

Supreme Court Case No. S071885

SUPREME COURT
OF THE STATE OF OREGON

JOSEPH ARNOLD and CLIFF AMUSSEN,
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.

Appeal from Oregon Court of Appeals, No.A183242

**BRIEF FOR *AMICUS CURIAE* NATIONAL SHOOTING SPORTS
FOUNDATION, INC., IN SUPPORT OF PETITIONERS**

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STATEMENT OF INTEREST

The National Shooting Sports Foundation, Inc. (“NSSF”), is the firearm industry’s trade association. Founded in 1961, NSSF’s mission is to promote, protect, and preserve hunting and shooting sports. NSSF has approximately 10,000 members—including thousands of federally licensed manufacturers, distributors, and sellers of firearms, ammunition, magazines, and related products—nearly 200 of whom are in Oregon. NSSF has a clear interest in this case. Its members engage in the lawful production, import, distribution, and sale of constitutionally protected arms, including ammunition feeding devices capable of holding more than ten rounds and many firearms that come equipped with them. When, as Oregon has done here, a state categorically bans such arms, or makes it dizzyingly complex (if not downright impossible) to acquire even the few types of arms it has not (yet) seen fit to ban, that threatens NSSF members’ businesses and infringes on their and their customers’ fundamental constitutional rights. NSSF also has extensive experience litigating Second Amendment questions. Indeed, NSSF is a plaintiff in one of the pending federal-court challenges to Ballot Measure 114. NSSF is thus well situated to assist this Court in its resolution of this matter.

BACKGROUND

In November 2022, Oregon voters passed Ballot Measure 114, which erects a new permitting scheme that forces law-abiding citizens to contend with truly Kafkaesque procedures, as well as a flat ban on common arms.

I. Under Ballot Measure 114, a law-abiding citizen cannot lawfully acquire a firearm without a “permit-to-purchase.” Or. Laws 2023, ch.1 (“BM114”), §§6(2)(a), (2)(d), (3)(c), 7(3)(a), (3)(d)(B), 8(2), 9(2). But individuals must run a veritable gauntlet before they can obtain the permit—and even if they finally get one, they are *still* not entitled to acquire a firearm: “A permit-to-purchase issued under this section does not create any right of the permit holder to receive a firearm.” *Id.* §4(6)(a).

The first step on the long, winding path to securing a permit-to-purchase is completing a “firearm safety course.” *Id.* §4(1)(b)(D). That sounds straightforward, but it is not. Oregon does not provide training courses, and Measure 114 does not require it to do so, or even contemplate the possibility that it ever will. The state instead apparently expects individuals to obtain training privately, at their own expense. And not just any course will suffice; to qualify, a course must, among other things, include an “[i]n-person demonstration” of proficiency with a firearm and “utiliz[e] instructors certified by a law enforcement agency.” *Id.* §4(8)(a), (c)(D).

Clearing that training-course hurdle is just the beginning. Next, an applicant must submit to fingerprinting and photographing at a local sheriff's office or police station, where a permit agent can demand "any additional information determined necessary by department rules" and can even deny her application on the spot if he "conclude[s] that [she] has been or is reasonably likely to be a danger to self or others, or to the community at large, as a result of the applicant's mental or psychological state." *Id.* §4(1)(b)(C), (1)(c). Satisfying a permit agent that one is not "a danger" is not the end of the process. At that point, after collecting the application fee, the permit agent must reach out to the Oregon State Police ("OSP") to conduct a background check. *Id.* §4(1)(e). Oregon imposes no time constraint on OSP's investigation. Yet Ballot Measure 114 repeals the longstanding Oregon-law provision that allowed dealers to "deliver [a] handgun to [a] purchaser" when OSP "fail[ed] to provide a unique approval number to a gun dealer or to notify the gun dealer that the purchaser is disqualified ... before the close of the gun dealer's next business day following the request by the dealer for a criminal history record check," Or. Rev. Stat. §166.412(3)(c) (2021), and replaces it with a blanket ban on transfers unless and until OSP gives the green light. Under Ballot Measure 114, a "dealer may not transfer the firearm unless the dealer receives a unique approval number from the department," under any circumstances, and it is a crime to "[k]nowingly sell[] or deliver[] a firearm ...

prior to receiving a unique approval number from the department,” even if the purchaser already has a concealed handgun license. BM114 §6(3)(c), (14). Ballot Measure 114 thus grinds to a halt lawful, constitutionally protected transactions. Indeed, even if OSP expeditiously determines that an individual has passed the background check, it can wait *another* 30 days to issue the permit, *id.* §4(3)(a), without which it is unlawful to purchase (or sell) a firearm, *see id.* §6(14).

Ballot Measure 114 also gives broad discretion to officials to exercise subjective judgments about who is (and is not) suitable to acquire a firearm—transforming what on paper is a “shall-issue” regime (albeit one riddled with impermissible costs and delays) into an impermissible, subjective “may-issue” regime; it is a “shall-issue” regime in name only. Even if an individual passes the OSP background check, the sheriff or police chief to whom she initially applied for the permit retains discretion to exercise on-the-spot judgment about whether to deny the application. To repeat: Even if an individual completed a valid training course, paid the require fee, and passed a complete background check, the permit agent can *still* deny the application—and thus prevent the law-abiding citizen from being able to lawfully obtain a firearm—based on his subjective judgment that the law-abiding citizen “is reasonably likely to be a danger to self or others, or to the

community at large, as a result of the applicant’s mental or psychological state.” *Id.* §5(2).

An individual who secures a “permit-to-purchase” despite all the hurdles and discretion might think that she could now finally go to a licensed dealer and purchase the firearm. But she would be wrong. Once someone comes to a licensed dealer with a “permit-to-purchase” in hand, the process starts anew. The dealer must take her thumbprint, *id.* §§6(2)(c), (10)(a), (11); verify that her “permit-to-purchase” is valid by cross-referencing a state database, *id.* §6(2)(d); and, finally, ask OSP to perform *another* background check. The dealer cannot transfer the firearm until OSP gives the green light, and—again—there is no time limit on OSP or mechanism to force it to act.

The same duplicative hurdles apply at gun shows. *See id.* §§8(2), 9(1). And private parties seeking to transfer a firearm between them in a non-commercial setting may not do so *at all*; they must appear in person before a licensed gun dealer, where the transferee must present a permit-to-purchase—but, once again, the dealer must ask OSP to conduct another background check and await a “unique approval number”; and if the results are delayed or unknown, the transfer is off. *Id.* §7(3)(a), (c), (d)(A).

II. Besides erecting a byzantine permitting regime that purposefully frustrates law-abiding citizens’ ability to keep and bear arms, Ballot Measure 114 makes it “unlawful” to “manufacture, import[], possess[], use, purchase,

s[ell] or otherwise transfer[]” a “large-capacity magazine[.]” *Id.* §11(2). Ballot Measure 114 defines the term “large capacity magazine” to mean any “magazine, belt, drum, feed strip, helical feeding device, or similar device, ... 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.” *Id.* §11(1)(d). That itself is extraordinary. One-fifth of Oregonians lawfully owned magazines that can hold more than ten rounds of ammunition before this measure took effect. Circuit.Ct.Op.41. And millions more Americans across the country lawfully own and use them for ordinary lawful purposes, like self-defense. *See* William English, PhD, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* 22-23 (May 13, 2022), <https://perma.cc/UAW6-GTVF>; NSSF, *Detachable Magazine Report, 1990-2021*, at 3 (2024), <https://perma.cc/9S2E-EMCD>; NSSF, *Modern Sporting Rifle Comprehensive Consumer Report* 18, 31 (July 14, 2022), <https://perma.cc/N6NX-JKNN> (charting “Recreational targeting shooting” and “Home/self-defense” as the two highest rated “Reasons for Ownership” of MSRs which often come “standard” with 10-plus round magazines).

That is not the worst of it. Unlike the small number of other states that have recently attempted to ban comparable arms, Oregon has not contented itself with banning only detachable magazines. Instead, it has made itself an

outlier among outliers, sweeping into its prohibition any *firearm* with a magazine that is “contained in or permanently attached to [it] in such a manner that the device cannot be removed without disassembly of the firearm action,” if that fixed magazine can hold more than ten rounds. BM114 §11(1)(c), (d). The measure gives no guidance on what that language means. *But see Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 537 (6th Cir. 1998) (invalidating, as void for vagueness, ordinance using similar language).

Worse still, this prohibition applies not only to the use, sale, or manufacture of such arms, but to mere possession—even if the individual or business possessing these arms lawfully acquired them well before Ballot Measure 114 was proposed, let alone took effect. BM114 §11(2). The Ballot Measure thus allows Oregon to confiscate long-lawful arms from those who have already lawfully obtained them, turning law-abiding citizens into criminals virtually overnight. While some individuals who lawfully acquired these long-lawful arms before Ballot Measure 114 took effect may keep them on their premises and may take them, under certain narrow conditions, to a few enumerated locations, *id.* §11(5), licensed gun dealers in Oregon have no such “keep” option. Dealers can avoid criminal liability only by sending these arms out of state, rendering them inoperable, or dispossessing themselves of them altogether.

SUMMARY OF THE ARGUMENT

Ballot Measure 114 violates both the Second Amendment to the United States Constitution and Article I, Section 27, of the Oregon State Constitution. This Court should reverse the contrary decision of the Court of Appeals.

I. Ballot Measure 114’s “permit-to-purchase” regime violates both the United States Constitution and the Oregon State Constitution.

A. Under the federal Constitution, “when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct.” *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 17 (2022). The government therefore has the burden of showing that any regulation of that conduct is “consistent with this Nation’s historical tradition of firearm regulation.” *Id.* If not, the law violates the Second Amendment.

Under *Bruen*, this case is easy. Ballot Measure 114’s permit-to-purchase regime plainly regulates conduct protected by the plain text of the Second Amendment—namely, the keeping and bearing of arms. The Second Amendment guarantees the right to “keep and bear” arms, U.S. Const. amend. II, which cannot be exercised if one cannot acquire arms in the first place, *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677-78 (9th Cir. 2017) (en banc). Because permit-to-purchase regimes impose restrictions on the ability to keep and bear arms, they implicate conduct covered by the plain text of the Second Amendment.

Oregon cannot shoulder its burden to show that Ballot Measure 114's permit-to-purchase rules are "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17. Permit-to-purchase regimes were exceedingly rare throughout American history. And even among states today, Oregon's law is an outlier. Only three other states have enacted a permitting regime that applies to the acquisition of all firearms, without exception. As this illustrates, no tradition of regulation existed at *either* the time of the ratification of the Second Amendment *or* the time of the ratification of the Fourteenth Amendment (*or* when Oregon was admitted to the Union) that included permitting requirements to acquire firearms. Worse still, Ballot Measure 114 compounds its problems by conferring subjective discretion on state officials that may be applied to "abusive ends," in flagrant disregard of *Bruen*'s admonitions. *Id.* at 38 n.9.

B. Ballot Measure 114 likewise violates Article I, Section 27, of Oregon's constitution. The Oregon Constitution recognizes Oregonians' right to engage in armed self-defense. *State v. Kessler*, 289 Or. 359, 371-72 (1980). Ballot Measure 114's permit-to-purchase regime prevents them from doing just that. The permitting regime it creates operates as a de facto 30-day waiting period *at the very least* on the acquisition of a firearm. Circuit.Ct.Op.13. Such a waiting period prevents vulnerable Oregonians from acquiring firearms to respond to exigent threats to their and their families'

lives. And 30 days is just the floor; because a second round of checks with no time cap is required, the delay can go on literally forever.

By extending the waiting period beyond the duration of many exigencies, Ballot Measure 114 effectively denies Oregonians the ability to engage in armed self-defense by barring them from obtaining the arms necessary to do so while the exigency occurs. The right to armed self-defense was meant to reflect the “exigencies” of life on the frontier, *Kessler*, 289 Or. at 368, and by preventing Oregonians from acquiring a firearm without a month’s lead time, Ballot Measure 114 violates that right.

II. Ballot Measure 114’s criminal prohibition on the acquisition and possession of magazines and other feeding devices capable of accepting more than ten rounds of ammunition likewise violates both the United States Constitution and the Oregon State Constitution.

A. Starting with the federal Constitution, “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms.” *Bruen*, 597 U.S. at 28 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008)); accord *United States v. Rahimi*, 602 U.S. 680, 691 (2024); *Caetano v. Massachusetts*, 577 U.S. 411, 411 (2016) (per curiam). That presumptive protection covers “any thing that a man ... takes into his hands, or useth in wrath to cast at or strike another,” *Heller*, 554 U.S. at 581, which an ammunition feeding device surely is. As their name suggests, feeding devices

are not passive holders of ammunition, like a cartridge box of yore; they are integral to the design of semiautomatic firearms and the mechanism that makes them work, actively feeding ammunition into the firing chamber. As even the Court of Appeals recognized, “[i]t is undisputed that ammunition magazines are required for firearms to be operable.” Att.25. Keeping and bearing such instruments is thus presumptively protected conduct, no matter the capacity of the feeding device. The threshold textual inquiry here is that simple.

The historical-tradition inquiry is no more complex. The Supreme Court of the United States has repeatedly held that “arms” cannot be prohibited “consistent with this Nation’s historical tradition” if they are “in common use today” for lawful purposes, as opposed to “dangerous and unusual.” *Bruen*, 597 U.S. at 17, 27, 47; *accord Heller*, 554 U.S. at 625, 631. An arms ban thus can pass muster only if the banned arms are “*both* dangerous *and* unusual.” *Caetano*, 577 U.S. at 417 (Alito, J., concurring in the judgment); *cf. Snipe v. Brown*, 145 S.Ct. 1534, 1534 (2025) (Kavanaugh, J., respecting the denial of certiorari) (“Given that millions of Americans own AR-15s and that a significant majority of the States allow possession of those rifles, petitioners have a strong argument that AR-15s are in ‘common use’ by law-abiding citizens and therefore are protected by the Second Amendment under *Heller*.”). Feeding devices that hold more than ten rounds of

ammunition are the furthest thing from “unusual” in modern American society. Tens of millions of Americans lawfully own hundreds of millions of these arms. Any claim that arms more common by an order of magnitude than the Ford F-150 are “unusual” would not pass the straight-face test.

That should be the end of the matter. Our Nation’s historical tradition is one of protecting the right of law-abiding citizens to keep and bear arms that are “in common use today” for lawful purposes. *Bruen*, 597 U.S. at 47. But even if one looked beyond common use, the historical record reveals no tradition whatsoever of banning firearms or feeding devices based on firing capacity. Firearms capable of firing more than ten rounds have been around for centuries. Yet “[a]t the time the Second Amendment was adopted, there were no laws restricting ammunition capacity.” David B. Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Alb. L. Rev. 849, 864 (2015). And while semiautomatic firearms equipped with feeding devices holding more than ten rounds have been on the civilian market since the turn of the twentieth century, not a single state in the Union (or Congress) restricted the manufacture, sale, or possession of magazines or other ammunition feeding devices until the 1990s. The historical record thus confirms what the common-use test reflects: There is no longstanding historical tradition in our Nation of prohibiting keeping or bearing ammunition feeding devices (or firearms) based on their capacity to fire without being reloaded.

To be sure, federal courts of appeals that have addressed prohibitions similar to Ballot Measure 114's have concluded that such laws do not violate the Second Amendment. But NSSF respectfully submits that those opinions are wrong, and that the Supreme Court of the United States is likely to overrule them in an appropriate case. Ballot Measure 114's prohibition on common arms violates the Second Amendment.

B. Ballot Measure 114 also violates Article I, Section 27, of the Oregon Constitution. While the Oregon Constitution grants different protections than the Second Amendment, which “applies equally to the Federal Government and the States,” *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), it too provides a “right to bear arms for purposes of self-defense,” *State v. Christian*, 354 Or. 22, 25 (2013). And those protected “arms” likewise include the ammunition feeding devices Ballot Measure 114 seeks to prohibit.

Because “ammunition magazines are required for” most modern semiautomatic “firearms to be operable,” it is not “appropriate” to “parcel[] out a firearm component from the firearm itself” when assessing the constitutionality of the ballot measure. Att.25. So the question for purposes of the Oregon Constitution is whether Ballot Measure 114 “unduly frustrat[es] the right to armed self-defense as guaranteed by Article I, Section 27.” Att.13. It does. Because Oregonians have long possessed and exercised a right to keep and bear ammunition feeding devices capable of holding more than ten

rounds, Ballot Measure 114’s sharp break with that tradition represents an unreasonable intrusion on Oregonians’ right to armed self-defense. It therefore violates Article I, Section 27, of the Oregon Constitution.

ARGUMENT

I. Ballot Measure 114’s Permitting Regime Is Unconstitutional.

Although Ballot Measure 114 bills itself as creating a “shall issue” licensing regime that awards applicants a five-year “permit-to-purchase” firearms, in reality it erects a Kafkaesque regime that finds no support in history, tradition, or even modern regulation. That novel regime violates both the Second Amendment and the Oregon Constitution.

A. The Novel Permitting Regime Ballot Measure 114 Erects Violates the Second Amendment.

Ballot Measure 114 forbids law-abiding Oregonians (“the people”) from acquiring (and thus “keep[ing] and bear[ing]”) common firearms and feeding devices that satisfy “the Second Amendment’s definition of ‘arms.’” U.S. Const. amend. II; *Bruen*, 597 U.S. at 28. It therefore trenches on arms-bearing conduct that is presumptively protected by the Second Amendment.

1. Ballot Measure 114’s restrictions on acquiring firearms plainly regulate conduct covered by the plain text of the Second Amendment. The threshold question in a Second Amendment case is “whether the plain text of the Second Amendment protects [the plaintiff’s] proposed course of conduct.” *Bruen*, 597 U.S. at 32. If the answer is yes—i.e., if the state has “regulate[d]

arms-bearing conduct,” *Rahimi*, 602 U.S. at 691—then “the Constitution presumptively protects that conduct,” *Bruen*, 597 U.S. at 24, and the government “bears the burden to ‘justify its regulation,’” *Rahimi*, 602 U.S. at 691 (quoting *Bruen*, 597 U.S. at 24). Here, the answer is plainly yes.

The Second Amendment secures “the right of the people to keep and bear Arms.” U.S. Const. amend. II. As *Heller* explained, “the most natural reading of ‘keep Arms’ ... is to ‘have weapons,’” and “the natural meaning of ‘bear arms’ ... implies ... the carrying of [a] weapon ... for the purpose of ‘offensive or defensive action.’” 554 U.S. at 582-83. Ballot Measure 114’s permit-to-purchase regime imposes obstacles on law-abiding Oregonians’ ability to have weapons or carry them for their defense. It therefore regulates arms-bearing conduct covered by the Second Amendment’s plain text.

2. Oregon must therefore demonstrate that Ballot Measure 114’s novel restrictions on acquiring firearms are consistent with this Nation’s historical tradition of firearm regulation. It cannot do so.

Whatever may be said about permits to *carry* firearms, permits to *purchase* firearms have long been exceedingly rare. Permit-to-*purchase* regimes did not exist in the eighteenth or nineteenth centuries. During the Progressive-Prohibition era, a few states enacted such requirements for the first time, though almost all (unlike Ballot Measure 114) exempted long guns and most were later repealed. See David B. Kopel, *Background Checks for*

Firearms Sales and Loans: Law, History, and Policy, 53 Harv. J. on Legis. 303, 343-46, 352-55, 358, 360-61 (2016); Nicholas Gallo, *Misfire: How the North Carolina Pistol Purchase Permit System Misses the Mark of Constitutional Muster and Effectiveness*, 99 N.C. L. Rev. 529, 543 (2021). Even today, such regimes remain quite rare, particularly when applied to all firearms whatsoever; only three other states go so far. *See* Conn. Gen. Stat. §§29-33, 29-36f – 29-36i, 29-37a, 29-38g – 29-38j; Haw. Rev. Stat. Ann. §§134-2, 134-13; N.J. Stat. Ann. §2C:58-3. Those laws are far too little and “too late to provide insight into the meaning of” constitutional provisions adopted long beforehand. *Bruen*, 597 U.S. at 36-37 (quoting *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 312 (2008) (Roberts, C.J., dissenting)). As *Bruen* made clear, the kind of historical tradition the government must prove to justify a burden on Second Amendment rights is “an enduring American tradition of state regulation,” not just a handful of late-in-time laws from “outlier jurisdictions.” *Id.* at 69-70; *see id.* at 38 (rejecting reliance on “a handful of late-19th-century [analogues]”).

Any argument that the tradition supporting *carry*-permit regimes can justify permit-to-*purchase* regimes fails coming and going. The test *Bruen* established requires the government to come forward with historical regulations that are analogous to the challenged regulation in terms of “two metrics”: “how and why the regulations burden a law-abiding citizen’s right

to armed self-defense.” *Id.* at 29. The nature of the burden is thus a core part of the test. *See id.* (reiterating that “whether modern and historical regulations impose a comparable burden on the right of armed self-defense” is a “‘*central*’ consideration[.]”). And it does not take a doctorate to understand that laws that restrict individuals’ right to carry do not impose the same burden on the right of armed self-defense as laws, like Ballot Measure 114, that restrict individuals’ ability to have a firearm at all. After all, one who is denied a carry permit can at least still exercise the right of armed self-defense in his home. One who is denied a permit to purchase under Ballot Measure 114 cannot do even that much.

That means that Oregon must come forward with historical analogues that burden the right in the same way. But the state has never pointed to any, and neither did the Court of Appeals. That is because none exists.

3. Ballot Measure 114’s novel permitting regime also runs afoul of *Bruen*’s admonition that even an otherwise-valid licensing regime violates the Second Amendment if it is “put toward abusive ends,” such as employing “lengthy wait times in processing license applications or exorbitant fees” that impede the ability to obtain the necessary permit or license. *Bruen*, 597 U.S.

at 38 n.9.¹ Ballot Measure 114 imposes severe delays on law-abiding citizens' ability to acquire firearms. Under Ballot Measure 114, individuals must undergo two background checks every time they want to purchase a firearm: one to acquire a permit, and another to purchase a firearm. Both of them may take upwards of a month—if not far longer. Ballot Measure 114 allows permit agents to take as long as 30 days to conduct the background check that is necessary to obtain a permit on the front end. But that cap is illusory, as Ballot Measure 114 also repealed the longstanding Oregon-law provision that allowed dealers to “deliver [a] handgun to [a] purchaser” when OSP “fail[ed] to provide a unique approval number to a gun dealer or to notify the gun dealer that the purchaser is disqualified ... before the close of the gun dealer’s next business day following the request by the dealer for a criminal history record check,” Or. Rev. Stat. §166.412(3)(c) (2021), and replaced it with a blanket ban on transfers unless and until OSP gives the green light. Thus, even 30 days is not the outer limit for the first background check under Ballot Measure 114. Nor is the first background check the endpoint: Ballot Measure 114 requires a dealer to obtain a *second* background check before it may transfer a firearm, and there is *no time limit at all* on how long OSP may take to

¹ Of course, it is not even clear that *Bruen* footnote 9 applies here, given that Ballot Measure 114 is not a presumptively valid shall-issue regime; as explained, a permit can be denied at the whims of officials.

complete that check. Such a duplicative, unending, prophylaxis-upon-prophylaxis approach is anathema to the notion that the Second Amendment secures a fundamental constitutional right. *Cf. McCutcheon v. FEC*, 572 U.S. 185, 221 (2014) (plurality op.) (First Amendment). Oregon’s novel permit-to-purchase regime is a blatant and unconstitutional interference with law-abiding citizens’ Second Amendment rights.

B. The Novel Permitting Regime Ballot Measure 114 Erects Violates the Oregon Constitution.

Oregonians have a right to armed self-defense under the Oregon Constitution. *Willis v. Winters*, 350 Or. 299, 302 n.1 (2011) (en banc). And state laws are unconstitutional when they “unduly frustrate” that right. *Christian*, 354 Or. at 33. Ballot Measure 114 does just that. By imposing a byzantine permitting process before Oregonians may acquire firearms, the measure prevents Oregonians from obtaining arms for self-defense in their most vulnerable moments—when sudden or exigent circumstances prompt an acute fear for their and their families’ lives.

The state’s permit-to-purchase regulation prevents Oregonians from acquiring firearms for at least 30 days. *See Circuit.Ct.Op.13*. That is no small burden on the right to self-defense. To be sure, individuals sometimes know they face potential danger months or years in advance, such that they can plan ahead and acquire a firearm well in advance. But sometimes the risk is more sudden: A boyfriend turns violent, assaulting his girlfriend in front of their

young child, *Rahimi*, 602 U.S. at 686, a man begins stalking his ex-girlfriend, causing her to fear for her safety, *Castro v. Heinzman*, 194 Or.App. 7, 11-12, 16 (2004), a stranger repeatedly accosts a passerby, threatening to kill him and his family, *State v. Hejazi*, 323 Or.App. 752, 755-56 (2023). When events like these give Oregonians good reason to fear immediate harm, they do not have the luxury of waiting at least a month for the state’s permitting process to run its languid course. And, as explained, 30 days is just the beginning: Under Ballot Measure 114, the delay literally can go on forever.

By imposing a time-consuming permitting regime that Oregonians must navigate before they can acquire firearms, Ballot Measure 114 does not merely “frustrate” Oregonians’ right to armed self-defense, *Christian*, 354 Or. at 33; in many cases it eliminates it altogether. When exigent circumstances drive Oregonians to acquire firearms to protect themselves and their families, the state’s de facto 30-day waiting period virtually ensures that the fear that prompted that need will have passed (or come to pass) by the time the firearm is actually available. That means that, for many Oregonians, Ballot Measure 114 deprives them of their right to armed self-defense by preventing them from acquiring a firearm with which to defend themselves unless the threat to their safety is known months in advance. But the Oregon constitution does not confer a right to bear arms *eventually*; it confers a right to acquire and bear arms for self-defense *when the need for self-defense emerges*. *Kessler*, 289

Or. at 367-68 (noting that Section 27 was meant to respond to “*the exigencies* of the rural American experience” (emphasis added)). No Oregonian wants to be in the position of needing to acquire a firearm on short notice to protect her life. But when the need arises, it is acute and urgent—and Ballot Measure 114 prevents law-abiding Oregonians from addressing it. Accordingly, Ballot Measure 114’s permit-to-purchase requirement violates Article I, Section 27, of the Oregon Constitution.

II. Ballot Measure 114’s Prohibition On Common Arms Violates The United States Constitution And The Oregon Constitution.

A. The Ban on “Large-Capacity Magazine” Violates the Second Amendment to the United States Constitution.

By outlawing ubiquitous feeding devices, Ballot Measure 114 plainly “regulates arms-bearing conduct.” *See Rahimi*, 602 U.S. at 691. And nothing in our Nation’s historical tradition supports a flat ban on arms commonly kept and borne for lawful ends, including self-defense.

1. The ammunition feeding devices Ballot Measure 114 bans are “Arms.”

As the Supreme Court of the United States has made clear, the term “Arms” in the Second Amendment includes “any thing that a man ... takes into his hands, or useth in wrath to cast at or strike another.” *Heller*, 554 U.S. at 581; *see also Bruen*, 597 U.S. at 28 (reiterating that “modern instruments” are covered). That obviously includes firearms that come standard with fixed magazines. And ammunition feeding devices plainly fit that bill as well. As

their name suggests, ammunition feeding devices do not just store ammunition. To the contrary, they are an integral part of the firing mechanism, as they feed ammunition into the chamber. *See Garland v. Cargill*, 602 U.S. 406, 416-21 (2024).

The Court of Appeals recognized as much, noting that it is “undisputed that ammunition magazines are required for [certain] firearms to be operable.” Att.25. Indeed, without a magazine, the remaining components of most semiautomatic firearms cannot function as a firearm at all. Ammunition feeding devices are essential to make semiautomatic firearms work: When a user pulls the trigger, the round in the chamber fires, and the magazine and semiautomatic action combine to feed a new round into the firing chamber. Citizens thus carry firearms equipped with ammunition feeding devices for the same reason they carry firearms loaded with ammunition: “[W]ithout bullets, the right to bear arms would be meaningless.” *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014).

In sum, the threshold question here boils down to “whether a magazine is an arm under the Second Amendment. The answer is yes.” *Ass’n of N.J. Rifle & Pistol Clubs, Inc. v. Att’y Gen. N.J.*, 910 F.3d 106, 116 (3d Cir. 2018). And the answer does not change if a magazine holds more than ten rounds of ammunition. Circuit.Ct.Op.24. After all, a bearable instrument that satisfies the definition of “Arms” in Size Small does not cease to be an “Arm” in Size

Medium or Size Large. When it comes to the threshold textual inquiry, an Arm is an Arm is an Arm.

Of course, that does not mean that the Second Amendment guarantees “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626. Nor does it mean that whether an arm is in common use for lawful purposes—or, conversely, is “dangerous and unusual”—is irrelevant to the final analysis. But considerations that find no purchase in the text are not part of the threshold plain-text inquiry. The threshold inquiry instead begins and ends with the indisputable fact that the outlawed firearms and feeding devices “constitute bearable arms,” which suffices to render them “presumptively protect[ed].” *Bruen*, 597 U.S. at 17, 24, 28.

2. The magazines Ballot Measure 114 bans are typically possessed by law-abiding citizens for lawful purposes.

Because the firearms and feeding devices that Ballot Measure 114 bans fit “the Second Amendment’s definition of ‘arms,’” the state bears the burden of proving that they nevertheless can be banned “consistent with this Nation’s historical tradition of firearm regulation.” *Id.* at 17, 28. It cannot do so. While laws that regulate arms-bearing conduct around the edges require independent inquiry, when it comes to a flat ban on possession, the Supreme Court of the United States has already done the work. As *Heller* held and *Bruen* reiterated, the only “arms” a state may ban “consistent with this Nation’s historical

tradition of firearm regulation” are those that are (at a minimum) “highly unusual in society at large,” as opposed to “in common use today.” *Id.* at 17, 47. That means, under *Bruen*, that only “dangerous and unusual weapons” may be banned. *Id.* at 4 (citing *Heller*, 554 U.S. at 627); accord *Caetano*, 577 U.S. at 417 (Alito, J., concurring in the judgment) (“A weapon may not be banned unless it is *both* dangerous *and* unusual.”).

The critical question, then, is whether the arms the state bans are in common use for lawful purposes, or whether the state (which bears the burden of persuasion at this stage) has demonstrated that they are dangerous and unusual. Once again, the answer is easy, as the arms Oregon outlaws are the furthest thing from “highly unusual” in modern America. Magazines that hold more than ten rounds are commonly owned by tens of millions of Americans for all manner of lawful purposes, including self-defense, sporting, and hunting, as are the firearms that come standard with such magazines affixed to them. As the Circuit Court noted, “Oregon [alone] has 1.6 million lawful gun owners, 808,000 of whom have large capacity magazines in their possession.” Circuit.Ct.Op.41. An item possessed by a fifth of the state and a half of its gun owners can hardly be called unusual—much less highly so.

Broadening the lens just underscores the ubiquity of the arms the state has banned. “One estimate based in part on government data shows that ... half of all magazines in America hold more than ten rounds.” *Duncan v.*

Becerra, 970 F.3d 1133, 1142 (9th Cir. 2020), *vacated on grant of reh’g en banc*, 988 F.3d 1209 (9th Cir. 2021)²; *see also* English, *supra*, at 22-23 (finding that 39 million Americans own or have owned ammunition feeding devices that hold more than ten rounds). Another more recent estimate using industry data found that between 1990 and 2021 Americans purchased 717 million magazines with a capacity of more than ten rounds. NSSF Report, *supra*. That is more than 44.5 times more common than the most common automobile in the country. *See* Brett Foote, *There Are Currently 16.1 Million Ford F-Series Pickups on U.S. Roads*, Ford Auth. (Apr. 9, 2021), <https://perma.cc/8229-KESW>. In short, what the D.C. Circuit said over a decade ago is even more true today: While “[t]here may well be some capacity above which magazines are not in common use[,] ... that capacity surely is not ten.” *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011).

² The Ninth Circuit ultimately held in *Duncan* that California’s ban on magazines capable of accepting more than ten rounds does not restrict conduct covered by the plain text and is not inconsistent with historical tradition. *Duncan v. Bonta*, 133 F.4th 852 (9th Cir. 2025) (*en banc*). That opinion is of a piece with the other federal court of appeals opinions to have addressed the issue post-*Bruen*. *See* *Hanson v. District of Columbia*, 120 F.4th 223 (D.C. Cir. 2024); *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38 (1st Cir. 2024); *Bevis v. City of Naperville*, 85 F.4th 1175 (7th Cir. 2023). But NSSF respectfully submits that those opinions are incorrect, and that the Supreme Court of the United States will likely overrule them in an appropriate case.

Nor is there any question that ammunition feeding devices capable of accepting more than ten rounds are “typically possessed by law-abiding citizens for lawful purposes.” *See Heller*, 554 U.S. at 625. In the vast majority of states, these arms are perfectly lawful. *See* Lillian Mongeau Hughes, *Oregon Voters Approve Permit-to-Purchase for Guns and Ban High-Capacity Magazines*, NPR (Nov. 15, 2022), <https://perma.cc/PL7Q-K9DQ>. And the most frequently cited reasons by the millions of Americans who own magazines capable of holding more than ten rounds are target shooting (64.3% of owners), home defense (62.4%), hunting (47%), and defense outside the home (41.7%). English, *supra*, at 23. Indeed, the “exigencies of the rural American experience,” *Kessler*, 289 Or. at 367-68—for example, defending one’s home from pack animals like coyotes or wolves—amply explain the need for magazines with a capacity of more than ten rounds. After all, “[w]hen a firearm being used for defense is out of ammunition, the defender no longer has a functional firearm.” Kopel, *supra*, 78 Alb. L. Rev. at 851.

Of course, as with any arms, there are some who misuse these arms for unlawful purposes. But that is equally (if not more) true of the handguns at issue in *Heller*. The *Heller* dissenters protested that handguns “are specially linked to urban gun deaths and injuries” and “are the overwhelmingly favorite weapon of armed criminals.” 554 U.S. at 682 (Breyer, J., dissenting). The majority did not dispute these points; it just found them irrelevant to whether

handguns are constitutionally protected, because that question does not turn on whether arms are misused by criminals. It turns on whether law-abiding citizens commonly own and use them for lawful purposes. That is why it was enough in *Heller* that handguns are “typically possessed by law-abiding citizens for lawful purposes.” *Id.* at 624-25 (majority op.).

This was the principal error of the Court of Appeals’ opinion, which focused pervasively on the potential misuse of the arms Oregon has banned by a small number of criminals, rather than their lawful use by hundreds of thousands of citizens. *See* Att.19-21, 27-28. In reality, Oregon’s ban flunks the historical-tradition test for the same reason the District of Columbia’s ban did in *Heller*: because millions of law-abiding Americans own for lawful purposes the arms Oregon has banned. *See Heller*, 554 U.S. at 625.

3. To the extent further historical analysis is warranted, Oregon cannot carry its historical-tradition burden.

The Court can and should end its analysis there. “[T]he traditions of the American people ... demand[] our unqualified deference,” *Bruen*, 597 U.S. at 26, and the tradition of the American people is that law-abiding citizens may keep and bear arms that are commonly possessed for self-defense and other lawful purposes. When it comes to a flat ban on arms, that *is* the historical test—and it forecloses the state’s effort to ban these unquestionably common arms. After all, a state may not prohibit what the Constitution protects.

In all events, even if further historical inquiry were necessary, Oregon has not come close to meeting its burden of demonstrating that Ballot Measure 114 is consistent with this Nation's historical tradition. Indeed, the very fact that millions of Americans have chosen to possess hundreds of millions of these arms confirms that there is not, nor has there ever been, any tradition of banning them. To the contrary, the historical record reveals a long tradition of welcoming technological advancements that enable civilian firearms to fire more rounds more accurately and efficiently.

First, there is no longstanding historical tradition of regulating firing or ammunition capacity, let alone of banning ammunition feeding devices above a certain threshold. That is not because a desire for greater ammunition capacity is a new phenomenon. On the contrary, Americans have always wanted arms that can fire more rounds more quickly (and more accurately). That explains why arms that could fire more than ten rounds without reloading would by no means have been "unforeseen inventions to the Founders." *Duncan*, 970 F.3d at 1147. Despite that historical reality, laws prohibiting the possession of such arms most certainly *would* have been. "At the time the Second Amendment was adopted, there were no laws restricting ammunition capacity." Kopel, *supra*, 78 Alb. L. Rev. at 864. That did not change anytime soon: Laws regulating firing capacity did not start to appear for another 100-

plus years. And no state restricted the manufacture, sale, or possession of magazines themselves (of any capacity) *until the 1990s*.

To be sure, a few states enacted laws restricting the firing capacity of semiautomatic weapons in the early twentieth century, contemporaneous with their enactment of restrictions on fully automatic firearms that had just started to make their way onto civilian markets in very limited numbers. *See* 1927 Mich. Pub. Acts 887, 888; 1927 R.I. Acts & Resolves 256, 256-57; 1933 Minn. Laws ch. 190. But those laws were either repealed outright or replaced with laws that restricted only fully automatic weapons—i.e., machine guns—which, unlike semiautomatics, were never widely adopted by law-abiding citizens for lawful purposes. *See* 1959 Mich. Pub. Acts 249, 250; 1959 R.I. Acts & Resolves 260, 260, 263; 1963 Minn. Sess. L. ch. 753, at 1229. And none of these laws—which were outliers even while on the books—was ever understood to apply to magazines. *See* Kopel, *supra*, 78 Alb. L. Rev. at 864-66.³ Only the District of Columbia restricted magazines or other ammunition

³ California and Ohio also enacted licensing laws for certain semiautomatics but did not enact outright bans. *See* 1933 Cal. Stat., ch. 450; 1933 Ohio Laws 189. And while a Virginia law enacted in this era could be read to include semiautomatic firearms that hold more than 16 rounds, it was not a general ban, but rather just heightened the penalties for using such a weapon in a “crime of violence” or “for offensive or aggressive purpose.” 1934 Va. Acts, ch. 96, §§1(a), 2, 4(b). As with the three laws cited in the text, moreover, all of these laws were either repealed outright or replaced in short order with laws restricting only fully automatic weapons. *See* 1965 Cal. Stat., ch. 33, at 913; 1972 Ohio Laws 1866, 1963; 1975 Va. Acts, ch. 14, at 67.

feeding devices before 1990, and that law was even more of an outlier than the handful of state laws just mentioned.⁴ That explains why the Supreme Court of the United States, when discussing modern semiautomatic rifles that come standard with 20- or 30-round magazines, observed (correctly) that such arms “traditionally have been widely accepted as lawful possessions” in this country. *Staples v. United States*, 511 U.S. 600, 612 (1994).

In all events, particularly given the ubiquity by the Prohibition Era of firearms with a capacity of more than ten rounds, these few, late-breaking laws do not an enduring tradition make. *See Bruen*, 597 U.S. at 36-37. Moreover, outside the District of Columbia, the first state law restricting magazine capacity did not come *until 1990*—two centuries after the founding and well over a century after the ratification of the Fourteenth Amendment. *See* 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. §2C:39-1(y), -3(j)). And most states still allow ordinary law-abiding citizens to choose for themselves what ammunition capacity they believe best suits their needs.

⁴ In 1932, Congress banned possession in the District of Columbia of firearms that “shoot[] automatically or semiautomatically more than twelve shots without reloading.” Pub. L. No. 72-275, §§1, 14, 47 Stat. 650, 650, 654. That law was not originally understood to ban magazines. Indeed, when Congress enacted the National Firearms Act just two years later, it imposed no restrictions on magazines. *See* Pub. L. No. 73-474, 48 Stat. 1236 (1934). But after the District achieved home rule in 1975, the new D.C. government interpreted its law to “outlaw[] all detachable magazines and all semiautomatic handguns.” Kopel, *supra*, 78 Alb. L. Rev. at 866. The latter portion of that D.C. law was invalidated in *Heller*.

As for the federal government, it did not regulate magazine capacity until 1994, when Congress adopted a nationwide ban on ammunition feeding devices with a capacity of more than ten rounds. *See* Pub. L. No. 103-322, 108 Stat. 1796 (1994) (formerly codified at 18 U.S.C. §922(w)). But Congress allowed the law to expire in 2004 after a study by the Department of Justice revealed that it had produced “no discernible reduction” in violence with firearms across the country. Christopher S. Koper et al., *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets & Gun Violence, 1994-2003*, Rep. to the Nat’l Inst. of Just., U.S. Dep’t of Just. 96 (2004), <https://perma.cc/UZX4-VAFS>.

In short, while there is a long historical tradition of law-abiding citizens possessing for lawful purposes the class of arms Oregon has now prohibited, there is no similar national tradition of government regulation of these commonplace arms—let alone of outright bans.

The state cannot save its ban by claiming that the devices it covers are some dramatic technological change. *See Bruen*, 597 U.S. at 27. Firearms capable of firing more than ten rounds of ammunition without reloading are not new—and neither are ammunition feeding devices up to that task. “[T]he first firearm that could fire more than ten rounds without reloading was invented around 1580.” *Duncan*, 970 F.3d at 1147; *see also* William Wellington Greener, *The Gun and Its Development* 80-81 (8th ed. 1907).

Several such arms pre-dated the Revolution, some by nearly a hundred years. For example, the popular Pepperbox-style pistol could “shoot 18 or 24 shots before reloading individual cylinders,” and the Girandoni air rifle, which “had a 22-round capacity,” “was famously carried on the Lewis and Clark expedition.” *Duncan*, 970 F.3d at 1147. These and other firearms capable of firing more than ten rounds without reloading became widespread in the United States well before the Fourteenth Amendment was ratified.

As for “cartridge-fed” “repeating” firearms in particular, they came onto the scene “in 1855 with the Volcanic Arms lever-action rifle that contained a 30-round tubular magazine, and at the latest in 1867, when Winchester created its Model 66, which was a full-size lever-action rifle capable of carrying 17 rounds” that “could fire 18 rounds in half as many seconds.” *Duncan*, 970 F.3d at 1148; *see* Louis A. Garavaglia & Charles G. Worman, *Firearms of the American West, 1866-1894*, at 128 (1984); *see also* Kopel, *supra*, 78 Alb. L. Rev. at 854-55 (discussing the advent of the “first metallic cartridge ... similar to modern ammunition” in the 1850s). These multi-shot arms were not novelties; they were ubiquitous among civilians by the end of the Civil War. “[O]ver 170,000” Winchester 66s “were sold domestically,” and the successors that replaced the Model 66 (the 73 and 92) sold more than ten times that amount in the ensuing decades. *Duncan*, 970 F.3d at 1148. And Winchesters were far from unique in this regard. *See, e.g.,*

Nicholas J. Johnson, et al., *Firearms Law and the Second Amendment: Regulation, Rights, and Policy* 437 (3d ed. 2021) (discussing the popular Henry lever action rifle, which could fire 16 rounds without reloading).

To be sure, feeding devices capable of holding more than ten rounds (and firearms that come standard with them) were not as common in the nineteenth century as they are today. But the same could be said of pretty much any type of arm. The state thus pervasively misunderstands the role of this history: It refutes any notion that there is something novel about what Oregon has banned. What fed ammunition into the chamber of these firearms were magazines and other ammunition feeding devices capable of holding more than ten rounds. “The Winchester M1873 and then the M1892 were lever actions holding ten to eleven rounds in tubular magazines.” Kopel, *supra*, 78 Alb. L. Rev. at 855; *see, e.g., Model 1873 Short Rifle*, Winchester Repeating Arms, <https://perma.cc/QUZ9-RRVN> (last visited July 29, 2025). The Evans Repeating Rifle, which first hit “the market in 1873,” came standard with a fixed magazine located in the buttstock that “held thirty-four rounds.” Kopel, *supra*, 78 Alb. L. Rev. at 856; *see also* Dwight B. Demeritt, Jr., *Maine Made Guns and Their Makers* 293-95 (rev. ed. 1997). In short, semiautomatic firearms and feeding devices capable of holding more than ten rounds have been part of the fabric of American life for well more than 100 years.

The fact that modern firearms and magazines are more accurate and capable of quickly firing more rounds than their founding-era predecessors does not make them any less linear descendants of the “small-arms weapons used by militiamen ... in defense of person and home” when the Second Amendment was ratified. *Heller*, 554 U.S. at 624-25 (brackets omitted); *see also Caetano*, 577 U.S. at 416-17 (Alito, J., concurring in the judgment) (noting that “revolvers and semiautomatic pistols” are protected as descendants of arms in common use at the founding). After all, the point of the technological developments of the nineteenth century was the same as those of the twentieth: to enable someone to fire more rounds more quickly and accurately. And it would be particularly perverse to confine the people to outdated arms that are less accurate, efficient, and reliable for self-defense than their modern descendants—which likely explains why no such historical tradition exists.

In short, the historical tradition in this country focuses on what law-abiding citizens commonly conclude best serves their needs, not which arms are capable of doing the most damage in the hands of the small number of people bent on misusing them. Because the state’s effort to ban arms commonly chosen by the people for self-defense flatly contradicts constitutional text and historical tradition, it violates the Second Amendment.

B. Ballot Measure 114’s Prohibition on Common Arms Violates the Oregon State Constitution As Well.

While the federal Constitution sets a floor beyond which Oregon cannot go, *see Mai v. United States*, 952 F.3d 1106, 1120 n.9 (9th Cir. 2020), Oregon can—and does—provide additional protection for its citizens’ right to keep and bear arms, *see State v. Soriano*, 68 Or.App. 642, 645 (1984) (Oregon constitution has “content independent of that of the federal constitution”).⁵ That additional protection provides an independent justification to reverse the Court of Appeals and hold that Ballot Measure 114 is unconstitutional.

When Oregonians adopted the State Constitution in 1857, they enshrined an unqualified guarantee of “the right to bear arms for the defen[s]e of themselves.” Or. Const. art. I, §27. While this Court has read that unqualified right to permit certain limited public-safety regulations, it has consistently recognized that such regulations must “not unduly frustrate the individual right to bear arms.” *Christian*, 354 Or. at 33. Absolute bars on “the mere possession or carrying of such arms” are the archetypal example of unreasonable regulations that Section 27 does not countenance. *State v. Delgado*, 298 Or. 395, 403-04 (1984) (en banc).

⁵ To the extent the Court of Appeals thought it could do otherwise, and lower the floor by rejecting *Bruen*’s approach, *see Att.3 n.1* (noting that “challenge[s] under Article I, section 27, proceed[] under a legal framework established by the Oregon Supreme Court which does not rely on that type of fact finding or on Second Amendment jurisprudence”), it was mistaken.

Under Article I, Section 27, Ballot Measure 114’s broad ban on common arms is plainly unconstitutional. Just as under the federal Constitution, ammunition feeding devices qualify as “arms” for purposes of Oregon law. The Court of Appeals conceded as much, deeming it “undisputed,” Att.25—because it is undisputable. Because “early forms of the technology” were in use when Section 27 was enacted, *id.*, feeding devices like those covered by Ballot Measure 114 are arms for purposes of Oregon law. So the question is whether Ballot Measure 114 “unduly frustrate[s] the individual right to bear” them. *Christian*, 354 Or. at 33.

It does. A flat ban on the possession of a class of arms undoubtedly “frustrate[s] the ... right to bear” it; few things do so more. *Id.* In fact, “this court has held that Article I, section 27, generally precludes the legislature from prohibiting the mere possession of constitutionally protected arms.” *State v. Hirsch*, 338 Or. 622, 643 (2005); see *Kessler*, 289 Or. at 372 (striking down ban on “mere possession” of billy clubs, rather than “manner” of carrying them); *Delgado*, 298 Or. at 403-04 (“The problem here is that [the statute] absolutely proscribes the mere possession or carrying of [certain] arms. This the constitution does not permit.”); *State v. Blocker*, 291 Or. 255, 260 (1981) (striking down “total proscription of the mere possession of certain weapons”); *Christian*, 354 Or. at 29 (distinguishing statute on ground that it “does not prohibit the mere possession of firearms in public places but

specifically regulates only the manner of possession”); *accord Heller*, 554 U.S. at 635 (striking down ban on possession of handguns).

But rather than acknowledge that obvious fact, the Court of Appeals dodged. It invented a reasonableness test to escape the strictures of the Oregon Constitution, relying on one word in isolation, plucked out of context from *Christian*, to displace the will of the Oregonian people as embodied in Section 27. *See* Att.13.

Suffice it to say, neither Section 27 nor *Christian* includes a reasonableness test. The word “reasonable” is conspicuously absent from Section 27. And while *Christian* described certain regulations as “reasonable,” it was doing so as a purely descriptive matter, to reflect the result of a textually and historically grounded analysis. That analysis turned on a historical assessment of the right to bear arms under “the English Bill of Rights,” “in England and colonial America,” *Christian*, 354 Or. at 33—not on a freewheeling inquiry into the “reasonableness” of the statute under review. *Christian* distilled from that history three specific principles to govern analysis of statutes under Article I, Section 27, and none was whether the statute was “reasonable” in an abstract sense. *Id.* Thus, while *Christian* described certain regulations that survived constitutional challenges as “reasonable,” it was using that word as a *conclusion*, not a premise: The

restrictions were “reasonable” precisely *because* they passed constitutional muster under the historical test the Court employed. *Id.* at 30-34.

By contrast, the Court of Appeals’ reasoning assumed its own conclusion: It first deemed Ballot Measure 114 “reasonable,” based on the court’s own view of sound public policy, and then upheld it as constitutional because, after all, it was reasonable. Att.27-29. This reasonableness test is inherently subjective (not to mention circular) and, taken in the most favorable possible light, is akin to rational-basis review—a standard hardly befitting an enumerated constitutional right.⁶

And that is not the worst part: The Court of Appeals’ adoption of this freewheeling standard deprived millions of Oregonians of the right to acquire and possess lawful arms that they have long chosen, “frustrat[ing] the[ir] individual right to bear arms” for self-defense, *Christian*, 354 Or. at 33 (citing Or. Const. art. I, §27), which is the purpose for which the overwhelming majority of Oregonians acquire such magazines, Resp.Br.37. That is wrong: Just as in *Kessler*, where this Court struck down a ban on “mere possession” of billy clubs, 289 Or. at 372, the Court should reverse and hold

⁶ Moreover, the Court of Appeals’ conclusion that Ballot Measure 114 was a reasonable crime control policy cannot be squared with the federal government’s assessment that such restrictions produce “no discernible reduction” in the incidence of violent crime. Koper et al., *supra*, at 96, <https://perma.cc/UZX4-VAFS>.

unconstitutional Oregon's ban on mere possession of magazines that hold more than ten rounds.

CONCLUSION

This Court should reverse the Court of Appeals' decision.

DATED this 31st day of July, 2025.

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**COMBINED CERTIFICATE OF COMPLIANCE WITH BRIEF
LENGTH AND TYPE SIZE REQUIREMENTS,
AND CERTIFICATES OF FILING AND SERVICE**

I certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 10,607. I 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.

I certify that on July 31, 2025, I directed the original brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Tony L. Aiello, Jr. and Tyler D. Smith, attorneys for petitioners on review; Robert A. Koch and Denise G. Fjordbeck, attorneys for respondents 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 July 31, 2025, I directed the brief to be served upon Tyler D. Smith, attorney for petitioners on review, by first-class mail.

DATED: July 31, 2025, at Lake Oswego, Oregon.

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