer constitutional protection. (ER-782 n 12). However, the hopes of gunmakers in the 1800s have no legal relevance to the

question of whether large-capacity magazines are akin to weapons commonly used for self-defense in 1859. A general historical desire for increased firearm capacity does not confer constitutional protection on later, technologically distinct weapons derived from military innovations. *Kessler*, 289 Or at 369.

Separately, the court reasoned that “[l]arge capacity magazines existed in the early 1800s” and “that firearm technology at the founding of the state is the foundation for the current firearm technology.” (ER-780, 782). The court cited two types of “repeater” firearms: “repeating rifles of the 1850s * * * including, but not limited to, the Lorenzoni and Girandoni rifles,” as well as “Colt revolvers and pepperboxes.” (ER-782 & n 12). Neither is apposite.

It was undisputed below that repeating rifles were not common, much less commonly used for self-defense, in the 1850s. According to plaintiffs’ own expert, there is evidence of only one Lorenzoni-style firearm ever making its way to the United States. (Tr-758, 1255). And the Girandoni was not a firearm at all: Like a pellet gun, it used compressed air to expel projectiles, which the user had to manually pump. Further, plaintiffs’ expert could identify only one Girandoni that appeared in the United States, famously brought by Merriwether Lewis on the Lewis and Clark Expedition as a show gun. (Tr-734–36, 1214). Air rifles in general were so rare and obscure at the time that museums charged admission to see one. (Tr-1256–57).

Repeating rifles were not commonly used for self-defense in the 1850s because the technology did not exist to make them in sufficient quantity and quality. (Tr-1167–68); *see Or. State Shooting Ass’n v. Multnomah Cnty.*, 122 Or App 540, 549, 858 P2d 1315 (1993), *rev den*, 319 Or 273 (1994) (so stating). The Volcanic was one attempted repeating rifle, which was underpowered and prone to gas leakage; the company ultimately filed for bankruptcy. (Tr-1225); *see Or. State Shooting Ass’n*, 122 Or App at 549 (so stating). The Belton was another example, which used “superposed loads,” where all rounds would fire after a single trigger pull; there is no evidence that that rifle was ever sold to the public, and superposed loads never became commonly used as they lacked any control or safety, where a misfire could turn the firearm into a pipe bomb and kill the user. (Tr-731, 1252–54).

With respect to pistols, Colt revolvers and pepperbox pistols were commonly used for self-defense in the 1850s. But large-capacity magazines are not their modern-day equivalent. As already discussed, the capacity of each was limited by their dimensionality. To increase capacity beyond the 4-to-8 rounds that they typically held, additional chambers or barrels would need to be added; doing so, however, was impractical, given the size and weight of each. (Tr-775, 1158–59). Moreover, reloading to fire more than 10 rounds would have been time-consuming and laborious: Each round had to be loaded manually—primer, propellant, and projectile—and the barrel required frequent

cleaning due to gunpowder fouling. (Tr-1160–64). Reloading a single firearm once would have taken at least a minute and a half. (Tr-1164).

By contrast, modern-day large-capacity magazines surpass those historical limitations with ruthless, lethal efficiency. In October 2017, a shooter opened fire on the Route 91 Harvest music festival in Las Vegas, Nevada, in the deadliest mass shooting in the nation’s history. (ER-569–70 (official Las Vegas police report on the shooting)).⁴ Armed with assault rifles equipped with 100-round and 25-round magazines, the shooter fired more than 1,000 rounds into the crowd in 11 minutes, including 289 rounds in one 60-second interval. (ER-596, 658–69). In a fraction of the time that it would have taken to reload one 1850s repeater, the shooter used large-capacity magazines to fire 289 bullets into a music festival, ultimately killing 58 and injuring more than 800. (ER-596–98, 658–65). The technologies are distinct.

Finally, the trial court cited for support to *Delgado*, 298 Or 395. (ER-781–82). *Delgado* held that an outright ban of switchblade knives violated Article I, section 27, because the only difference from its historical antecedent,

⁴ The trial court refused to consider the police report on relevance grounds, a ruling that was the basis for the state’s Sixth Assignment of Error on appeal. (App Br 64–66). Regardless, this court may consider such public facts in the context of a facial challenge, particularly those referenced in the measure itself. *Payless Drug Stores Nw.*, 300 Or at 247; *Fed. Cartridge Corp.*, 202 Or at 565; see M114, Preamble (referencing the use of large-capacity magazines “in all 10 of the deadliest mass shootings since 2009”).

the jackknife, was “the presence of [a] spring-operated mechanism that opens the knife.” 298 Or at 403. In other words, the resulting weapon was the same; the only difference lay in how the knife was opened. But large-capacity magazines present wholly distinct weaponry from revolvers and pistols in the 1850s—in form, function, and lethality. *Delgado* is inapt.

2. Measure 114’s restrictions on large-capacity magazines are reasonable.

Even if large-capacity magazines were protected “arms” under Article I, section 27, Measure 114’s restrictions still would pass constitutional muster. The restrictions reasonably relate to significant threats to public safety, and they do so without unduly frustrating armed self-defense, just as the Court of Appeals correctly held. *Arnold*, 338 Or App at 580. In ruling otherwise, the trial court misconstrued the statutory text and misstated the legal standard.

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

The constitution permits reasonable regulations of protected weapons to promote public safety. *Christian*, 354 Or at 33–34; *Hirsch/Friend*, 338 Or at 678. To assess Measure 114’s reasonableness, the state will address: (1) the harm to the public that the law seeks to address; (2) whether the law reasonably relates to that public-safety purpose; and (3) whether the law unduly infringes armed self-defense. Measure 114’s restrictions on large-capacity magazines easily satisfy that test.

i. The restrictions seek to prevent gun violence.

Measure 114 seeks to prevent significant harms to public safety, specifically, “horrific deaths and devastating injuries due to mass shootings, homicides and suicides.” M114, Preamble. As pertinent here, the people found that large-capacity magazines “pose a grave and immediate risk to the health, safety and well-being of the citizens of this State, particularly our youth.” *Id.* Such magazines are frequently used in mass shooting; they “increase casualties by allowing a shooter to continue firing for longer periods of time before reloading”; and state restrictions on large-capacity magazines “have been found to reduce the number of fatalities and injuries in shooting incidents.” *Id.*

Whether to address those harms is a legislative policy judgment reserved to the people. Data also supports those legislative findings. Between 2001 and 2021, Oregon firearm-related homicides more than tripled, from 47 in 2001, to 146 in 2021. (Tr-1527). And between 1982 and 2022, the country experienced 179 mass shootings in which four or more victims were killed, the number and frequency of which also have increased over time. (Tr-1681, 1702).

Large-capacity magazines pose a particular threat. NERA Economic Consulting, an economic research firm that analyzes data quantitatively, examined news accounts and crime statistics of mass shootings in which four more people were killed. (Tr-1601, 1679–80). In 115 of 179 such public mass shootings, NERA was able to determine whether a large-capacity magazine was

used; across that subset, the use of a large-capacity magazine resulted in an exponential increase in the number of shots fired and, unsurprisingly, a concomitant exponential increase in the number of fatalities and injuries:

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

(Tr-1696–702).

Mass shootings involving four or more injuries are even more common. In 2021 alone, the country experienced 689 such mass shootings with 3,453 total casualties; in 2022, 645 such mass shootings with 3,298 total casualties. (Tr-1703–06). Oregon has not been immune to this mass violence. Since 2014, Oregon has experienced 21 such mass shootings with 118 total casualties, including at Umpqua Community College in 2015, the deadliest mass shooting in state history. (Tr-1709–11).

That firearm-related casualties and traumas are real public-safety harms cannot reasonably be denied.⁵ As Measure 114’s preamble states, the law seeks

⁵ Of course, numbers alone do not tell the complete story. The state proffered three additional witnesses on the community-shattering impacts of gun violence: Dr. Melissa Brymer, Joshua Friedlein, and Paul Kemp. The trial court excluded their testimony as irrelevant—a ruling addressed in the state’s Second Assignment of Error on appeal. (App Br 51–55). Because the evidence is plainly relevant, the state briefly summarizes their testimony here.

Dr. Brymer is a clinical psychologist who has counseled nearly a dozen communities shattered by mass gun violence. (ER-496). In her experience,
Footnote continued...

to forestall “identified public safety concerns stemming from the advancements in technology and the availability of those advancements to the public that have created observable threats to public safety.” *Arnold*, 338 Or App at 578.

ii. The restrictions reasonably relate to preventing gun violence.

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

survivors and their families must navigate a world where crowds, sounds, and everyday activities feel dangerous. (ER-497). The trauma also extends outward to the community at large: to police officers who respond to a shooting; to doctors who treat or lose a patient; to faith leaders who assist in the healing process; to friends and neighbors who lose a friend or neighbor; even to nearby communities, who often receive threats of copycat violence. (ER-497).

Joshua Friedlein is a survivor of the mass shooting at Umpqua Community College in 2015. (ER-555). Mr. Friedlein lived the terror of being trapped in a classroom during the shooter’s rampage, anticipating his own death, and fearing for the lives of friends and loved ones, some of whom were killed that day. (ER-555–56).

Paul Kemp is the brother-in-law of Steve Forsyth, who was killed in the Clackamas Town Center shooting in December 2012. (ER-559). Mr. Kemp responded to the mall that day, waiting with family after news of the shooting broke and his brother-in-law could not be located. (ER-559). As they waited, they received counseling from the Trauma Intervention Program, a nonprofit that provides support to victims and their families in the hours following a tragedy; Mr. Kemp then volunteered with that program for four years, providing support to seven grieving families, five due to firearm suicides. (ER-560).

As discussed above, a shooter's use of a large-capacity magazine typically results in more shots fired, more fatalities, more injuries, and more casualties. (Tr-1695–702). Epidemiological studies have uniformly found that large-capacity magazines are used in most mass shootings; that a shooter's use of a large-capacity magazine results in more than double the number of average fatalities compared to mass shootings where such a magazine is not used; and that state restrictions on large-capacity magazines reduce the average number of mass-shooting fatalities. (Tr-1482, 1487–89, 1501–06; *see* M114, Preamble (citing studies); ER-220, 307 (summarizing studies); 222–467 (studies)).⁶ Those correlations alone are more than sufficient to reasonably relate the magazine restrictions to Measure 114's stated intent.

Indeed, logic alone reasonably relates the two. The defining feature of a large-capacity magazine allows a shooter to fire more than 10 rounds without having to pause to reload. Limiting magazine capacity means that a shooter will have to pause to reload sooner and more frequently, thereby giving bystanders greater opportunities to try to stop a shooter or flee. (Tr-1491–92, 1497). And this has, in fact, happened. In 2011, Representative Gabby

⁶ The trial court refused to consider these studies, which was the basis for the state's Third Assignment of Error before the Court of Appeals. As discussed above, this court may consider such studies in a facial challenge. *See also* M114, Preamble (citing the impacts of similar magazine restrictions).

Giffords and 18 others were shot, six of whom died, when a gunman opened fire in a supermarket parking lot; his rampage was stopped when he paused to reload. (Tr-1497). In 2019, a gunman opened fire on the Chabad of Poway synagogue, killing one and injuring two; again, the gunman was stopped when he paused to reload. (Tr-1497). Perhaps unsurprisingly, one of plaintiffs’ experts conceded the obvious fact that limiting magazine capacity creates these reload windows. (Tr-556–57; *see* Tr-1778 (discussing reload steps)).

In short, as the Court of Appeals explained, “the use of large-capacity magazines presents a clear public safety threat to the welfare of the public because of the great increase in capacity to cause death and injury when a person may fire a firearm more than 10 times without having to reload.” *Arnold*, 338 Or App at 579. And Measure 114 represents “a reasonable regulation directed at the specific, observable public safety concern that the people of Oregon sought to address.” *Id.*

iii. The restrictions do not unduly frustrate armed self-defense.

Measure 114’s restrictions on magazine capacity do not unduly frustrate armed self-defense. The plain text of the statute and undisputed evidence at trial both establish that ample firearm self-defense options are allowed under the statute. If the law burdens armed self-defense at all, the burden is minimal.

As an initial matter, some firearms, like a revolver or a pistol with a 10-round magazine, are compliant as sold. (Tr-540, 882–83, 1748–51). They are not affected at all by the magazine restrictions.

For firearms that currently have a magazine with a capacity of more than 10 rounds, capacity-compliant magazines are readily available. Plaintiffs' experts conceded that every major firearm manufacturer, and large after-market magazine manufacturers, make and sell magazines with a capacity of 10 or fewer rounds for both rifles and pistols, including the popular brands Glock, Remington, Smith & Wesson, Sig Sauer, Browning, and Magpul. (Tr-882–83, 1054, 1066, 1766–69, 1785–97). Plaintiffs Arnold and Asmussen testified that they both own capacity-compliant magazines. (Tr-574, 581). And Mr. Arnold's self-defense weapon of choice uses a 10-round magazine. (Tr-592).

Compliant magazines are not only readily available, but they also are readily usable. Plaintiffs' experts also conceded that the vast majority of firearms will readily accept and operate with capacity-compliant magazines. (Tr-857, 1094, 1763–69, 1807). Namely, the capacity of a magazine does not impact a firearm's operability: A firearm that takes a magazine generally functions the same regardless of magazine size; the capacity impacts only how often the user needs to pause to reload. (Tr-857, 1094, 1763–69, 1807).

In addition, the statute allows permanent modifications for a magazine to accept 10 or fewer rounds. M114 § 11(1)(d). In other jurisdictions that limit

magazine capacity, such as Washington and Canada, manufacturers add metal rivets or take similar steps to render magazines capacity-compliant. (Tr-802).

Finally, more than 10 rounds of ammunition are generally not used or needed for armed self-defense. NERA Economic Consulting conducted two studies to analyze instances where a defender fired a firearm in self-defense against another person. The first analyzed the National Rifle Association's armed-citizen database, a self-reported database of defensive gun uses; the second analyzed news stories on defensive gun use using Factiva, an aggregator of more than 33,000 news sources. (Tr-1612–14, 1633–37). Each study examined January 2011 to May 2017. (Tr-1635). Consistent across both, at least 99% of defensive gun uses involved firing 10 or fewer rounds in self-defense, and the average number of rounds fired was just over 2:

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

(Tr-1622–23, 1660).

NERA also conducted a separate study of gun uses in Portland between 2019 and 2022. (Tr-1666). Out of 3,956 reported shootings, only one involved a defensive gun use, and the defender there fired 4 or 5 rounds. (Tr-1666–67).

Plaintiffs, meanwhile, offered no evidence at trial that *any* defensive gun use by a civilian against an attacker in Oregon has *ever* involved firing more

than 10 rounds of ammunition. Plaintiffs only presented testimony from a sheriff who, while hunting, “hazed” a pack of wolves by firing 30 rounds from a .22 caliber firearm. (Tr-994, 1810).

In sum, “Measure 114 does not affect any individual’s Article I, section 27, right to use a firearm in defense of self or property.” *Arnold*, 338 Or App at 579. Rather, it only “limit[s] an individual’s ability to legally fire more than 10 rounds of ammunition without reloading while doing so.” *Id.* But capacity-compliant magazines are readily available and usable. And more than 10 rounds are virtually never, if ever, used in self-defense. Measure 114’s magazine restrictions thus do not unduly frustrate armed self-defense.

b. The trial court’s ruling to the contrary was error, and plaintiffs’ arguments lack merit.

The trial court ruled otherwise based on three legal errors, which plaintiffs then adopt across multiple sections of their merits brief. (ER-780–99; PBOM 24–27, 42–44, 49–57). For clarity, the state will address the trial court’s rulings in its amended letter opinion with cross references to plaintiffs’ brief.

i. The trial court misconstrued the text of the statute.

First, the trial court adopted an implausible interpretation of the statute, ruling that the statute “effectively bans all firearm magazines fixed or attached” and thus “effectively bans most of firearms currently within the possession of Oregon citizens.” (ER-789; *see* PBOM 24–27, 50–54 (so arguing)). That

interpretation violates the text of the statute and core canons of construction.

The Court of Appeals properly rejected it. *Arnold*, 338 Or App at 577 & n 10.

In interpreting a statute, the “paramount goal is to ascertain the intent of the legislature that enacted the disputed provision, and [courts] determine that intent by examining the text, in context, as well as legislative history[.]”

Marshall v. PricewaterhouseCoopers, LLP, 371 Or 536, 540, 539 P3d 766

(2023) (cleaned up). Here, the text defines a large-capacity magazine as

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

M114 § 11(1)(d).

That is, the statute restricts both those magazines with a current capacity that exceeds 10 rounds of ammunition, and those “that can be readily restored, changed, or converted to accept” more than 10 rounds. *Id.* Specifically prohibited is “any such device coupled with another in any matter, or a kit with such parts.” *Id.* For example, many manufacturers make magazine extensions that attach to the bottom of a magazine to increase firing capacity. (Tr-808, 1783). Such an extension attached to a magazine is clearly prohibited if the resulting capacity exceeds 10 rounds of ammunition.

Put another way, Measure 114 does not restrict magazines with a capacity of 10 or fewer rounds. As noted, every major firearm manufacturer, and many after-market magazine manufacturers, make and sell such capacity-compliant magazines. (Tr-882–83, 1054, 1066, 1766–69, 1785–97). Further, magazines with greater capacity can be permanently modified. (Tr-801–02).

To be sure, future cases may raise questions about how the statute applies to interesting, edge fact patterns. For example, it may be necessary to decide when a particular modification is sufficiently “permanent” to render a large-capacity magazine capacity-compliant, as the statute allows. M114 § 11(1)(d)(A). But a facial challenge is not the proper venue for such line drawing, where plaintiffs “raise hypothetical questions about the application of laws untethered by facts on the ground.” *Christian*, 354 Or at 39.

Nevertheless, the trial court concluded that, in prohibiting the purchase and restricting the use of *large-capacity* magazines, the voters intended to ban *all* magazines. To do so, the trial court interpreted the phrase “readily restored, changed, or converted” to mean that all magazines are effectively banned because, with enough time, effort, and ingenuity, a gunsmith can use tools or parts to increase *any* magazine’s capacity to hold more than 10 rounds of ammunition, whether by adding an extension or removing parts from the magazine. (ER-785–88). In doing so, the trial court impermissibly read the term “readily” out of the statute. This court has already interpreted the term

“readily” in the firearm-modification context, and it requires, at a minimum, a short temporal window. *State v. Briney*, 345 Or 505, 200 P3d 550 (2008).

In *Briney*, the question was whether defendant’s pistol, which had a broken firing pin, constituted a firearm under a definition requiring that the pistol be “readily capable of use as a weapon.” *Id.* at 507. An individual could obtain a new firing pin via overnight delivery and then install the new pin in a matter of minutes. *Id.* at 508. The court held that the pistol could not “readily” be used as a weapon, reasoning that “readily” required “that the firearm either be operational *or promptly able to be made so.*” *Id.* at 516 (emphasis added). Moreover, as the Court of Appeals observed, the term “readily” includes “both temporal *and* degree-of-difficulty components.” 338 Or App at 577 n 10.

Here, no evidence at trial suggested that every magazine can promptly or easily be made into a device capable of holding more than 10 rounds of ammunition. The trial court reasoned that a user could remove interior parts from a capacity-compliant magazine to do so “in [a] manner of seconds.” (ER-784). No one testified to that effect, and the record refutes it.

For example, one plaintiffs’ expert testified about his attempts to modify two 10-round magazines, neither of which happened promptly. (Tr-1861–69). With one, he used a knife to remove four of six spring coils that push ammunition toward the chamber of a firearm; with the other, he removed the locking floorplate of the magazine, which secures the baseplate and holds the

ammunition in the magazine. (Tr-1861–69). The former took 15 to 20 minutes, the latter five minutes. (Tr-1863, 1869). He managed to squeeze 11 rounds into each magazine but never fired either. (Tr-1865). Unsurprisingly, another one of plaintiffs’ expert counseled against such home modifications, citing concerns over safety and functionality: “I just don’t think it would be a safe thing to do if you want an operational firearm.” (Tr-801, 830).

The trial court cited three video exhibits and one piece of testimony, each of which is inapt. (ER-784 n 16). In one exhibit, plaintiffs’ expert showed a 10-round magazine that had attached a 3-round magazine extension, for a total capacity of 13 rounds. (Ex 19). The joined combination is indeed prohibited by Measure 114. But as in *Briney*, the fact that magazine extensions exist out in the world does not mean that every 10-round magazine, standing alone, can “readily” be converted to hold more than 10 rounds.

The second exhibit was an advertisement for a “block” that users insert to decrease a magazine’s capacity. (Ex 20). The third exhibit showed plaintiffs’ expert using a power drill to remove a dimple in a magazine that the manufacturer had inserted to limit capacity. (Ex 21). And in the last, the expert testified about possibly using boiling water to remove a magazine’s baseplate to attach a magazine extension. (Tr-832). But although there may be questions about whether a particular modification is sufficiently permanent, that does not

mean that *every* capacity-compliant magazine, standing alone, can be “readily” modified to hold more than 10 rounds.

The trial court also concluded that all 10-round magazines are barred under the statute because all firearms can hold one round in the chamber of the gun, resulting in an overall capacity of 11 rounds. (ER-788). That contravenes the text of Measure 114. The statute regulates the capacity of “ammunition feeding device[s],” that is, of magazines. The chamber is not an ammunition feeding device; it is part of a firearm, into which a magazine feeds ammunition. (Tr-1053–54, 1748, 1751). In other words, the chamber is not part of the magazine, nor of the *magazine’s* capacity.

In brief, the trial court adopted a strained interpretation of the statute that bans all firearm magazines. Armed with that interpretation, the court found the statute unconstitutional. But courts are required to “*avoid* interpreting a statute in a way that would render it unconstitutional if a different, but also plausible, interpretation would be constitutional.” *City of Damascus v. State ex rel. Brown*, 367 Or 41, 67, 472 P3d 741 (2020) (emphasis added). The plain text of the statute permits capacity-compliant magazines of 10 or fewer rounds, easily avoiding the constitutional problems created by the court’s atextual reading.

Indeed, the trial court’s implausible interpretation is belied by decades of experience with similar laws. The former federal assault-weapons ban also restricted large-capacity magazines, including devices “that can be *readily*

restored or converted to accept, more than 10 rounds of ammunition.” *Former* 18 USC § 921(31) (emphasis added). Yet Plaintiff Arnold testified that he lawfully purchased and possessed capacity-compliant magazines under that law, as did others. (Tr-592, 1756, 1779).

Similarly, Connecticut, Delaware, Illinois, Massachusetts, New York, Rhode Island, Vermont, and the District of Columbia each restricts large-capacity magazines, including capacity-compliant magazines that can be “readily” converted into a large-capacity magazine. Conn Gen Stat § 53-202w(a)(1); Del Code tit 11 § 1468; 720 Ill Comp Stat § 5/24-1.10(a)(1)(2); Mass Gen Laws ch 140, § 121; NY Penal Law § 265.00(23); RI Gen Laws § 11-47.1-2; Vt Stat Ann tit 13, § 4021; DC Code Ann § 7-2506.01. But James Yurgealitis, a former firearms expert for the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives purchased a variety of 10-round magazines in three of those states in the weeks leading up to trial, including magazines that accept extensions. (Tr-1785–96).

In short, the trial court’s interpretation contravenes the statute’s plain text. As stated by the Court of Appeals, “[w]hether individuals can subvert the law in the future by undoing alterations to large-capacity magazines or by altering smaller-capacity magazines to hold more than 10 rounds has no bearing on whether Measure 114 is constitutional on its face.” *Arnold*, 338 Or App at 577 n 10. Similarly, “[w]hether any particular magazine in a prosecution for

violation of Measure 114, section 11 meets the definition of large-capacity magazine and whether that application of the law violates Article I, section 27, are questions that must be explored on an as-applied basis.” *Id.* The trial court’s contrary determination has no legal or practical basis.

ii. The trial court conducted an impermissible overbreadth analysis.

Second, the trial court conducted an overbreadth analysis, reviewing possible future applications of the law. In a proper facial challenge, the pertinent legal question is “whether the ordinance is capable of constitutional application in *any* circumstance.” *Christian*, 354 Or at 40 (emphasis added). That is, a statute is facially constitutional unless a challenger shows that there are “no reasonably likely circumstances in which application of the statute would pass constitutional muster.” *Id.* (citation omitted).

Nowhere in the trial court’s opinion did the court ask, much less answer, that question. Instead, the trial court speculated on various ways in which the statute might be applied impermissibly in the future. (ER-783–92; *see* PBOM 54–57 (so arguing)). As this court has explained, an overbreadth challenge asks whether a “statute swept so broadly as to infringe rights that it could not reach.” *Christian*, 354 Or at 35 (quoting *State v. Blocker*, 291 Or 255, 261–62, 307 P3d 429 (1981)). However, this court also has squarely held that “overbreadth challenges are not cognizable in Article I, section 27, challenges.” *Id.* at 40.

Neither a challenger nor a court can “raise hypothetical questions about the application of [a] law,” seeking to speculate about “the rights of parties who are not before the court.” *Id.* at 39. The trial court erred by doing exactly that. See *Arnold*, 338 Or App at 577 n 10 (so holding).

iii. The trial court re-weighted the policy merits.

Third, the trial court applied the wrong legal standard. The pertinent question of law is whether Measure 114 is a reasonable regulation to promote public safety without unduly frustrating self-defense. *Christian*, 354 Or at 33–34; *Hirsch/Friend*, 338 Or at 678. The trial court conducted no such analysis.

Instead, the trial court assessed the policy merits of the measure for itself. (ER-793–99; see PBOM 42–44 (so arguing)). On harm, the court opined that “mass shootings rank very low in frequency” and “are highly sensationalized by the media”; that “[t]he historic number of casualties [sic] from mass shootings is staggeringly low in comparison [to] the media’s sensationalized coverage of the events”; and that the “number of people killed and injured is statistically insignificant compared to the number of lawful gun owners.” (ER-793–97). The court further opined that “the restriction on large capacity magazines would [not] affect the mass shooting event outcomes with any scientific certainty,” as there was not “evidence demonstrating a positive public safety result for the large capacity ban beyond a speculative, de minimis impact on mass shooting fatalities which occur very rarely.” (ER-794, 799). The court also stated that

“[t]he limited number of mass shootings in the country weighed against the massive criminalization of lawful firearm possession in Oregon does not allow for” the burden imposed by the law, which the court had misconstrued as an absolute ban of firearms. (ER-798).

It is frankly shocking to suggest that Oregonians’ desire to decrease the frequency and harms of mass shootings is unreasonable. The court’s rationale lacks support in the record and contradicts the peer-reviewed, published epidemiological studies recounted above. *See infra* pp 30–31 & n 6. There also was no evidence at trial about whether the media sensationalizes mass-shooting events, nor on how many Oregonians might be affected by the magazine restrictions. Indeed, both named plaintiffs testified that they own capacity-compliant magazines. (Tr-574, 581).

More fundamentally, the trial court misunderstood the pertinent legal inquiry. There is no minimum number of mass shootings that Oregon communities must suffer before voters can legislate to mitigate or prevent them. And the legislative power is not limited to policies that a court believes are certain to be effective. As the Court of Appeals held, Measure 114’s magazine restrictions are reasonable regulations to promote public safety that do not unduly frustrate armed self-defense. *Arnold*, 338 Or App at 580. That is all that the law requires. *Christian*, 354 Or at 33; *Hirsch/Friend*, 338 Or at 678.

C. Measure 114’s permit-to-purchase provisions are facially constitutional.

Plaintiffs next challenge the facial constitutionality of Measure 114’s permit-to-purchase requirements. M114 §§ 3–10. Their challenge is foreclosed by *Christian*, 354 Or 22. In any event, the provisions are reasonable for the reasons found by the Court of Appeals and explained below. *Arnold*, 338 Or App at 569–74.

The Court of Appeals considered the permit requirements in tandem with the law’s point-of-transfer background-check requirements. *Id.* at 571–74. For completeness, the state will discuss each component in turn.

1. Plaintiffs’ permit challenge is foreclosed by *Christian*.

Plaintiffs’ permit challenge is foreclosed by *Christian*, 354 Or 22. There, this court held that requiring a license to carry a loaded firearm in public was facially constitutional because the restriction was not a total ban on armed self-defense; instead, anyone with a license to carry a concealed handgun was free to carry their gun loaded. *Id.* at 41. That holding applies with equal force here.

In *Christian*, the court reiterated that a “facial challenge is limited to whether the ordinance is capable of constitutional application in any circumstance.” *Id.* at 40. To carry a concealed handgun under Oregon law, a sheriff “shall issue” a concealed-carry license to any applicant who passes a background check, lacks a disqualifying mental condition, and demonstrates competence with firearm safety. ORS 166.291. As such, Oregonians there

could lawfully carry a loaded firearm for self-defense by obtaining a concealed-carry license, and such a requirement did not unduly frustrate armed self-defense, as any license holder could exercise their rights unimpeded by the law. *Christian*, 354 Or at 41. Such a requirement was thus facially constitutional. *Id.*

So too here. Sheriffs and chiefs of police “shall issue” a permit-to-purchase to any applicant who passes a background check, lacks a disqualifying mental condition, and demonstrates competence with firearm safety. M114 §§ 3(3), 4(1), 4(3). As a result, to purchase a legal firearm for self-defense, any Oregonian need only satisfy those constitutionally permissible requirements and obtain a permit; any permit holder then can purchase a firearm unimpeded by Measure 114. As noted, plaintiffs bear the burden of persuading the court to abandon its precedents. *Ciancanelli*, 339 Or at 290. Plaintiffs fail to carry that burden, and their challenge therefore fails under *Christian*, 354 Or at 41.

2. Measure 114’s permit requirements are reasonable.

Even if *Christian* did not directly control, the permit requirements are facially constitutional because they reasonably seek to address significant threats to public safety without unduly frustrating armed self-defense. Implicit in *Christian* is the recognition that requiring a background check, screening psychological state, and acquiring competence with a firearm all reasonably

relate to firearm safety: Doing so prevents dangerous individuals from acquiring a firearm and ensures that users can handle the lethal weapon safely.

The text of the ballot measure supports and explains that reasonableness. The measure found, as a matter of policy, that “horrific deaths and devastating injuries” from rising gun violence posed an unacceptable threat to public safety. M114, Preamble. And the law sought to forestall those harms by requiring permits “so that firearms are kept out of dangerous hands.” *Id.* In other words, the requirements “are a legislative response to identified public safety concerns stemming from dangerous individuals obtaining firearms and the dangerous practice of individuals untrained in firearm safety obtaining firearms.” *Arnold*, 338 Or App at 572. The law then seeks to directly address “the threat posed by untrained and dangerous persons obtaining firearms.” *Id.* at 573.

Moreover, Measure 114’s permit requirements do not unduly frustrate armed self-defense. Permit agents must issue a permit to any qualified Oregonian, and any Oregonian with a permit may purchase a legal firearm. *See id.* at 573–74 (so holding). As such, “when the measure is executed as the text of the measure contemplates, * * * [any] qualified individual will be able to obtain a firearm for the purposes of self-defense.” *Id.* at 574.

Epidemiological studies further underscore the law’s reasonableness. Nine peer-reviewed, published epidemiological studies have analyzed the impact of state-level gun-permit requirements on firearm homicide rates; eight

of the studies found a statistically significant decrease in firearm-related homicides in states that instituted permit requirements; the ninth study had analyzed only one year of data from 1970, making it significantly less robust than the others. (ER-43, 46–125). Further, two peer-reviewed, published epidemiological studies have analyzed the impact of state permit requirements on mass-shooting events; both found a statistically significant decrease—between 40% and 56%—in the number of mass shootings in states that instituted such requirements. (ER-44, 47, 126–81).⁷

In short, epidemiological studies confirm what logic provides: Requiring permits promotes public safety and helps to reduce firearm-related homicides and mass shootings. As such, Measure 114’s permit requirements reasonably seek to promote public safety without unduly burdening armed self-defense. The law’s permit requirements are therefore constitutional on their face.

3. The trial court’s ruling to the contrary was error, and plaintiffs’ arguments lack merit.

The trial court concluded otherwise, construing the statute in a way that contravenes its plain text, and applying “intermediate scrutiny,” which has no basis in Oregon law. (ER-768–80). Plaintiffs adopt the former ruling in their

⁷ The trial court refused to consider these studies, which was addressed in the state’s Fourth Assignment of Error. (App Br 61–63). As discussed, this court may consider such facts in a facial challenge. *See also* M114, Preamble (citing studies on the public-safety impacts of similar permit requirements).

merits brief, and they defended the latter ruling before the Court of Appeals. (PBOM 57–63; Resp 45–46). Before this court, plaintiffs also advance dual policy arguments. (PBOM 27–33, 44–45). None have merit.

a. The trial court misread the text of the statute.

First, the trial court found determinative that the statute “delays the purchase of firearms for a minimum of 30 days” and that, in the future, the FBI could “refuse[] to conduct criminal background checks.” (ER-768–69; *see* PBOM 57–63 (so arguing)). Neither reasoning has any basis in either the statutory text or the record below.

The notion that Measure 114 establishes a 30-day prohibition on purchasing a firearm is flatly wrong. The statute provides that any applicant who has not received a permit within 30 days can sue in circuit court to compel its issuance: The trial court reviews the matter *de novo* and must issue a decision “within 15 judicial days of filing or as soon as practicable thereafter”; the resulting decision is then appealable as a matter of right. M114 §§ 5(1), (5), (8), (10), (11). But the availability of that remedy does not imply, much less require, a 30-day delay in processing an application. Put simply, “nothing in the measure prevents the permit agent from acting sooner when qualifications are met.” *Arnold*, 338 Or App at 570.

The trial court incorrectly stated that a 30-day minimum delay was “agreed upon by the parties at trial.” (ER-768). The record belies that

assertion. During opening statements, the court engaged in an extended colloquy with the state’s counsel on the permit process, including the judicial-review provisions:

COURT: So it’s 30 days -- you agree that it has to be issued within 30 days.

COUNSEL: Correct.

COURT: Or you can seek relief.

COUNSEL: Correct, Your Honor. And I will say the statute directs the issuance of a permit if the * * * requirements are met during that 30 days.

COURT: Okay. Thank you.

COUNSEL: And -- and another one is that *that’s a maximum*, not that the statute requires or even contemplates that a permit agent would unduly sit on an application if it’s -- if they’ve met all the requirements *in a few hours or a few days*.

(Tr-517 (emphases added)). During trial, the court then recounted defendants’ position that delay “could not be more than 30 days.” (Tr-1101). At no point did the state “agree” that Measure 114 creates a minimum 30-day prohibition against purchasing firearms. More fundamentally, the statute does no such thing, and parties “cannot stipulate to how a statute operates.” *Arnold*, 338 Or App at 561 n 5.

The trial court’s characterization of a permit requirement as an absolute prohibition also cannot be reconciled with *Christian*. There, too, a person who did not have a license could not engage in the regulated conduct, but the law

was facially constitutional because one need only obtain a license to engage in it. *Christian*, 354 at 41. Any license or permit system necessarily requires time to process applications. No precedent supports treating such a system as an absolute prohibition. *See Arnold*, 338 Or App at 573–74 (so reasoning).

As to the FBI, the trial court stated that an FBI background check “is required by the” statute and that, although the FBI currently states that it will process background-check requests, the FBI could change its mind “[a]t any moment.” (ER-777 n 10, 778). Neither rationale has merit.

First, the statute does not require that the FBI *conduct* a background check. Rather, the statute directs the Oregon State Police (OSP) to *request* one:

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

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

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

Id.

This structure—requiring OSP to request a background check from the FBI—comports with basic federalism principles. Under the Supremacy Clause, the state cannot “directly regulate the Federal Government’s operations or property.” *Blackburn v. United States*, 100 F3d 1426, 1435 (9th Cir 1996). If the statute did impermissibly direct the FBI, the proper judicial recourse would be to sever that ineffective provision, rather than to invalidate the entire statute. M114 § 12 (severability clause); ORS 174.040 (severability). But the statute does no such thing. Instead, it requires OSP to report the results of its background checks to the permit agent, including any information provided by the FBI. As a result, “nothing in Measure 114 requires cooperation from the FBI to issue a permit-to-purchase.” *Arnold*, 338 Or App at 570.

Second, the trial court’s unsupported speculation about what the FBI may or may not do in the future is improper. Even if the FBI decided not to process fingerprint-based background checks, that would not preclude issuance of any permit, as just discussed. More fundamentally, hypothetical speculation about the future has no place in a facial challenge. *See id.* at 574 (so stating).

b. The trial court applied “intermediate scrutiny,” which has no basis in Oregon law.

The trial court also invoked “intermediate scrutiny” to conclude that Measure 114 is facially unconstitutional. (ER-772; *see* Resp Br 45–46

(defending the trial court’s ruling)). The court reasoned that the state must show “an important government objective and competent evidence” before regulating one’s right to bear arms, including by “proving a citizen is too dangerous to own a firearm.” (ER-776). The court further indicated that the state was required to prove that a permit process would definitively reduce firearm-related violence. (ER-779). That standard has no basis in Oregon law.

Under Article I, section 27, a legislative policy decision need only reasonably seek to promote public safety without unduly frustrating armed self-defense. *Christian*, 354 Or at 33–34; *Hirsch/Friend*, 338 Or at 678. In reasoning otherwise, the trial court cited two Oregon cases. (ER-773, 776 n 9). Both, however, involved claims under the *federal* constitution. *Christian*, 354 Or at 41–46 (Second Amendment); *Matter of Comp. of Williams*, 294 Or 33, 40, 653 P2d 970 (1982) (Equal Protection Clause). As discussed above, it is long established “that the Oregon Constitution has a content independent of that of the federal constitution.” *Soriano*, 68 Or App at 645. This includes Article I, section 27. *Kessler*, 289 Or at 61–62. Case law on the federal constitution is therefore inapposite. *See Arnold*, 338 Or App at 559 n 1 (so stating).

Particularly puzzling is that the trial court improperly excluded, as irrelevant, the very evidence that the court found lacking. (Tr-477–79, 1456, 1465). As discussed above and in the state’s fourth assigned error, studies show that permit requirements decrease firearm-related homicides and mass

shootings. (ER-46–47 (summarizing studies)). The Oregon Constitution does not require such statistical proof to justify an exercise of legislative authority to promote public safety. But they further underscore the law’s reasonableness.

c. Plaintiffs’ additional policy arguments fail.

In their merits brief, plaintiffs advance two additional policy arguments, neither of which has merit. First, plaintiffs again question the policy wisdom of seeking to prevent gun violence, this time through the adoption of a permit-to-purchase program. (PBOM 44–45). That fails for the reasons discussed above. Gun violence exists, and the state legislative power may permissibly seek to promote public safety by combatting it. At bottom, that policy decision was the people’s to make under Article IV, section 1(2).

Second, plaintiffs question the constitutionality of requiring any permit at all. (PBOM 27–33). The gravamen of their argument is that Measure 114’s permit requirements impermissibly “designate all Oregonians as dangerous criminals until OSP determines that they are not disqualified.” (PBOM 30). That argument misreads both the statutory text and this court’s case law.

As recounted above, local permit agents, not the state police, are tasked with determining whether a permit applicant meets the basic eligibility requirements. The Oregon State Police run a background check to determine if the applicant has any disqualifiers. M114 § 4(1)(e). Local permit agents then “shall issue” a permit to any applicant who passes the background check, lacks

a disqualifying mental condition, and demonstrates competence with firearm safety. M114 §§ 3(3), 4(1), 4(3).

More fundamentally, plaintiffs’ assertion of an unrestricted right to purchase a firearm by any person at any time lacks any basis in Oregon law. The constitutional right to bear arms “is not an absolute right.” *Christian*, 354 Or at 33; *see Kessler*, 289 Or at 369 (so explicating). The state right to bear arms and the legal history from which it was derived recognize “the permissible legislative purpose of protecting the security of the community against the potential harm that results from the possession of arms.” *Hirsch/Friend*, 338 Or at 678. As such, the state may permissibly seek to prevent dangerous individuals from obtaining a firearm while ensuring that firearm users know how to use such a lethal weapon safely. *See Christian*, 354 Or at 40–41 (upholding a license requirement with similar eligibility criteria); *Hirsch/Friend*, 338 Or at 679 (upholding the disarming of convicted felons); *see also Arnold*, 338 Or App at 572, 574 (the Court of Appeals so reasoning).

D. Measure 114’s point-of-transfer background-check requirement is facially constitutional.

Finally, plaintiffs challenge Measure 114’s closure of the Charleston Loophole. The law requires a completed background check at the point-of-transfer, where federal law otherwise allows a transfer to proceed once three business days have passed since the check was initiated, even if the check

remains pending. As explained below, such a background-check requirement is facially constitutional.

1. Plaintiffs’ Charleston challenge is foreclosed by case law, and requiring a completed background check reasonably seeks to promote public safety without unduly frustrating self-defense.

Plaintiffs’ challenge to the closure of the Charleston Loophole is foreclosed by *Hirsch/Friend*, 338 Or 622, and *Christian*, 354 Or 22. As discussed, in *Hirsch/Friend*, the court upheld the facial constitutionality of a state prohibition on felons possessing a firearm. 338 Or at 677. The court concluded that “the drafters of the Oregon Constitution * * * did not intend to deprive the legislature of the authority to restrict arms * * * to protect the public safety.” *Id.* To that end, the legislature reasonably could choose to promote public safety by disarming those “posing identifiable threats to the safety of the community by virtue of earlier commission of serious criminal conduct.” *Id.*

Here, requiring a completed background check at the point of sale or transfer is a logical and permissible means to that constitutional end. If the legislature permissibly can disarm convicted felons, then it necessarily follows that the legislature can institute a process through which to identify those felons before they acquire a firearm. And like a license holder in *Christian*, 354 Or at 41, anyone whose background check has cleared is then free to proceed with a transfer, unimpeded by Measure 114.

Even if *Hirsch/Friend* and *Christian* were not dispositive, closing the loophole is reasonable. A completed background check ensures that an individual does not, in fact, have a disqualifying conviction, in part by helping to identify any convictions acquired since any previous background checks. At the same time, the requirement does not unduly frustrate armed self-defense because any Oregonian is free to complete their transfer once their background check clears; any problems with the law’s future implementation then “can only be explored through as-applied challenges.” *Arnold*, 338 Or App at 572–73.

Statistics again confirm what logic provides.⁸ In 2020 alone, at least 2,989 individuals with a disqualifying conviction nevertheless were able to purchase a firearm because their background check did not complete in three business days. (Tr-1597). Closing the loophole to prevent such transfers reasonably seeks to promote public safety by preventing those dangerous individuals from acquiring a firearm. *Hirsch/Friend*, 338 Or at 677.

2. The trial court’s ruling to the contrary was error, and plaintiffs’ arguments lack merit.

Eliding the above analysis, the trial court simply refused to consider the facial constitutionality of requiring a point-of-transfer background check. For

⁸ The trial court’s refusal to consider these statistics is addressed in the state’s Fifth Assignment of Error. (App Br 63–64). As discussed, this court may consider such facts in a facial challenge.

their part, plaintiffs reiterate their assertion of an unrestricted right to obtain a firearm by any person at any time. (PBOM 33–35). Neither has merit.

The trial court did not examine the point-of-transfer background-check requirement at all. Instead, the court reasoned that such background checks were “so essentially and inseparably connected with and dependent upon the unconstitutional permit-to-purchase scheme, the court finds it apparent the remaining parts would not have been enacted without the unconstitutional part.” (ER-768). But under Oregon law, severability is the rule, not the exception. Specifically, “it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force.” ORS 174.040. Further, Measure 114 includes a severability clause that emphasizes that each part should “be given effect” even absent any “invalid provision or application.” M114 § 12.

As such, even if the permit requirements were not constitutional (they are), the trial court could have tailored injunctive relief to enjoin permit-to-purchase without also enjoining the loophole closure. An injunction against requiring permits, while still requiring a completed background check at the point-of-transfer, would effectuate the unambiguous legislative preference for as much of the law going into effect as possible. M114 § 12; ORS 174.040. The policies are distinct, and an injunction easily could treat them separably.

Plaintiffs address the merits of a point-of-transfer background check by re-raising their same policy arguments discussed (and rebutted) above. They contend that no public-safety threat warrants requiring completed background checks, and they assert an unrestricted right to purchase a firearm without having to complete any background check at all. (PBOM 33–35, 44, 62–63). But gun violence poses a real, identifiable threat to public safety; the policy judgment was the people’s to make; and the state legislative power here reasonably seeks to address those threats without unduly frustrating armed self-defense. *See Arnold*, 338 Or App at 573–74 (so holding).

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CONCLUSION

To the extent that Measure 114 regulates protected weapons, the law constitutes “reasonable regulations to promote public safety” that “do[] not unduly frustrate the individual right to bear arms for the purpose of self-defense.” *Christian*, 354 Or at 33. The law is therefore facially constitutional under Article I, section 27. This court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 18, 2025, I directed the original Brief on the Merits of Respondents on Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Tony L. Aiello, Jr., attorney for petitioners on review, and Dominic M. Carollo, Jessica Ogden, Elizabeth Savage, Margaret S. Olney, Nadia Dahab, attorneys for amici curiae, by using the court's electronic filing system.

I further certify that on September 18, 2025, I directed the Brief on the Merits of Respondents on Review, to be served upon Tyler D. Smith, attorney for petitioners on review, and Daniel J. Nichols, attorney for amici curiae, by mailing a copy, with postage prepaid, in an envelope addressed to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 13,854 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

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