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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

Appellate Court No.: A183242

Supreme Court No.

PETITION FOR REVIEW OF PLAINTIFFS

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

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

April 2025

Continued…

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PETITIONERS ON REVIEW INTEND

TO FILE A BRIEF ON THE MERITS

April 2025

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PETITION FOR REVIEW OF PLAINTIFFS

III.

STATEMENT OF THE CASE

Plaintiffs-Petitioners Messrs. Arnold and Asmussen ("Petitioners") petition for review of *Arnold v. Kotek*, 338 Or App 556, 2025 Or App LEXIS 406 (2025); (ATT-1–30) (citations reference attachment). The Court of Appeals ruled in Defendant-Respondents Governor Kotek, Attorney General Rayfield, and Superintendent Codding's ("Respondents") favor by written Opinion by Ortega, Presiding Judge which was unanimous but not heard *en banc*. The other panel judges, Hellman, Judge and Mooney, Senior Judge, did not write separately. If granted review, Petitioners intend to file briefs on the merits.

IV.

HISTORICAL AND PROCEDURAL FACTS

Petitioners briefly supplement the relevant historical and procedural facts stated in the Opinion, (ATT-3–8); ORAP 9.05(4)(a).

In November 2022, voters narrowly approved Ballot Measure 114 ("BM114") which creates and requires a permit-to-purchase a firearm ("Permit"), BM114, §§3-5,[1] criminalizes so-defined large-capacity magazines

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1. For ease of reference and consistency with the Opinion, Petitioners refer to Section numbers in the Measure rather than the codified statute numbers.

("LCMs"), *id.* at §11, and criminalizes firearm transfers without a completed background check, *id.* at §§6-9.

To obtain the Permit, Oregonians must pay for and complete two classes, *id.* at §§4(1)(b)(D), 8; undergo an in-person psychological evaluation with law enforcement, *id.* at §4(1)(b)(C); pass two background checks, *id.* at §4(1)(e); undergo fingerprinting and photographing, *id.* at §4(1)(e); wait up to 30 days to appeal an indecision or denial, *id.* at §§4(3)(a), 5; and pay a $65 fee, §4(3)(b).

BM114 also prohibits manufacturing, importing, possessing, using, purchasing, selling or otherwise transferring so-defined LCMs which include any detachable magazine or magazine fixed to the firearm "capable, now or in the future, of accepting more than 10 rounds of ammunition" or "that can be readily restored, changed, or converted to accept, more than 10 rounds of ammunition[.]" *Id.* at §§11(1)(d), (2), (6). Rather than exempting existing magazines, BM114 creates a criminal affirmative defense requiring proof that a defendant owned the magazine before the effective date, or inherited it from someone who owned it before the effective date, and only possessed it on their own property, at a gunsmith, or while engaged in an approved activity. *Id.* at §11(5). There is no self-defense exception.

Last, BM114 requires a third completed background check before receiving a firearm transfer irrespective of the time it takes the Department of State Police ("OSP") to complete the background check. *Id.* at §§6-9. During

the background check, the transferee is indefinitely *in limbo* without official status (approved, delayed, or denied) or due process. Only after OSP formally delays or denies a transaction may transferees review the potentially disqualifying information and request correction. OAR 257-010-0035(1), (3). There is no time within which OSP must respond, creating a second indefinite timeline. *Id.* at (3). Transferees may only challenge a delay or denial after OSP refuses to correct the challenged record. *Id.* at (4).

Petitioners obtained a temporary restraining order before BM114's effective date, later obtaining a preliminary injunction preventing enforcement. The parties then agreed it was necessary to litigate the mixed issues of law and fact in a six-day bench trial, after which the Trial Court declared BM114 unconstitutional and entered a permanent injunction. Respondents appealed and the Court of Appeals reversed and remanded. *Arnold*, 338 Or App 556 (the "Opinion").

V.

QUESTIONS PRESENTED ON REVIEW AND PROPOSED RULES OF LAW

First Question Presented:

Does Article I, section 27, limit Oregon's legislature to restricting dangerous manners of possessing or using arms, or prohibiting certain dangerous criminals from bearing arms?

First Proposed Rule of Law:

Yes. Constitutionally valid restrictions must be analogous to early American restrictions. Identified historical analogues restricted dangerous manners of possessing or using arms or prohibited certain designated groups of persons posing identifiable threats to public safety by virtue of their earlier commission of serious criminal conduct (*e.g.*, felons) from bearing arms. The manner in which an arm is possessed or used refers to the way the arm is possessed or used, not whether it can be possessed or used whatsoever. Absolute proscriptions on possessing or using arms for self-defense are always unconstitutional.

Prior restraints on acquiring firearms, like requiring a Permit and completed background check, neither restrict dangerous manners of possessing or using firearms nor prohibit dangerous criminals from possessing or using firearms. Absolutely proscribing the mere ownership, possession, or use of an arm also does not restrict any dangerous manner of possessing or using the arm. Restricting magazine capacity does not restrict any dangerous manner of possessing or using firearms.

Second Question Presented:

Does Article I, section 27, require the government to demonstrate that restrictions on arms are necessary to promote public safety and will promote public safety through historical analogy or factual evidence?

Second Proposed Rule of Law:

Yes. The legislature may restrict dangerous manners of possessing or using arms when the restriction is necessary to protect public safety. This requires that the government demonstrate a threat to public safety. Further, any restriction must satisfy the purpose of promoting public safety, which requires the government to prove that the restriction promotes public safety. This may be shown through historical analogy or, for novel restrictions, fact evidence.

When there is no convincing evidence of a public safety threat requiring Oregonians to obtain a Permit and complete a background check prior to receiving a firearm, or no demonstrable link between imposing those restrictions and public safety, the restrictions are unconstitutional. Likewise, when there is no convincing evidence of a threat requiring that so-defined LCMs be criminalized, or no demonstrable link between imposing the restriction and public safety, the restriction is unconstitutional.

Third Question Presented:

Does Article I, section 27, require that the government demonstrate through historical analogy or factual evidence that a restriction on arms does not unduly burden the individual right to bear arms for self-defense and defense of the state?

Third Proposed Rule of Law:

Yes. The legislature may specifically restrict dangerous manners of

possessing or using arms that do not unduly burden the right to bear the arm for self-defense and defense of the state. Government may not restrict merely possessing or using an arm for self-defense or defense of the state, especially in the home. Government must also demonstrate that restrictions provide sufficient due process protections and do not impose undue delay, difficulty, expense, or other burdens on the immediate right to bear arms for self-defense and defense of the state. Government may show that restrictions are analogous to earlier laws that did not infringe on the right to bear arms or, for novel restrictions, provide fact evidence showing that restrictions impose the same or lesser burden than historical analogues.

Imposing prior restraints on merely acquiring firearms by compelling Oregonians to pay for and complete two firearm classes, undergo an in-person psychological evaluation, undergo fingerprinting and photographing, pass two background checks, wait up to 30 days, and pay a fee to obtain a Permit imposes undue delay, difficulty, and expense. Likewise, requiring that Oregonians complete a background check—irrespective of the indefinite delay imposed—without due process while it is processed imposes undue delay, difficulty, and expense. Lastly, absolutely proscribing merely owning, possessing, or carrying an arm imposes a total burden on the right to bear that arm for self-defense.

VI.

REASONS FOR REVIEW

This case presents the Court with the most significant and widely applicable firearm restriction in Oregon history. BM114 imposes the first statewide prohibition on arms in over 40 years and provides the first opportunity to consider whether the state may require all Oregonians to request permission from their government before exercising a constitutionally guaranteed right they already hold. This is an indispensable opportunity for the Court to clarify and update Oregon's Article I, section 27, jurisprudence for Oregonians, lawmakers, lawyers, and lower courts at a time when Oregon is actively considering other firearm restrictions.

A. THE CASE IS RIPE FOR REVIEW.

The Opinion was unanimous but not considered *en banc*. ORAP 9.07(11)-(13). The issues are well-presented by the briefs and lower court opinions, and all legal issues were preserved. *Id.* at (7), (15). The record presents all desired issues. *Id.* at (8). There were six amicus briefs below, and additional prospective *amici* intend to appear. *Id.* at (16).

The parties litigated mixed issues of law and fact which took a six-day trial and significant briefing to resolve. On appeal, the Opinion did not disturb factual findings, which are reviewed for "any evidence" in the record. *Muzzy v. Uttamchandani*, 250 Or App 278, 280, 280 P3d 989 (2012), *rev den*, 352 Or

341 (2012) (reciting standards of review). Instead, the Opinion disregarded facts in favor of bare conclusions; this is among the most important issues for review. Factual disputes and procedural obstacles should not prevent the Court from reaching the legal issues. ORAP 9.07(7).

B. THE CASE PRESENTS A SIGNIFICANT STATE LEGAL ISSUE.

As the Court recognized, BM114 "is of significant concern to many Oregonians." *Arnold v. Kotek*, 370 Or 716, 719, 524 P3d 955 (2023). Nevertheless, the Court twice declined to intervene *prematurely*, noting that judicial review was underway. *Id.*; *Arnold v. Brown*, No. S069923, 2022 Or LEXIS 834 (Dec. 7, 2022). Now, BM114 is before the Court again, this time at the right time.

This case presents significant issues of state law concerning a state constitutional right. ORAP 9.07(1), (4). There is no related or similar issue before the Court. *Id.* at (6).

As framed by the Opinion, prohibiting so-defined LCMs prohibits protected arms, (ATT-25), which is not a new issue for the Court. *State v. Kessler*, 289 Or 359, 614 P2d 94 (1980) (prohibiting mere ownership of clubs is unconstitutional); *State v. Blocker*, 291 Or 255, 630 P2d 824 (1981) (prohibiting mere possession of clubs in public is unconstitutional), *overruled on other grounds*, *State v. Christian*, 354 Or 22, 307 P3d 429 (2013); *State v. Delgado*, 298 Or 395, 692 P2d 610 (1984) (prohibiting public possession and

carrying of switchblades is unconstitutional). However, because the Opinion upheld this absolute proscription, this case is the first of its kind if not reversed.

Additionally, the Court has never been tasked with considering restrictions as heavy-handed as requiring that all Oregonians receive government permission, *viz.*, a Permit, before exercising their constitutional right to merely acquire a firearm and requiring that Oregonians submit to background checks with unlimited delays. The Court has held felons may be deprived the right to bear arms, *e.g.*, *State v. Hirsch/Friend*, 338 Or 622, 114 P3d 1104 (2005), *overruled on other grounds*, *Christian*, 354 Or 22, and concealed-handgun-licenses ("CHL") can be required to engage in certain manners of firearm possession, *State v. Christian*, 249 Or App 1, 9, 274 P3d 262 (2012), *affirmed*, *Christian*, 354 Or 22 (Prohibiting publicly carrying "a recklessly not-unloaded" firearm while exempting CHL-holders). Neither are analogous to BM114.

BM114 imposes novel restrictions greatly exceeding the types of restrictions the Court has upheld; this necessitates the Court's review. Although state firearm restrictions have been historically minimal, Oregon's legislature is considering numerous firearm restrictions containing the same material provisions as BM114, as well as other novel restrictions. ORAP 9.07(3). It is imperative that the Court provide a definitive and well-explained Article I, section 27, test.

C. THE OPINION APPEARS TO BE WRONG; CASELAW INCONSISTENT.

The Opinion is incorrect and causes serious and irreversible injustice by erasing Oregonians' Article I, section 27, right and setting disastrous precedent. *Id.* at (14). Lawmaking cannot correct this error because it concerns a constitutional right. *Id.*

The most blatant error is the Opinion's studious avoidance of caselaw describing the constitutional limitations imposed on government in favor of adopting—and subjecting a constitutional right to—a *reasonability* analysis mirroring federal rational basis. (ATT-13). The Court has never adopted a *reasonability* analysis for Article I, section 27, which the Opinion created from an out-of-context reading of *Christian*, 354 Or at 33.

Christian summarized the Court's jurisprudence identifying the types of laws which have been historically upheld. *Id.* at 30-33. Caselaw describes these laws as restricting dangerous *manners* of possessing and using arms, *id.* at 39, or prohibiting *certain dangerous criminals* (*e.g.*, felons) from bearing arms, *id.* at 31 (citing *Hirsch/Friend*, 338 Or 622; *State v. Cartwright*, 246 Or 120, 418 P2d 822 (1966) *cert den*, 386 US 937, 87 S Ct 961 (1967); *State v. Robinson*, 217 Or 612, 343 P2d 886 (1959)). *Christian* called these laws *reasonable*, but did not purport to alter the established test into a mere reasonability inquiry. *Id.* at 33-34. On the contrary, *Christian* underscored limitations previously imposed

on government. *Id.* at 30-31 (*Kessler* conviction was reversed "because the underlying statute did not specifically regulate the manner of possession or use of a billy club" but "banned outright the mere possession of the club[.]") (citing *Kessler*, 289 Or at 370; *Blocker*, 291 Or 255; *Delgado*, 298 Or 395). *Christian* adhered to prior holdings providing that constitutional arms restrictions must be analogous to early American restrictions. *Id.* at 30.

The Opinion also contradicts itself, simultaneously holding that so-defined LCMs are protected arms and that distinguishing a firearm from its components is inappropriate, while also upholding BM114 because it restricts firearm components and not the whole firearm despite contrary factual findings by the Trial Court. (ATT-25–26). Moreover, *Delgado* foreclosed that reasoning by refusing to separately consider a switchblade from the spring used to make it operable. *Delgado*, 298 Or at 403.

Additionally, the Opinion also concluded that facts do not matter, thereby failing to meaningfully analyze the public safety and undue burden prongs of the *Christian* analysis. *Id.* at 33-34.

For public safety, *Christian* confirmed rulings requiring that restrictions on arms must be *necessary*, stating that the constitution does not prevent specific regulations when the legislature "determines that such regulation is necessary to protect public safety[.]" *Id.* at 31. *Christian* also confirmed that restrictions must *actually* promote public safety, stating that restrictions "must

satisfy the purpose of promoting public safety[.]" *Id.* at 33 (quoting *Hirsch/Friend*, 338 Or at 677). Caselaw has not explained what this requires, especially for novel restrictions. Most cases reference historical justifications but exempt self-defense. *Hirsch/Friend*, 338 Or at 626 (historical regard of felons), 648-49 (historical regard of concealed weapons); *Kessler*, 289 Or at 369-70 (the "1678 Massachusetts law"); *Cartwright*, 246 Or 120 (New York restriction was "held not to apply to" self-defense). Others make dangerousness part of the offense which prosecutors must prove. *Christian*, 249 Or App at 7-9. However, arguments concerning the supposedly inherent danger or unlawful use of arms are insufficient. *Delgado*, 298 Or at 399, 400 n 4.

The Opinion engages in none of these analyses, disregards factual findings, and merely relies on BM114's preamble. (ATT-20, 27–28). If Article I, section 27, only requires that laws recite *magic words*, then the standard is useless. Precedent indicates that more is required. *Hirsch/Friend*, 338 Or at 677. Moreover, if a right can be taken away simply because the government claims it promotes public safety in some way, it is not a right at all.

Next, caselaw provides no guidance for analyzing whether restrictions unduly burden the right to bear arms aside from consistently holding that absolute proscriptions on arms, *Christian*, 354 Or at 29, 38; *Blocker*, 291 Or 255, 259, 630 P2d 824 (1981); *Kessler*, 289 Or at 372, and *components* of arms, *Delgado*, 298 Or at 403-04, are always unconstitutional. However, it is difficult

to understand how courts can determine whether a burden or frustration is *undue* without analyzing the factual effect of the law, which is what the Trial Court did. While the Opinion merely declared, without explanation, that no BM114 provision unduly burdens the right to bear arms, the Trial Court carefully considered each provision's effect and concluded BM114 unduly burdens the right to bear arms by, among other things, imposing undue delay, difficulty, and expense for obtaining firearms and absolutely proscribing the vast majority of firearms and magazines.

The Opinion also erroneously construed the analysis as considering the burden imposed on Oregonians' *right to self-defense* rather than the burden imposed on Oregonians' *right to bear arms* for self-defense, concluding that BM114 is constitutional because there are alternative weapons for self-defense. Using the Opinion's logic, prohibiting a switchblade does not affect any individual's Article I, section 27, right to use a knife in defense of self or property, but it does limit an individual's ability to legally use a spring-operated blade while doing so. *Compare* (ATT-29:1-4). It appears the Opinion's analysis would require reversing *Kessler*, *Blocker*, and *Delgado* since there are *alternatives* to clubs or switchblades for self-defense.

Most importantly, this case provides the indispensable opportunity to resolve vital questions for Oregonians, lawmakers, lawyers, and lower courts in an expanding area of law. Below, all parties and both lower courts relied on the

same precedent—often citing the same *quotations* from cases—but reached polar opposite conclusions and completely different tests. ORAP 9.07(9), (10). With respect to the Court, this is indicative of *bad law* and a *bad explanation* of the *Christian* test that requires clarification. The Opinion substantially departs from decades of caselaw; if not, then the Trial Court and all parties are confused by the test. *Id.* Indeed, the Opinion criticizes the parties and Trial Court for having an *unnecessary* trial, while the parties and Trial Court all agreed that a trial was necessary. (ATT-3, n 1).

D. THIS CASE AFFECTS MILLIONS OF OREGONIANS.

Every Oregonian is affected by the constitutional issues presented by this case. ORAP 9.07(3). BM114 directly affects each of the 38.3% of Oregonians who own firearms and all future Oregon firearm transferees since BM114 turns the right to bear arms into a privilege for government to grant or refuse. ER-797. BM114 also turns at least 50% of law-abiding firearm owners who own so-defined LCMs into presumed criminals, requiring them to surrender their lawfully-acquired arms or face prosecution. *Id*.

VII.

ARGUMENT CONCERNING THE LEGAL QUESTIONS PRESENTED ON REVIEW

A. ARGUMENT ON FIRST QUESTION.

Relying on *Christian*, BM114 does not restrict any dangerous *manner* of

possessing or using firearms. *Christian*, 354 Or at 31. Nor does BM114 prohibit dangerous criminals from bearing arms. *Hirsch/Friend*, 338 Or at 677. The Opinion fails to perform any historical examination, instead applying a *reasonability* analysis foreign to Article I, section 27 caselaw. (ATT-13, 19, 24-25). Because no provision of BM114 meets *Christian*'s requirements, each provision is unconstitutional. *Christian*, 354 Or at 30-33.

Consistent caselaw requires that courts examine early American (or pre-colonial English) history for analogues to modern arms restrictions. *Robinson*, 217 Or 612; *Cartwright*, 246 Or 120; *Kessler*, 289 Or at 363-70; *Blocker*, 291 Or 255; *Delgado*, 298 Or 395. *Christian* synthesized this framework, identifying laws restricting *dangerous manners of possessing or using arms*, or prohibiting *dangerous criminals* from possessing or using arms, as analogous to historical restrictions. *Christian*, 354 Or at 31; *Hirsch/Friend*, 338 Or at 677. For dangerous criminals, the constitution limits the legislature to classifying *certain groups* of persons designated as posing an *identifiable threat* to public safety by virtue of their earlier commission of *serious criminal conduct* (*e.g.*, felons) as unfit to bear arms. *Hirsch/Friend*, 338 Or at 677.

Nothing in Sections 3-10 even purports to restrict a dangerous manner of possessing or using firearms. Nevertheless, the Opinion concludes, without explanation or citation, that Permits restrict the "dangerous practice" of

"individuals untrained" by government obtaining firearms.[2] (ATT-20). Oregon has never required that individuals be *trained* prior to exercising a fundamental constitutional right, nor has caselaw prohibited Oregonians from exercising rights *they hold* until they receive government training and permission. Neither caselaw nor history provides support for mandated government training because, plainly, being "untrained" is neither a dangerous *manner* of possessing or using firearms. *Christian*, 354 Or at 31. Indeed, BM114 plainly does not obligate adherence to the *training*, so it does not proscribe any dangerous practice. Therefore, Sections 3-10 do not restrict any dangerous manner of possessing or using firearms.

Likewise, Sections 3-10 do not prohibit *dangerous criminals* from using or possessing firearms; that is accomplished through other laws, *e.g.*, ORS 166.270. Nevertheless, the Opinion states that Sections 3-10 prohibit "dangerous individuals obtaining firearms[.]" (ATT-20). The Court has never upheld background checks under the *Hirsch/Friend* analysis, and Petitioners assert that blanket background checks apply too broadly to meet that test. *Hirsch/Friend*, 338 Or at 677. Regardless, state and federal laws have imposed background checks for decades. However, requiring additional background checks for a Permit is duplicative and does nothing to prevent felons from

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2. The preamble does not tie firearm safety training to BM114's goal of reducing mass shootings, murder, or suicides.

obtaining firearms that existing background checks do not. Moreover, no other provision of Sections 3-10 meets the *Hirsch/Friend* requirements for narrowly defining these certain groups. *Id*. Instead, Sections 3-10 regards all Oregonians as dangerous criminals unfit to exercise their rights until they comply with each arduous and expensive step required by BM114. None of these additional prerequisites assist in disqualifying individuals as contemplated under *Hirsch/Friend*. *Id.*

For Section 11, BM114 totally proscribes so-defined LCMs irrespective of any *manner* of possession or use. BM114, §11(2). Caselaw *universally* holds that absolute proscriptions on arms are unconstitutional. *Christian*, 354 Or at 40-41 (citing *Kessler*, 289 Or at 359; *Blocker*, 291 Or 255; *Delgado*, 298 Or 395). The Opinion conceded that magazines, including so-defined LCMs, are protected by the constitution, and that it is inappropriate to separately consider a component of an arm. (ATT-25). Therefore, Section 11 is unconstitutional.

B. ARGUMENT ON SECOND QUESTION.

Respondents failed to demonstrate any threat to public safety necessitating BM114's restrictions or that, if employed, BM114's restrictions promote public safety. Therefore, BM114 is unconstitutional.

Caselaw requires that government demonstrate that a restriction on arms is *necessary* to protect public safety from a specific threat, *Christian*, 354 Or at 31, and that the chosen restriction actually "satisfy the purpose of promoting

public safety[,]" *Id.* at 33 (quoting *Hirsch/Friend*, 338 Or at 677). As addressed above, most cases reference the historical recognition of certain persons, *Hirsch/Friend*, 338 Or at 626, 648-49, or practices as dangerous to meet this requirement,[3] *Kessler*, 289 Or at 369-70; *Cartwright*, 246 Or 120. Even *Christian* appeals to historical analogy, 354 Or at 34, and no case simply accepts as true the government's representation that a law is necessary to, and will indeed, promote public safety.

The Opinion did not perform any historical examination or find the Trial Court's factual findings unsupported. *Muzzy*, 250 Or App at 280. Instead, the Opinion adopted the preamble's findings despite Petitioners' refutation of its purported *facts*, Respondents' inability to provide supporting evidence, and the Trial Court's factual findings. If all Oregon's constitution requires to deprive Oregonians of their constitutional right to bear arms is that the government *say* that a restriction promotes public safety, then the right has been reduced to a privilege that may be cast aside whenever government determines that doing so fits the needs of the moment. This possibility is incompatible with the very nature of a *right*.

Respondents failed to provide any historical analogy for the Permit or

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3. For dangerous practices, *e.g.*, discharging firearms in cities and towns, self-defense exceptions are made by statute or caselaw. BM114 has no self-defense exception.

completed background check requirements. Respondents also *tried* and *failed* to support the bare conclusions from the preamble, including failing to demonstrate any threat necessitating a Permit beyond vaguely indicating that suicide and violence sometimes occurs via firearms. For instance, Respondents failed to show the percentage of violence, suicides, or accidents completed using recently and legally acquired firearms—as opposed to firearms stolen, unlawfully acquired, or lawfully owned for years—or link these harms to a lack of training or background checks. In short, Respondents failed to demonstrate how Permits would affect firearm-related tragedies. Additionally, as the Court knows, rights sometimes produce negative consequences. *McDonald v. City of Chicago*, 561 US 742, 783, 130 S Ct 3020 (2010) ("the right to keep and bear arms… is not the only constitutional right that has controversial public safety implications."). The preamble's conclusions *at best* evince an opinion that reducing how many Oregonians exercise a right reduces the negative consequences sometimes occasioned by exercising that right. However, deterring Oregonians from exercising their constitutional rights is an *illegitimate government interest*, no matter the purported benefit.

For Sections 6-10, Respondents proffered evidence showing that approximately 2,989 disqualified individuals obtained a firearm in 2020; Respondents omitted that this is a nationwide statistic that does not distinguish between incomplete background checks and completed background checks

which failed to find disqualifications. (Tr-1597). Respondents also omitted that approximately 24,994,000 applications were processed nationally in 2020, meaning 0.012% were improper. (APP-3). Only 398,000 (1.6%) were denied. (APP-3). There were also approximately 50% more firearm transfers in 2020 than 2019. (APP-1). Respondents fixated on 2020—accounting for half of the 6,000 improper transfers nationwide from 2005-2020, (Brief of *Amicus Curiae* Portland Metro Chamber, 25) (June 14, 2024), because COVID-19 and riots increased firearm demand and slowed background checks. In the same span, there were approximately 229,666,000 nationwide applications, meaning 0.0026% nationwide were improper. (APP-1). Respondents can only cite one instance resulting in violence in Charleston, South Carolina nearly a decade ago. For context, NICS has overseen approximately 291,686,000 transfers from 1993-2020. (APP-3). There is no public-safety threat to Oregonians from the pre-BM114 law.

Respondents also failed to show how prohibiting so-defined LCMs reduces mass shootings, violence, or suicides. Respondents primarily argued the absurdity that reducing magazine capacity and requiring *everyone* to reload more frequently gives unarmed targets time to tackle gunmen. Petitioners' unrebutted evidence shows changing magazines takes 2-5 seconds. Respondents also argued that so-defined LCMs are often used illegally; Petitioners showed that so-defined LCMs are the most common standard magazine, making it

unsurprising that they are commonly used both lawfully and unlawfully. Respondents' reasoning relies on the base rate fallacy and erroneously assumes that correlation implies causation. Additionally, Respondents failed to explain how the existence of technology compels human beings to use that technology harmfully. More importantly, the Opinion did not overturn any of the Trial Court's factual findings which dictated its conclusions on public safety.

C. ARGUMENT ON THIRD QUESTION.

BM114 unduly burdens Oregonians' right to bear arms by regarding all Oregonians as *unfit* until they comply with a lengthy, expensive, and arduous process for obtaining a Permit and completing a point-of-transfer background check where they wait an indefinite and unreviewable period. BM114 also imposes the ultimate frustration, a total proscription, on merely owning so-defined LCMs for self-defense, irrespective of whether the self-defense occurs in public or at home.

Caselaw provides no guidance for analyzing this step beyond consistent holdings that total proscriptions on arms are always unconstitutional. *Christian*, 354 Or at 29, 38; *Delgado*, 298 Or at 403-04; *Blocker*, 291 Or at 259; *Kessler*, 289 Or at 372. However, analyzing whether restrictions impose an undue burden necessarily requires that courts analyze their effect; this is not an overbreadth analysis. Turning to definitions, *frustrate* means "to make

ineffectual," "impede," or "obstruct."[4] *State v. Hansen*, 253 Or App 407, 412, 290 P3d 847 (2012) ("frustrate" among synonyms for "prevent."); *State v. Leers*, 316 Or App 762, 767 n 3, 502 P3d 1130 (2022) (same); *State v. Schoen*, 348 Or 207, 213, 228 P3d 1207 (2010) ("frustrate" among synonyms for "interfere."). *Infringe* can mean to "encroach," "destroy," "hinder," "cause impediment," "curtail," "violate," or "transgress" and specifically contemplates "burdens that fall short of total deprivations." *Md. Shall Issue, Inc. v. Moore*, 86 F4th 1038, 1044 n 8 (4th Cir 2023); *Frein v. Pa. State Police*, 47 F4th 247, 254 (3d Cir 2022); *United States v. Jimenez-Shilon*, 34 F4th 1042, 1046 (11th Cir 2022).

For Sections 3-10, the Trial Court appropriately considered mixed questions of law and fact such as the delay allowed by statute, unavailability of Permits because the FBI refuses to complete mandated background checks for the Permit, unavailability and insufficiency of due process under Sections 3-10, and the burden of proof for justifying Permit revocation or denial.

For Section 11, the Trial Court appropriately considered the level of restraint imposed (a total proscription), scope of arms proscribed, sufficiency of the affirmative defense, and usefulness of so-defined LCMs for self-defense.[5]

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4. Merriam Webster.com, Frustrate, (April 7, 2025, 11:21 AM), https://www.merriam-webster.com/dictionary/frustrate.

5. For self-defense, use of the word "necessary" in ORS 161.209 "pertains to the degree of force which a person threatened with unlawful force reasonably

Section 11 absolutely proscribes so-defined LCMs, which caselaw has universally found unconstitutional because it imposes the ultimate burden on the right to bear those arms for self-defense. *Christian*, 354 Or at 29, 38; *Blocker*, 291 Or 255; *Kessler*, 289 Or at 372; *Delgado*, 298 Or at 403-04.

Further, Section 11 bans the vast majority of firearms and magazines. Fixed magazine capacity cannot be reduced whatsoever. For detachable box magazines, although various capacities can be created, the magazine's length cannot be shorter than the portion of the firearm where the magazine is inserted (the "receiver" or "magazine well"). This creates the firearm's minimum or standard capacity. A pistol's minimum capacity depends on the length of the firearm's grip. Likewise, detachable box magazines and tubular magazines (common among shotguns) are universally designed to accept magazine extensions which increase minimum capacity. No method yet conceived—and certainly no method in the record—permanently reduces magazine capacity. All existing methods rely on adding material to the magazine *(e.g.*, plastic blocks or rivets) to decrease capacity, which are not permanent can be readily removed with household tools and no specialized training.

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believes to be required[.]" *State v. Sandoval*, 342 Or 506, 511-12, 156 P3d 60 (2007).

VIII.

CONCLUSION

This case presents substantial legal questions for Oregon, including questions of first impression and conclusions which substantially depart from the Court's existing caselaw. As Oregon's government embraces anti-firearm policies, it is imperative that Oregonians, lawmakers, lawyers, and lower courts, have a clear and effective constitutional test for Article I, section 27.

Petitioners ask that the Court accept review, allow briefs on the merits, reverse the Court of Appeals' decision, and affirm the General Judgment of the Trial Court.

Respectfully submitted,

DATED: April 14, 2025,

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FILED: March 12, 2025

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Joseph Arnold and Cliff Asmussen,
Plaintiffs-Respondents,

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.

Harney County Circuit Court
22CV41008

A183242

Robert S. Raschio, Judge.

Argued and submitted on October 29, 2024.

Robert Koch, Assistant Attorney General, argued the cause for appellants. Also on the briefs were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Tony L. Aiello, Jr., argued the cause for respondents. Also on the brief were Tyler D. Smith and Tyler Smith & Associates, P.C.

Nadia Dahab and Sugerman Dahab filed the brief *amici curiae* for Lift Every Voice Oregon, Ceasefire Oregon, Central Oregon Gun Safety Advocates, Jewish Federation of Greater Portland, League of Women Voters of Oregon, Muslim Educational Trust, Ecumenical Ministries of Oregon, VIVA Inclusive Migrant Network, and Albina Ministerial Alliance.

Elizabeth C. Savage and Elizabeth Savage Law, PC, filed the brief *amicus curiae* for Portland Metro Chamber.

Jessica G. Ogden, Matthew T. Nelson, and Covington & Burling, LLP, New York, NY; Timothy C. Hester and Covington & Burling, LLP, Washington, DC; Priya S. Leeds and Covington & Burling, LLP, San Francisco, CA; Douglas N. Letter and Shira Lauren

Feldman; Esther Sanchez-Gomez and Giffords Law Center to Prevent Gun Violence; Ciara Wren Malone; and Zachary J. Pekelis, W. Scott Ferron, and Pacifica Law Group, LLP; filed the brief amicus curiae for Brady Center to Prevent Gun Violence, Giffords Law Center to Prevent Gun Violence, March for Our Lives, Oregon Alliance for Gun Safety, Alliance for Gun Responsibility, and Gun Owners for Responsible Ownership.

Margaret S. Olney and Bennett Hartman, LLP, filed the brief *amici curiae* for The Oregon Medical Association, Oregon Pediatric Association, Oregon Nurses Association, Oregon Academy of Family Physicians, Oregon, Oregon Chapter of the American College of Physicians, Oregon Chapter of the American College of Emergency Room Physicians, Oregon Society of Physicians Assistants, Oregon Psychiatric Physicians Organization, and Oregon Physicians for Social Responsibility.

Dominic Carollo and Carollo Law Group filed the brief *amici curiae* for Eastern Oregon Counties Association and Oregon Farm Bureau Federation.

Before Ortega, Presiding Judge, Hellman, Judge, and Mooney, Senior Judge.

ORTEGA, P. J.

Reversed and remanded.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Appellants

[ ] No costs allowed.
[X] Costs allowed, payable by Respondents.

ORTEGA, P. J.

In November 2022, the people of Oregon enacted Ballot Measure 114, the Reduction of Gun Violence Act, which is a comprehensive law that makes three major changes in Oregon's gun laws: It requires a permit to purchase a firearm from any transferor; it requires the completion (not just the initiation) of a criminal background check of the transferee at the point-of-transfer for a firearm; and it limits lawful firearm magazine capacity to 10 or fewer rounds, with certain exceptions, most notably for law enforcement and the military. *See* Or Laws 2023, ch 1 (Ballot Measure 114). Plaintiffs challenged the facial constitutionality of the measure under Article I, section 27, of the Oregon Constitution, which provides that "[t]he people shall have the right to bear arms for the defence [*sic*] of themselves, and the State[.]"[1] In a general judgment, the circuit court declared that Measure 114 was facially unconstitutional and permanently enjoined enforcement of the law. The court also entered a supplemental judgment awarding plaintiffs $5,374 in costs, a $105 prevailing party fee, and $196,790 in attorney fees. The

[1] Plaintiffs do not raise a challenge under the Second Amendment to the United States Constitution. Measure 114 has been challenged separately under the Second Amendment in federal court. After a bench trial, the District Court of Oregon upheld Measure 114, *Oregon Firearms Fed'n v. Kotek*, 682 F Supp 3d 874 (D Or 2023); *Oregon Firearms Fed'n, Inc. v. Brown*, 644 F Supp 3d 782 (D Or 2022) (denying a temporary restraining order), and the case is currently on appeal in the Ninth Circuit Court of Appeals. We express no opinion on the fact-finding approach undertaken by the district court to address the facial challenge under the Second Amendment, except to note that a facial challenge under Article I, section 27, proceeds 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.

state appeals from both judgments. We conclude that all of Measure 114 is facially constitutional under Article I, section 27, based on the established legal test set out in *State v. Christian*, 354 Or 22, 307 P3d 429 (2013).[2] Accordingly, we reverse. We remand to the circuit court for the limited purposes of entering a declaratory judgment consistent with our opinion and determining whether the state is entitled to fees or costs.

I. PROCEDURAL BACKGROUND

In November 2022, the people of Oregon enacted Measure 114, which amends ORS 166.210 to 166.490, the statutes that regulate the possession and use of weapons and the sale and transfer of firearms.[3] Measure 114 makes three major changes to the law: It requires a permit to purchase a firearm (the permit-to-purchase program); it requires the completion of a background check of the transferee at the point-of-transfer for a firearm (the point-of-transfer background check); and it limits lawful firearm magazine capacity to 10 or fewer rounds (the large-capacity magazine ban). Measure 114 includes an express policy statement enacted as part of the legislation, which provides:

> "The People of the State of Oregon find and declare that regulation of sale, purchase and otherwise transferring of all firearms and restriction of the manufacture, import, sale, purchase, transfer, use and possession of ammunition magazines to those that hold no more than 10 rounds will

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[2] The state raises six assignments of error on appeal. Because we reverse based on the state's first assignment of error, we do not address any other assignment.

[3] For ease of reference, we refer to the section numbers in Measure 114, and not the codified statute numbers in the Oregon Revised Statutes, throughout this opinion.

> promote the public health and safety of the residents of this state and this Act shall be known as the Reduction of Gun Violence Act."

Measure 114, § 2.

Shortly after the people of Oregon enacted Measure 114, plaintiffs filed for declaratory and injunctive relief, alleging that the measure was facially unconstitutional under Article I, section 27. Plaintiffs' complaint did not allege an as-applied challenge to the measure. In advance of trial, plaintiffs applied for and the circuit court issued a temporary restraining order and preliminary injunction that prevented the measure from going into effect until a trial could be held. The state sought mandamus relief from the injunction in the Supreme Court, which was denied. *Arnold v. Kotek*, 370 Or 716, 524 P3d 955 (2023). After a six-day trial that primarily included testimony from experts on the historical record of firearms, modern day firearms, and gun violence, the circuit court issued a comprehensive letter opinion. The court considered two aspects of Measure 114 separately: the permit-to-purchase program and the large-capacity magazine ban. The court did not address the point-of-transfer background check because it considered it a part of the permit-to-purchase program. In sum, the court determined that both aspects of the measure were facially unconstitutional under Article I, section 27, and permanently enjoined enforcement of the measure.[4] As a result, Measure 114 has never gone into effect.

[4] The circuit court ruled that it would address only the facial constitutionality of Measure 114 and would not address an as-applied challenge. Plaintiffs do not seek review of that ruling on appeal.

With regard to the permit-to-purchase program, the court determined that "Oregon citizens have a right to self-defense against an imminent threat of harm, which is unduly burdened by Ballot Measure 114's permit to purchase scheme." In arriving at that conclusion, the court stated that the parties agreed on three "facts" that it found fatal to the constitutionality of the law: that Measure 114 delays purchases of firearms for a minimum of 30 days, that the program derives its language from the concealed handgun license statute, and that the Federal Bureau of Investigation (FBI) refuses to conduct criminal background checks which are required by the measure.[5] The court concluded that the "30-day absolute prohibition on the initial purchase of a firearm is not permitted under the Oregon Constitution"; that using the concealed handgun license scheme is impermissible because it allows "review of a decision by an elected official under the principles of due process" instead of under "intermediate scrutiny" where the burden is on the government to show an important government objective and competent evidence to restrain the right and because it "flip[s] the burden of proof, requiring citizens to prove they are not dangerous"; and that, because the FBI will not conduct criminal background checks, a permit-to-purchase cannot be issued under Measure 114 without going through the judicial review process, which unduly burdens the Article I, section 27, right. The court also relied on the state "fail[ing] to provide any convincing evidence of a threat to

[5] We note here that parties cannot stipulate to how a statute operates, and it is not a question of fact. It is the role of the courts to correctly interpret statutes as a matter of law.

public safety requiring a permitted process," failing to "provide sufficient evidence to find these harms require a complete restraint to firearm purchases for at least 30 days," and failing to provide "evidence the program would help reduce [gun violence] harms." The court refused to consider the preamble to the measure, which was presented to the voters, because the state did not prove that it was factually true.

With respect to the large-capacity magazine ban, the circuit court concluded that large-capacity magazines are protected arms under Article I, section 27. The court then concluded that "most firearms, except those specifically excluded by the definition in Ballot Measure 114, are banned under by [*sic*] Ballot Measure 114, because there is no effective way of limiting magazines to ten rounds or less by permanently alter[ing] them and the magazines are readily capable of alteration or changed to carry more than ten rounds within seconds." The court's reasoning was based on its reading of the definition of "large-capacity magazine" in Measure 114, which includes a magazine that "can be readily restored, changed, or converted to accept, more than 10 rounds of ammunition," Measure 114, § 11(1)(d), and that "permanently altered" means that "it is not capable, now or in the future, of accepting more than 10 rounds of ammunition," Measure 114, § 11(1)(d)(A), and on expert testimony that components can be removed from magazines such that they could hold more than 10 rounds and that permanent alterations to larger magazines could be removed with a drill or other methods. The court concluded that the effective ban on most firearms was facially unconstitutional.

The court also determined that banning large-capacity magazines did not

enhance public safety to a degree that allowed the undue burden on the Article I, section 27, right, because: (1) off-duty officers would not be able to possess their issued weapons, and could not respond directly to emergent situations, (2) citizens use large-capacity magazine firearms to defend themselves, (3) mass shootings are "very rare," (4) defendants did not "show the limitation of ten rounds has any demonstrable effect on negative outcomes to mass shooting events," (5) most untrained persons can reload within six seconds and trained persons can reload in around two seconds, and (6) "there is no clarity in the literature about how often large-capacity magazines were used" in mass shootings.

The court entered a general judgment that declared Measure 114 facially unconstitutional and permanently enjoined enforcement of the law. The court also entered a supplemental judgment awarding plaintiffs costs and fees.

The state now appeals both of those judgments.

II. LEGAL FRAMEWORK

We begin with a discussion of the legal framework that we are required to apply in this case on a facial constitutional challenge under Article I, section 27.

A. *Standard of Review*

We review as a matter of law a facial challenge under Article I, section 27, as well as any necessary statutory interpretation of Measure 114. *See Christian*, 354 Or at 26, 40 (taking that approach). There is some dispute between the parties over how we should review factual findings that the circuit court made based on the testimony offered

below. Ultimately, we do not address those findings, because the circuit court's analysis did not adhere to the legal framework that we are required to follow as set out in *Christian* and discussed below, which if followed, would have made most of the court's findings irrelevant to its legal decision.[6] As the Supreme Court recognized in the course of rejecting the notion that a party has a burden of proof or persuasion with respect to the facial constitutionality of a law:

> "'[A]n ambiguity in the constitution or in a statute does not, by itself, create an issue of fact, let alone one that must be resolved by the presentation of evidence.' *Ecumenical Ministries v. Oregon State Lottery Commission*, 318 Or 551, 558, 871 P2d 106 (1994). Rather, the court's '"sole duty * * * is to resolve the dispute in terms of the applicability of * * * the constitutional provision[ ]"' that defendants invoke, that is, Article I, section 27. *Id*. at 559 (quoting *Monaghan v. School District No. 1*, 211 Or 360, 363, 315 P2d 797 (1957) (first ellipsis in *Ecumenical Ministries*))."

State v. Hirsch/Friend, 338 Or 622, 630-31, 114 P3d 1104 (2005), *overruled in part*, *Christian*, 354 Or at 40 (overruled to the extent that *Hirsch/Friend* permitted a facial overbreadth challenge under Article I, section 27); *see also Christian*, 354 Or at 34, 40-41 (assigning no burdens of proof or persuasion and addressing facial constitutionality under Article I, section 27, purely as a matter of law). *Cf. Payless Drug Stores Northwest*

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[6] For example, the circuit court made extensive findings about whether a threat to public safety exists that requires the regulations in Measure 114 and about whether the regulations in Measure 114 would, in fact, address such threats. As explained below, those inquiries are not part of the legal question before a court that has been asked to resolve a facial challenge under Article I, section 27.

We further note that, on appeal, plaintiffs have asserted the position that the state, as the law's proponent, has a burden to prove "the law's necessity for, and actual furtherance of, public safety." We reject that assertion as explained here and below.

v. Brown, 300 Or 243, 247, 708 P2d 1143 (1985) ("The [facial] constitutionality of a law as enacted is rarely if ever dependent on facts, least of all on the kind of facts denominated as 'adjudicative facts' in the Oregon Evidence Code (Rule 201(a)) and subject to being proved by evidence. This is so because almost all laws are written to govern numerous concrete situations under circumstances that may change over time."). To the extent findings of historical fact are referred to in our decision, those facts are about the history of firearms and the mechanical operation of modern-day firearms. We do not perceive any dispute in the record on the limited facts that we refer to. Thus, we understand our task as addressing the legal question of whether Measure 114 is facially valid under Article I, section 27. *See Christian*, 354 Or at 34, 40-41 (addressing questions posed by a facial challenge under Article I, section 27, as purely questions of law); *see also State v. Delgado*, 298 Or 395, 400-03, 692 P2d 610 (1984) (addressing as a pure question of law whether a switchblade knife was a constitutionally protected arm under Article I, section 27, using historical treatises).

B. *Legal Framework for Facial Challenge Under Article I, Section 27*

The legal framework for addressing a facial challenge under Article I, section 27, is established by Supreme Court case law and circumscribes the scope of our review in important ways. First, on a facial challenge under Article I, section 27, our review "is limited to whether the [law] is 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." *State v. Sutherland*, 329 Or 359, 365, 987 P2d 501 (1999); *cf. City of Portland v. Sottile*, 336 Or App 741, 744, 561 P3d 1159 (2024) (stating with respect to a facial challenge under the Second Amendment to the United States Constitution that "[a] facial challenge is 'the most difficult challenge to mount successfully,' because it 'requires a defendant to establish that no set of circumstances exists under which' the law would be valid." (Quoting *United States v. Rahimi*, 602 US 680, 693, 144 S Ct 1889, 1898, 219 L Ed 2d 351 (2024))). In making that clarification in *Christian*, the court held that an overbreadth challenge is not a challenge that can be brought on a facial challenge under Article I, section 27.[7]

Second, our review is circumscribed by the Supreme Court's prior interpretation and application of Article I, section 27. In *Christian*, the Supreme Court explored its jurisprudence on Article I, section 27, and pulled together the key features that we must apply in this case. The right that Article I, section 27, establishes is an "individual right to bear arms for purposes limited to self-defense," which limits the scope of the constitutionally protected conduct. *Christian*, 354 Or at 30 (citing *State v.*

[7] In a facial overbreadth challenge, the challenger "need not demonstrate that the statute at issue is unconstitutional under the particular circumstances at hand. Rather, the challenger will prevail in his or her facial challenge if the court concludes that the statute in question prohibits constitutionally protected conduct of any kind." *Hirsch/Friend*, 338 Or at 628. In *Christian*, the Supreme Court concluded that facial overbreadth challenges are not cognizable in Article I, section 27, challenges and overruled *Hirsch/Friend* and *State v. Blocker*, 291 Or 255, 630 P2d 824 (1981), to the extent those cases allowed such challenges. *Christian*, 354 Or at 40.

Kessler, 289 Or 359, 614 P2d 94 (1980)). The self-defense right is also limited to self-defense using constitutionally protected arms. *Id.* As to whether a weapon is so constitutionally protected, the court in *Delgado* stated:

> "The appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, 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. In particular, it must be determined whether the drafters would have intended the word 'arms' to include the [weapon at issue] as a weapon commonly used by individuals for self defense."

Delgado, 298 Or at 400-01 (footnote omitted).

The court, in *Christian*, summarized the contours of the right to bear arms enshrined in Article I, section 27, as follows:

> "Because the right to bear arms is not an absolute right, our Article I, section 27, holdings reflect a judicial recognition that the legislature has wide latitude to enact specific regulations restricting the possession and use of weapons to promote public safety. We have consistently acknowledged the legislature's authority to 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 as guaranteed by Article I, section 27."

354 Or at 33.[8] Further, as explained in *Hirsch/Friend*, 338 Or at 639, the right in Article

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[8] Similarly, in *Hirsch/Friend* the court stated:

> "First, when the drafters of the Oregon Constitution adopted and approved the wording of Article I, section 27, they did not intend to deprive the legislature of the authority to restrict arms possession (and manner of possession) to the extent that such regulation of arms is necessary to protect the public safety. Second, and more significantly for our purposes here, Article I, section 27, does not deprive the legislature of the authority (1) to designate certain groups of persons as posing identifiable threats to the safety of the community by virtue of earlier commission of serious criminal conduct and, in accordance with such a designation, (2) to restrict the

I, section 27, is not balanced against state interests; "rather, any constitutional limitations on the state's actions 'must be found within the language or history' of the constitution itself." (Quoting *Eckles v. State of Oregon*, 306 Or 380, 399, 760 P2d 846 (1988), *cert dismissed*, 490 US 1032 (1989)).

C. *Synthesized Legal Framework*

From the foregoing, the question we must address in this case is whether the enacting body--here, the people of Oregon--enacted a reasonable regulation governing the possession and use of constitutionally protected arms in order to promote public safety without unduly frustrating the right to armed self-defense as guaranteed by Article I, section 27. *Christian*, 354 Or at 33. In making that determination, we are addressing legal questions of the enacting body's purpose and the reasonableness of the regulation to achieve that purpose--*i.e.*, whether the regulation is directed at and drafted to achieve the public-safety purpose. If, as a legal matter, the measure is a reasonable regulation to promote public safety, there is one remaining legal question: Is the right to armed self-defense unduly frustrated? That question, in turn, is not answered by the use of a balancing test. Any constitutional limitation on a reasonable regulation to promote public safety "must be found within the language or history of the constitution itself." *Hirsch/Friend*, 338 Or at 639 (internal quotation marks omitted).

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exercise of the constitutional guarantee by members of those groups."

338 Or at 677.

To be clear, a facial challenge under Article I, section 27, does not involve fact finding to answer those legal questions. In particular, the legal inquiry is not aided by a battle of the experts attempting to persuade a trier of fact about whether a public-safety threat, in fact, exists or whether a public-safety benefit, in fact, will be realized. Despite those established parameters for a facial challenge under Article I, section 27, and for reasons that are unclear to us, the parties and the circuit court ended up treating those legal issues as factual. As a result, we largely are not aided in our work here by the record developed below or the findings of fact that the circuit court made on that record.[9]

Guided by that legal framework, we turn to the text of Measure 114 and whether, on its face, it is constitutional under Article I, section 27.

III. ANALYSIS

As previously stated above, Measure 114 adds three major components to the firearm regulatory scheme--the permit-to-purchase program, the point-of-transfer background check, and the large-capacity magazine ban. We address the facial constitutionality of those three changes in the law under Article I, section 27.

A. *Permit-to-Purchase Program and Point-of-Transfer Background Check*

As an initial matter, we note again that the circuit court determined that the

[9] We recognize that expert witnesses on the history of firearms or the operation of modern-day firearms could be appropriate if such testimony aids the court in addressing the legal issue of whether a particular weapon falls within the protection of "arms" under Article I, section 27. However, as discussed below, that is not an issue we ultimately reach in this opinion.

permit-to-purchase program and the point-of-transfer background check were intertwined and could not be analyzed separately under the severability clause of Measure 114. On appeal, the state argues that the two parts of Measure 114 are severable and can be analyzed separately; and plaintiffs defend the circuit court's approach. We conclude that, whether considered together or alone, both parts of Measure 114 are facially constitutional. Consequently, we do not address the parties' severability arguments.

1. *Text of sections 3 through 10 of Measure 114*

Sections 3 through 10 of Measure 114 cover the permit-to-purchase program and point-of-transfer background check, which are codified at ORS 166.503 to 166.508, and in amendments to ORS 166.412, ORS 166.435, ORS 166.436, and ORS 166.438. The permit-to-purchase program requires that, to purchase any firearm, a person must apply for and obtain a permit-to-purchase from the police chief or county sheriff, or their designee, with jurisdiction over the person's residence (the permit agent). Measure 114, § 4(1)(a). The person must present that permit-to-purchase at the point-of-transfer for any firearm, whether the transfer is through a licensed gun dealer, a gun show, or a private transfer. Measure 114, §§ 6, 7, 8, 9. Measure 114 also amends existing law to require that a criminal background check must be completed at the point-of-transfer of a firearm before the firearm is transferred, whether through a gun dealer, gun show, or private transfer. Prior to the enactment of Measure 114, the law required that a criminal background check be requested from the Oregon State Police (OSP) but allowed the transfer to occur if OSP did not respond within a certain time. Under

Measure 114, if the background check is not approved, the firearm may not be transferred. Measure 114, § 6(3)(c), (14) (licensed gun dealers); Measure 114, § 7(3)(d)(B) (private transfers); Measure 114, § 8(2), (3)(c) (gun shows).

For the permit-to-purchase program, the permit agent is required to issue the permit-to-purchase to a person within 30 days of receiving an application "if the permit agent has verified the applicant's identity and determined that the applicant has met each of the qualifications." Measure 114, § 4(3)(a). A person is qualified to be issued a permit-to-purchase if the person (1) "[i]s not prohibited from purchasing or acquiring a firearm under state or federal law, including but not limited to successfully completing a criminal background check as described under paragraph (e) of this subsection"; (2) is not the subject of an extreme risk protection order under ORS 166.525 to 166.543; (3) "[d]oes not present reasonable grounds for a permit agent to conclude that the applicant 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 or as demonstrated by the applicant's past pattern of behavior involving unlawful violence or threats of unlawful violence"; (4) provides proof of completion of a firearm safety course; and (5) pays the fee required by the permit agent, which cannot exceed $65. Measure 114, § 4(1)(b), (3)(b). Once issued, a permit-to-purchase is valid for five years, as long as it is not revoked, and can be renewed. Measure 114, § 4(7).

If the permit agent denies a permit or revokes a previously issued permit, the permit agent must notify the person in writing of the reasons for the denial or

revocation. Measure 114, § 5(1), (3). A person who is denied a permit, is denied renewal of a permit, has a permit revoked, or whose application is not acted upon within 30 days, may petition the circuit court for review of the decision or inaction. Measure 114, § 5(1), (5), § 10. Those decisions can be appealed to the Court of Appeals in the same manner as any civil action. Measure 114, § 11.

2. *Construction of Sections 3 to 10 of Measure 114*

We first address a few issues of statutory construction in the circuit court's opinion and raised by plaintiffs on appeal. In construing a statute, we review for legal error and apply our usual methodology for interpreting statutes to discern the intent of the enacting body--here, the people of Oregon. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). We primarily consider the text and context of the statute and, when it is useful to our analysis, we will also consider legislative history. *Id.*

Plaintiffs assert, and the circuit court below agreed, that the permit-to-purchase program will cause at least a 30-day delay in purchasing a firearm. We reject that assertion as untethered to the text of Measure 114. The plain text of the measure requires the permit agent to act on the application within 30 days of receiving it--which also encompasses the time to get the background check--but nothing in the measure prevents the permit agent from acting sooner when qualifications are met. Measure 114, § 4(3)(a). In addition, it is only if the permit agent fails to fulfill the agent's statutorily required duty within the 30 days (or denies the permit) that a permit applicant would need to seek relief from the court. If judicial review is sought, the circuit court reviews for

"whether the petitioner meets the criteria that are used for issuance of a permit-to-purchase and, if the petitioner was denied a permit, whether the permit agent has reasonable grounds for denial under subsection (2)" and must make its decision within 15 judicial days "or as soon as practical thereafter." Measure 114, § 5(6), (8). Although the circuit court in this case stated that the administrative review "flip[s] the burden" to the applicant to prove they are not dangerous in order to exercise their Article I, section 27, right, the plain text of the measure does not do that. Both at the administrative level and on judicial review, the burden remains on the state actor to provide sufficient justification to deny a permit-to-purchase as provided in the measure.

In addition, although the wording is not a picture of clarity, nothing in Measure 114 requires cooperation from the FBI to issue a permit-to-purchase. A "criminal background check" and "criminal history record check" are terms defined under ORS 166.432 and they both mean "determining the eligibility of a person to purchase or possess a firearm by reviewing state and federal databases, including" the five listed databases in the statute. Completion of that statutorily defined criminal background check does not require receiving information from the FBI. For purposes of the permit-to-purchase, the measure requires OSP to request that the FBI run a fingerprint criminal background check and report any information received, but obtaining that FBI information is not necessary to complete the statutory "criminal background check." *See* Measure 114, § 4(1)(e) ("The permit agent shall request the department to conduct a criminal background check, including but not limited to a fingerprint identification,

through the Federal Bureau of Investigation. * * * Upon completion of the criminal background check * * *, the department shall report the results, including the outcome of the fingerprint-based criminal background check, to the permit agent.").

With that understanding of the plain text of Measure 114, we proceed to the constitutional analysis.

3. *Article I, section 27, analysis*

As set out above, our task is to confront whether Measure 114 is a reasonable regulation on the possession or use of a weapon to promote public safety without unduly frustrating the right to armed self-defense guaranteed by Article I, section 27. Our analysis is "limited to whether the [measure] is capable of constitutional application in any circumstance." *Christian*, 354 Or at 40.

We first observe that the permit-to-purchase program and point-of-transfer background check is not a total ban on obtaining firearms for self-defense. Persons who meet the qualifications for a permit and do not have any disqualifying criminal convictions may obtain a firearm. *See, e.g.*, *Christian*, 354 Or at 34, 40-41 (rejecting a challenge to an ordinance under Article I, section 27, and relying on the fact that the ordinance was not a total ban on possessing a loaded firearm for self-defense in a public place).

The preamble to Measure 114, which informs our understanding of the legislative purpose for the people's decision to enact the measure, *Oregon Cable Telecommunications v. Dept. of Rev.*, 237 Or App 628, 641, 240 P3d 1122 (2010), sets

out that the two programs are a specific legislative response to identified public safety concerns. Specifically with respect to the permit-to-purchase and point-of-transfer background check, the preamble states:

> "Whereas the People of the State of Oregon have seen a sharp increase in gun sales, gun violence, and raised fear in Oregonians of armed intimidation, it is imperative to enhance public health and safety in all communities; and
>
> "Whereas the gun violence in Oregon and the United States, resulting in horrific deaths and devastating injuries due to mass shootings, homicides and suicides is unacceptable at any level, and the availability of firearms, including semiautomatic assault rifles and pistols with accompanying large-capacity ammunition magazines, pose a grave and immediate risk to the health, safety and well-being of the citizens of this State, particularly our youth; and
>
> "Whereas Oregon currently has no permit requirements for purchasing a semiautomatic assault firearm or any other type of weapon and studies have shown that permits-to-purchase reduce firearm-related injuries and death and studies further have shown that firearm ownership or access to firearms triples the risk of suicide and doubles the risk of homicide when compared to someone who does not have access, this measure will require that anyone purchasing a firearm must first complete a safety training course, successfully pass a full background check and, only then, will an individual be granted a permit-to-purchase a firearm, so that firearms are kept out of dangerous hands[.]"

Measure 114, preamble; *see also* Measure 114, § 2 (policy statement that the regulation "will promote the public health and safety of the residents of this state").

We thus observe that sections 3 through 10 of Measure 114 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. That is the type of legislative response that the drafters of Article I, section 27, did not intend to prohibit. *See Christian*, 354 Or at 31-33 (summarizing

jurisprudence that explains that the drafters of Article I, section 27, did not intend to prohibit the legislature from enacting regulations that restrain dangerous practices or restrict possession by persons who pose a threat to public safety); *see also Hirsch/Friend*, 338 Or at 679 (holding that Article I, section 27, does not prohibit the legislature from "restrict[ing] the possession of arms by the members of a group whose conduct demonstrates an identifiable threat to public safety"); *cf. State v. H. N.*, 330 Or App 482, 491, 545 P3d 186 (2024) (recognizing, in the context of a challenge under the Second Amendment to the United States Constitution, that "limitations on people with mental disorders possessing firearms are in fact 'longstanding'").

The permit-to-purchase program and point-of-transfer background check "reflect[ ] a contemporary legislative response to identifiable threats to public safety" and "a legislative determination that the risk of death or serious injury to members of the public" is increased by the threat posed by untrained and dangerous persons obtaining firearms. *Christian*, 354 Or at 34 (stating the same with respect to a city ordinance prohibiting carrying loaded firearms in public places without a concealed carry permit). The regulations chosen by the people to address those public safety threats are reasonable because they are directed at and drafted to address those identifiable threats. Both aspects of Measure 114 directly seek to identify persons disqualified to own or possess a firearm under state or federal law, to identify dangerous persons who either are the subject of an extreme risk protection order or have " been or [are] reasonably likely to be a danger to self or others, or to the community at large" based on their psychological state

or past conduct, and to ensure that persons seeking to obtain firearms have completed a firearm safety course.

We also conclude that the permit-to-purchase program and point-of-transfer background check do not unduly frustrate the right guaranteed by Article I, section 27. Article I, section 27, does not provide an absolute right, but a right to armed self-defense that is subject to the wide latitude of the legislature "to enact specific regulations restricting the possession and use of weapons to promote public safety." *Christian*, 354 Or at 33. We are not persuaded that requiring a permit-to-purchase and passing a criminal background check--even if complying with those regulations causes a delay in obtaining a firearm--would render Measure 114 unconstitutional *under all circumstances*. To the contrary, when the measure is executed as the text of the measure contemplates, it will not unduly frustrate the Article I, section 27, right to armed self-defense because a qualified individual will be able to obtain a firearm for the purposes of self-defense. Article I, section 27, does not confer the right to obtain a firearm immediately in all circumstances; it is a right to defend oneself using constitutionally protected arms. We decline to engage in any speculation about how the measure might be executed in the future and the effect that might have on any one individual's Article I, section 27, right. Those questions can only be explored through as-applied challenges that are not before us, as plaintiffs' complaint alleged a facial challenge and the circuit court ruled that it would address only a facial challenge, which is a ruling that plaintiffs do not challenge on appeal. Plaintiffs have not pointed to anything "within the language or history of the

constitution itself," *Hirsch/Friend*, 338 Or at 639, that limits the people of Oregon from enacting sections 3 through 10 of Measure 114, and we are aware of none.

We conclude that sections 3 through 10 of Measure 114, which include the permit-to-purchase program and point-of-transfer background check, are facially valid under Article I, section 27.

B. *Large-Capacity Magazine Ban*

We next address the large-capacity magazine ban in Measure 114.

1. *Text of section 11 of Measure 114*

Section 11 of Measure 114 is codified at ORS 166.355 and covers the ban on large-capacity magazines. The measure 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, but does not include any of the following:
>
> "(A) An ammunition feeding device that has been permanently altered so that it is not capable, now or in the future, of accepting more than 10 rounds of ammunition;
>
> "(B) An attached tubular device designed to accept, and capable of operating only with 0.22 caliber rimfire ammunition; or
>
> "(C) A tubular ammunition feeding device that is contained in a lever-action firearm."

Measure 114, § 11(1)(d).

Measure 114 makes it a Class A misdemeanor to manufacture, import, possess, use, purchase, sell, or otherwise transfer any large-capacity magazine in Oregon

after the effective date of the measure. Measure 114, § 11(2), (6). There are exceptions to that ban for dealers and manufacturers to provide firearms to the United States Armed Forces or a law enforcement agency and for "[a]ny government officer, agent or employee, member of the Armed Forces of the United States or peace officer * * * that is authorized to acquire, possess or use a large-capacity magazine provided that any acquisition, possession or use is related directly to activities within the scope of that person's official duties." Measure 114, § 11(4). The measure also provides that it is an affirmative defense "to the unlawful possession, use and transfer of a large-capacity magazine in this state by any person" if the large-capacity magazine "was owned by the person before the effective date of [the measure] and maintained in the person's control or possession" or the person acquired possession "by operation of law upon the death of a former owner who was in legal possession of the large-capacity magazine" and as long as the owner only used the large-capacity magazine in the manner and at the locations authorized in the measure. Measure 114, § 11(5)(a) - (c). That affirmative defense also applies when "[t]he person has permanently and voluntarily relinquished the large-capacity magazine to law enforcement or to a buyback or turn-in program approved by law enforcement, prior to commencement of prosecution by arrest, citation or a formal charge." Measure 114, § 11(5)(d).

2. *Article I, section 27, analysis*

We reiterate that what we must confront is whether the legislation is a reasonable regulation on the possession or use of a weapon to promote public safety

without unduly frustrating the right to armed self-defense guaranteed by Article I, section 27. Our analysis is "limited to whether the [measure] is capable of constitutional application in any circumstance." *Christian*, 354 Or at 40.

At the outset, we decline to address the state's argument that magazines are not "arms" constitutionally protected under Article I, section 27. It is undisputed that ammunition magazines are required for firearms to be operable. We do not think that it is appropriate to approach this case by parceling out a firearm component from the firearm itself in addressing the constitutionality of Measure 114. We also do not think that the constitutionality of the ban should be dependent upon whether large-capacity magazines and firearms that could discharge multiple shots without reloading existed and were commonly used for self-defense at the time Article I, section 27, was adopted. It is undisputed in the historical record that limited, early forms of the technology did exist at that time, and we decline to base our constitutional analysis in this case on whether current forms of the technology are constitutionally protected. *But see OSSA v. Multnomah County*, 122 Or App 540, 548-49, 858 P2d 1315 (1993) (holding that a city ordinance restricting possession of "assault weapons" in public was constitutional because the semi-automatic firearms classified as assault weapons were not constitutionally protected arms because they derived from military weaponry and "mid-nineteenth century repeating firearms used for self-defense * * * were not in common use at the time"). We thus proceed based on the assumption that large-capacity magazines are part of constitutionally protected arms and use the same analytic framework that we

applied to the other sections of Measure 114.

We first observe that the large-capacity magazine ban is not a ban on any particular type of firearm or constitutionally protected arm--it is a ban on possessing magazines that allow a firearm to discharge more than 10 rounds without having to reload. We thus disagree with plaintiffs' characterization of the regulation as a ban on the mere possession or use of nearly any firearm. From the text of the measure, and legislative findings, we discern that the voters' intent in enacting the measure is to regulate the manner of possession or use of firearms in that it restricts the size of magazine that can be used with a firearm to make it operable; it is not a restriction of the mere possession of operable firearms themselves.[10]

---

[10] We note that the circuit court concluded that most firearms were banned by Measure 114 "because there is no effective way of limiting magazines to ten rounds or less by permanently alter[ing] them and the magazines are readily capable of alteration or changed to carry more than ten rounds within seconds." The court's reasoning was based on its reading of the definition of "large-capacity magazine" in Measure 114, which includes a magazine that "can be readily restored, changed, or converted to accept, more than 10 rounds of ammunition" and that "permanently altered" means that "it is not capable, now or in the future, of accepting more than 10 rounds of ammunition."

We reject the circuit court's line of reasoning for at least two reasons. First, it does not demonstrate that Measure 114 is incapable of constitutional application in any circumstance. The facts found by the circuit court demonstrate the ingenuity of persons trying to subvert manufacturer limits on magazines; those facts do not demonstrate that most magazines holding 10 or fewer rounds fall within the Measure 114 legal definition of large-capacity magazine, or, more importantly, that Measure 114, on its face, bans most firearms themselves, when the text of Measure 114 provides for no such ban on firearms. The reasoning employed by the circuit court appears to be grounded in concerns of constitutional overbreadth, which asks whether "the statute in question prohibits constitutionally protected conduct of any kind." *Hirsch/Friend*, 338 Or at 628. The Supreme Court in *Christian* made clear that that kind of facial challenge is not cognizable under Article I, section 27.

We also observe that the large-capacity magazine ban is 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. The preamble to Measure 114 specifically states with respect to large-capacity magazines:

> "Whereas the People of the State of Oregon have seen a sharp increase in gun sales, gun violence, and raised fear in Oregonians of armed intimidation, it is imperative to enhance public health and safety in all communities; and
>
> "Whereas the gun violence in Oregon and the United States, resulting in horrific deaths and devastating injuries due to mass shootings, homicides and suicides is unacceptable at any level, and the availability of firearms, including semiautomatic assault rifles and pistols with accompanying large-capacity ammunition magazines, pose a grave and immediate risk to the health, safety and well-being of the citizens of this State, particularly our youth; and

---

Second, we do not think the circuit court's expansive reading of the definition of "large-capacity magazine" comports with the legislative intent of Measure 114, which was not intended to ban all magazines. Moreover, "readily restored, changed, or converted to accept more than 10 rounds of ammunition" does not necessarily encompass the types of modifications the circuit court relied on. "Readily" is an adverb that encompasses both temporal *and* degree-of-difficulty components. *See Webster's Third New Int'l Dictionary* 1889 (unabridged ed 2002) (defining "readily" to include "with fairly quick efficiency : without needless loss of time : reasonably fast : SPEEDILY" and "with a fair degree of ease : without much difficulty : with facility : EASILY); *see also State v. Briney*, 345 Or 505, 516, 200 P3d 550 (2008) (construing "readily capable of use as a weapon" in *former* ORS 166.210(3) (2007) to mean "promptly able to be made so *at the time that an individual is alleged to be unlawfully carrying it concealed*" (emphasis in original)). Whether 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. Whether 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.

> "* * * * *
>
> "Whereas large-capacity magazines are often associated with semiautomatic assault rifles, and can also be used with many semiautomatic firearms including shotguns and pistols, and estimates suggest that nearly 40% of crime guns used in serious violent crimes, including attacks on law enforcement officers, are equipped with large-capacity magazines; and
>
> "Whereas firearms equipped with large-capacity magazines increase casualties by allowing a shooter to continue firing for longer periods of time before reloading, thus explaining their use in all 10 of the deadliest mass shootings since 2009, and in mass shooting events from 2009 to 2018 where the use of large-capacity magazines caused twice as many deaths and 14 times as many injuries, including the 2015 shooting at Umpqua Community College in Roseburg, Oregon in which 10 people were killed and 7 more were injured; and
>
> "Whereas restrictions on high-capacity magazines during the 10-year federal ban from 1994-2004 and the ban in over nine (9) states and the District of Columbia have been found to reduce the number of fatalities and injuries in shooting incidents, this measure will enhance the safety of residents, particularly children, of this state by prohibiting the manufacture, sale, or transfer of large-capacity ammunition magazines and regulate the use of such magazines that are currently owned[.]"

Measure 114, preamble; *see also* Measure 114, § 2 (policy statement).

By the findings contemplated by the people of Oregon when it enacted Measure 114, 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. The ban on large-capacity magazines is a reasonable regulation directed at the specific, observable public safety concern that the people of Oregon sought to address.

The ban also does not unduly frustrate the right to armed self-defense guaranteed by Article I, section 27. In so concluding, we emphasize that the right is one

of armed *defense* of person or property. Measure 114 does not affect any individual's Article I, section 27, right to use a firearm in defense of self or property. Measure 114 does limit an individual's ability to legally fire more than 10 rounds of ammunition without reloading while doing so. That limitation does not *unduly* frustrate the Article I, section 27, right. Plaintiffs assert that certain defensive scenarios benefit from the assistance of large-capacity magazines--most notably in rural areas where law enforcement response times are long, and livestock requires protection from predators. However, an individual's desire to use a large-capacity magazine for such purposes, instead of a capacity-compliant magazine, does not demonstrate that the large-capacity magazine ban in Measure 114 is incapable of constitutional application. Article I, section 27, does not provide an absolute right, but a right to armed self-defense that is subject to the wide latitude of the legislature "to enact specific regulations restricting the possession and use of weapons to promote public safety." *Christian*, 354 Or at 33.

We also reject the argument that allowing an affirmative defense to a prosecution for unlawful possession, use, or transfer of a large-capacity magazine renders the measure unconstitutional. How the use of the affirmative defense may play out in any particular prosecution and whether the prosecution would violate the individual's right under Article I, section 27, is a question that can be answered only in an as-applied challenge, which is not before us on plaintiffs' facial challenge. We conclude that section 11 of Measure 114 does not unduly frustrate the right to armed self-defense that is guaranteed in Article I, section 27. Plaintiffs have not pointed to anything "within the

language or history of the constitution itself," *Hirsch/Friend*, 338 Or at 639, that limits the people of Oregon from enacting section 11 of Measure 114, and we are aware of none.

We conclude that section 11 of Measure 114, which covers the large-capacity magazine ban, is facially valid under Article I, section 27.

III. CONCLUSION

In sum, we hold that all of Ballot Measure 114 (2022) is facially valid under Article I, section 27, because the law is capable of constitutional application. *Christian*, 354 Or at 40. We reverse both the general judgment and the supplemental judgment. We remand to the circuit court for the limited purposes of entering a declaratory judgment consistent with this opinion and determining whether the state is entitled to fees or costs.

Reversed and remanded.

APPENDIX

INDEX OF APPENDICES

Excerpts from: Brooks, Connor, *Background Checks for Firearm Transfers, 2019–2020*, U.S. DEPARTMENT OF JUSTICE, *Bureau of Justice Statistics* (November 7, 2023) APP-1

Excerpts from: Claudia Burton & Andrew Grade, *Legislative History of the Oregon Constitution of 1857 – Part 1 (Articles I & II)*, 37 WILLAMETTE L. REV. 489 (2001) APP-4

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

November 2023, NCJ 306971

Bulletin

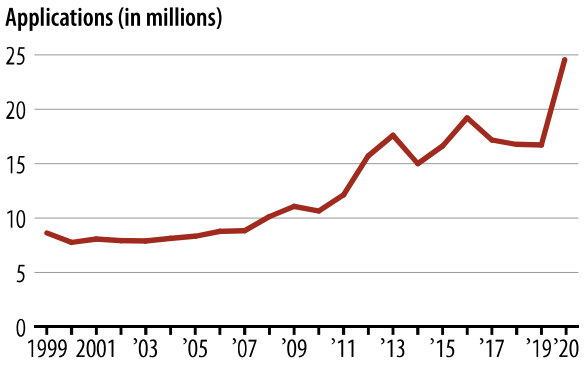
Background Checks for Firearm Transfers, 2019–2020

Connor Brooks, *BJS Statistician*

In 2020, almost 25.0 million applications for firearm transfers and permits were subject to background checks under the Brady Handgun Violence Prevention Act (Brady Act) (figure 1; table 1). This was a nearly 50% increase from about 16.7 million applications in 2019. Approximately 400,000 applications were denied in 2020. From the time that the Brady Act went into effect in 1994 to 2020, almost 291.7 million applications were subject to background checks and about 4.4 million (1.5%) applications were denied.

Findings in this report are based on the Firearm Inquiry Statistics (FIST) program, administered by the Bureau of Justice Statistics (BJS). FIST collects information on firearm applications, denials, and reasons for denial from state and local checking agencies and combines it with data from the FBI's National Instant Criminal Background Check System (NICS) Section. FIST also collects data on denials that the FBI referred to the Bureau of Alcohol, Tobacco, Firearms and Explosives' (ATF) Denial Enforcement and NICS Intelligence (DENI) Branch for investigation and possible prosecution.

FIGURE 1
Estimated number of applications for firearm transfers and permits since the first full year of the Brady Act's permanent provisions, 1999–2020



Note: The National Instant Criminal Background Check System (NICS) began operations in 1998. From February 28, 1994 to November 29, 1998, state and local checking agencies conducted background checks on applicants, mainly on handgun transfers. See *Presale Handgun Checks, the Brady Interim Period, 1994–98* (NCJ 175034, BJS, June 1999). The law's permanent provisions took effect when NICS began operations on November 30, 1998. Totals for 2011 and 2013 were estimated. See *Methodology*. See table 1 for totals.

Source: Bureau of Justice Statistics, Firearm Inquiry Statistics Program, 1999–2020; and Federal Bureau of Investigation, National Instant Criminal Background Check System Transaction Statistics, 1999–2020.

HIGHLIGHTS

- The FBI and state and local checking agencies received about 16.7 million applications for firearm transfers and permits in 2019 and 25.0 million applications in 2020.
- From 1994, when the Brady Act became effective, to 2020, about 291.7 million applications were subject to background checks and 4.4 million (1.5%) applications were denied.
- About 243,000 (1.5%) applications for firearm transfers and permits were denied in 2019, and 398,000 (1.6%) were denied in 2020.
- The FBI received about 12.8 million applications in 2020 and denied 185,000 (1.5%), while state and local checking agencies received more than 12.2 million applications and denied about 212,000 (1.7%).
- In 2020, state checking agencies denied 2.7% of purchase permits, 1.8% of instant checks, 1.2% of exempt carry permits, and 0.2% of other approvals.
- ATF's Denial Enforcement and NICS Intelligence Branch referred 10% of denials to the field for further investigation in both 2019 and 2020.

Terms and definitions

Application—Information submitted to a checking agency about a prospective firearm purchaser to determine if the individual is disqualified from receiving a firearm or obtaining a permit to receive a firearm under state or federal law. A prospective firearm purchaser or a firearm seller may submit the information to a checking agency.

Brady Handgun Violence Prevention Act (Brady Act)—An act passed by the United States Congress that mandated federal background checks on prospective firearm purchases and established the National Instant Criminal Background Check System. The Brady Act took effect on February 28, 1994. For more information, see *Background Check Laws and Procedures*.

Checking agency—The FBI or a state or local governmental agency that conducts background checks in the National Instant Criminal Background Check System (NICS) or state records. Checking agencies are typically law enforcement agencies.

Denial—A decision by a checking agency to prohibit an applicant from receiving a firearm or a state permit to receive a firearm because a disqualifying factor was found during the background check.

Federal Firearms Licensee (FFL)—A firearm seller, also known as a federally licensed firearms dealer, that is licensed by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to buy, sell, and transfer firearms. All entities that regularly engage in firearms sales must be FFLs. They must also enroll in NICS if they reside in states where FFLs contact the FBI, instead of state points of contact (POCs), to request NICS checks.

Firearm—Any weapon that is designed or may readily be converted to expel a projectile by the action of an explosive.

Handgun—A firearm that has a short stock and is designed to be held and fired using a single hand, such as a pistol or revolver.

Long gun—A firearm that has a barrel length of about 30 inches to improve accuracy and range, commonly has a shoulder butt, and is designed to be fired with two hands, such as a rifle or shotgun.

National Instant Criminal Background Check System (NICS)—A national system administered by the FBI that checks available federal, state, local, and tribal records to determine if prospective firearm purchasers are disqualified from receiving firearms.

Private transfer—A firearm transfer between two people who are not FFLs.

State permit or check types: States use four methods to approve a prospective purchaser to receive a firearm. A state may use one or more of these methods, depending on the type of firearm being transferred and relevant state law. For more information, see *Background Check Laws and Procedures*.

- **Exempt carry permit**—A permit issued by a state or local checking agency after a successful NICS check that exempts the holder (for up to 5 years under an ATF regulation or state law) from a new background check when presented to a seller (an FFL or, in some states, a non-FFL seller) for a firearm transfer.
- **Instant check**—A background check system that requires a seller to transmit a prospective purchaser's information to a checking agency by telephone or computer and the agency to respond immediately or as soon as possible.
- **Other approval**—A background check system that requires the seller to transmit the prospective purchaser's information to a state or local checking agency by telephone or other means and the agency to respond within an established time limit.
- **Purchase permit**—A government-issued document (such as a permit, a license, or an identification card) that is issued by a state or local checking agency after a background check and must be presented to a seller for a firearm transfer.

State point of contact (POC)—An agency designated by state law to access NICS for checks for applications originating in its state.

Transaction—An inquiry by NICS staff to NICS about a prospective firearm purchaser.

Transfer—The physical change in possession of a firearm from one person to another, whereas a purchase is the exchange of money for a firearm.

There were nearly 25.0 million applications for firearm transfers and 398,000 denials in 2020

State and local checking agencies and the FBI received about 25.0 million applications for firearm transfers and permits in 2020, 30% more than in 2016, the year with the second-largest number of applications (19.2 million) (table 1). Checking agencies denied about 398,000 applications in 2020, for a denial rate of 1.6%. From 1994, when the Brady Act became effective, to 2020, about 291.7 million applications were subject to background checks and 4.4 million (1.5%) applications were denied.

State and local checking agencies received more than 12.2 million applications for background checks in 2020, and the FBI received 12.8 million

The FBI processed all NICS checks for federal firearms licensees (FFLs) in 30 states, the District of Columbia, and the five U.S. territories in 2019 and 2020. (See *Methodology* for more details.) In seven other states, it processed NICS checks for FFLs only for long gun applications. The FBI conducted NICS checks for 12.8 million applications for firearm transfers and permits in 2020 and denied about 185,000 (1.5%) of those applications (table 2). In comparison, the FBI conducted NICS checks for 8.2 million applications in 2019 and denied about 106,000 (1.3%). From 2019 to 2020, the number of applications for which the FBI conducted NICS checks increased by 56%.

State and local checking agencies conducted background checks for 8.5 million applications in 2019 and 12.2 million applications in 2020, for an increase of about 43% in the number of applications from 2019 to 2020. In 2020, state checking agencies received more than 10.5 million applications and denied about 162,000 (1.5%). Local checking agencies received more than 1.7 million applications and denied about 50,000 (2.9%).

TABLE 1
Estimated number of firearm applications and denials since the Brady Act's effective date, 1994–2020

	Applications	Denials	Percent denied
Total	291,686,000	4,416,000	1.5%
Brady interim period[a]			
1994–1998	12,740,000	312,000	2.4%
Permanent Brady[b]	278,946,000	4,104,000	1.5%
1998[c]	893,000	20,000	2.2
1999	8,621,000	204,000	2.4
2000	7,753,000	153,000	2.0
2001	8,068,000	150,000	1.9
2002	7,926,000	136,000	1.7
2003	7,883,000	126,000	1.6
2004	8,133,000	126,000	1.5
2005	8,324,000	132,000	1.6
2006	8,772,000	135,000	1.5
2007	8,836,000	136,000	1.5
2008	10,131,000	147,000	1.5
2009	11,071,000	150,000	1.4
2010	10,643,000	153,000	1.4
2011[d]	12,135,000	160,000	1.3
2012	15,718,000	192,000	1.2
2013[d]	17,602,000	193,000	1.1
2014	14,993,000	193,000	1.3
2015	16,610,000	226,000	1.4
2016	19,203,000	265,000	1.4
2017	17,163,000	237,000	1.4
2018	16,765,000	230,000	1.4
2019	16,706,000	243,000	1.5
2020	24,994,000	398,000	1.6

Note: Totals are rounded to the nearest 1,000. Details may not sum to totals due to rounding. For information on sample design and checking agencies that reported data, see *Methodology*.

[a]From February 28, 1994 to November 29, 1998, background checks on applicants were conducted by state and local checking agencies, mainly on handgun transfers. See *Presale Handgun Checks, the Brady Interim Period, 1994–98* (NCJ 175034, BJS, June 1999).

[b]The National Instant Criminal Background Check System (NICS) began operations in 1998. Under that system, checks on handgun and long gun transfers are conducted by the FBI and state and local agencies.

[c]Includes counts from November 30, 1998 to December 31, 1998 that are based on the FBI's 1998–1999 NICS Operations Report and may include multiple transactions for the same application.

[d]Totals for 2011 and 2013 were estimated. See *Methodology*.

Source: Bureau of Justice Statistics, Firearm Inquiry Statistics program, 1995–2020; and Federal Bureau of Investigation, National Instant Criminal Background Check System Transaction Statistics, 1998–2020.

A LEGISLATIVE HISTORY OF THE OREGON CONSTITUTION OF 1857 - PART I (ARTICLES I & II)

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When the delegates gathered in Salem, Oregon, in August 1857 to draft Oregon's Constitution, they kept it simple. They did not keep records (save for the *Journal of the Convention*,[1] recording all official actions taken by the Convention), nor did they go to the expense of hiring a reporter to record the debates. Thus, those interested in the original understanding of the provisions of Oregon's Constitution of 1857 have been limited to just a few primary resources, principally the Convention's *Journal*, and a book published in 1926[2] that interleaved the Convention's *Journal* entries for a particular session with the contemporaneous newspaper accounts of that session from the *Weekly Oregonian* and the *Oregon Statesman*.

Recently, the senior author discovered important additional sources of information about the original understanding of Oregon's

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1. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OREGON (1882) [hereinafter JOURNAL].

2. THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (Charles Henry Carey ed., 1926) [hereinafter OREGON CONSTITUTION AND PROCEEDINGS].

Constitution.[3] Housed in the library of the Oregon Historical Society is a near complete set of documents from the Oregon Constitutional Convention of 1857. With just three exceptions, for each article of the constitution, there is: (1) an initial committee report; (2) a set of amendments to that article reported by the Committee of the Whole; and (3) the engrossed article (reflecting amendments the Convention made to the article).[4] Three documents are missing from the Oregon Historical Society's collection—the initial committee report for article IX and the committee amendments for articles II and VIII. From the documents in the Oregon Historical Society's collection, it is possible to compile a much fuller legislative history of each provision in the Constitution of 1857. In addition, the authors have discovered a few additional contemporary newspaper accounts, dating from the period when Oregonians were debating whether to adopt the new constitution (September 18, 1857, through November 9, 1857).[5] From the documents in the Oregon Historical Society's collection, it is possible to have a fuller understanding of Oregon's Constitution.[6]

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3. Research 101—ask the librarian. The senior author went to the Oregon Historical Society seeking these documents. She asked to review the papers of Matthew Deady, who had served as President of the Convention, since it was known that he had retained at least some of the Convention documents for a number of years. *See infra* text accompanying note 41. The Convention documents she sought were not among the Deady papers. She then searched the card catalog under such headings as "Convention," "Constitution," and "Constitutional Convention," and found nothing. Finally, she asked the librarian, "Do you have any materials relating to the Oregon Constitutional Convention of 1857?" "Oh, yes," was the reply. "We have a whole box. Would you like to see them?" And there they were.

4. The originals of these documents are in the library of the Oregon Historical Society. The Library Registrar does not know the source of the documents. Matthew Deady, who presided at the Convention, was known to have retained the documents relating to the article on corporations and internal improvements as late as 1880. *See infra* text accompanying note 41. It is tempting to conclude that the documents in the Oregon Historical Society library came from Deady, but we do not know this for certain.

Archive-quality photographs of these documents are in the J.W. Long Law Library of Willamette University College of Law. A transcription of the documents relating to articles I and II, with notes pertaining to the physical appearance of the documents, is included as an Appendix to this Article.

5. Copies of these newspaper accounts are on file with the senior author.

6. The following resources are useful in understanding the historical context in which the Convention occurred and the events of the Convention itself: DAVID A. JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON AND NEVADA, 1840-1890 (1992); David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611 (1995); and several excerpts contained in OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2 (*e.g.*, Charles Henry Carey, *Creation of Oregon as a State*, at 1; Address of Honorable

To understand the Convention documents (the report of the committee, the committee amendments, and the engrossed article), it is necessary to understand the Convention's procedures for considering articles. At its August 19, 1857 (a.m.)[7] session, the delegates adopted rules to guide the Convention. The initial draft of an article was prepared by one of the standing committees authorized under Rule 8.[8] This draft took the form of a report to the Convention from the Committee, which report consisted only of the proposed article.[9] Each article had three readings (Rule 36).[10] The first reading was for information only (Rule 37),[11] following which the article was set for second reading.[12] At the second reading, the article typically was referred to a committee of the whole (Rule 38).[13]

The *Journal* entry when an article was read a second time was brief. It reflected only that the article had received a second reading and had been referred to a committee—*e.g.*, "The article on bill of rights was read a second time. On motion of Mr. Lovejoy, the article on bill of rights was referred to a committee of the whole."[14] When the Committee of the Whole took up the article, it debated the article and considered amendments to it, section by section (Rule

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John R. McBride, at 483; and Address of Honorable George H. Williams, at 496).

7. JOURNAL, *supra* note 1, at 9-15. Typically, the Convention met twice each working day—once in the morning (beginning at 8:00, 9:00, or 10:00 a.m.) and once in the afternoon (usually beginning at 2:00 p.m.). Thus, references to sessions or to *Journal* entries will refer to the morning (a.m.) or afternoon (p.m.) session of a particular date.

8. *Id.* at 11.

9. This is the document referred to in this Article as the "Report of Committee on . . . ."

10. *Id.* at 13.

11. *Id.*

12. The *Journal* entry when an article received its first reading was brief—*e.g.*, "The committee on Bill of Rights made a report. The article on the Bill of Rights was read a first time and passed to second reading." *Id.* Aug. 22, 1857 (a.m.), at 20. The *Journal* did not contain the text of the committee's report. Sometimes the *Weekly Oregonian*'s report for that session included the complete text of the proposed article, but frequently it did not.

13. *Id.* Aug. 19, 1857 (a.m.), at 13.

> Upon the second reading of an article the president shall state it is for commitment or engrossment; and if committed, then the question shall be whether to a select or standing committee, or to a committee of the whole; but if the article be ordered to be engrossed, the convention shall appoint the day when it shall be read a third time.

Rule 39, Rules and Orders of the Constitutional Convention, JOURNAL, *supra* note 1, Aug. 19, 1857 (a.m.), at 13.

14. JOURNAL, *supra* note 1, Aug. 26, 1857 (a.m.), at 28.

40).[15] This discussion and debate could take several sessions. When the final section in the article had been approved or amended, the Committee of the Whole's work with that particular article was concluded.[16] A a list of amendments to which the Committee of the Whole agreed was then drawn up.[17] At a subsequent session, the Convention took up the article again, considering the amendments reported by the Committee of the Whole. The Convention could accept or reject the amendments to which the Committee of the Whole agreed and it could make additional amendments. At the conclusion of this discussion, the article would be ordered engrossed (*i.e.*, any agreed-to amendments were incorporated within the text, which thus represented the article as it had been amended by the Convention)[18] and a time would be set for a third reading of the article (Rule 40).[19] At the third reading, the question was whether to approve the article or to recommit it to committee for further amendment. No amendments occurred at the third reading.[20] When each of the articles had

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15. *Id.* at 13-14.

16. *Id.* The *Journal* entry simply reported that the Committee of the Whole had concluded its consideration of the article—*e.g.*,

> On motion of Mr. Dryer, the convention resolved itself into the committee of the whole on article of bill of rights, with Mr. Lovejoy in the chair; after some time spent therein, the committee rose, and the president resumed the chair, and the chairman, Mr. Lovejoy, reported that the committee having had under consideration the article on bill of rights, report the same back to the convention with sundry amendments.

Id. Sept. 10, 1857 (a.m.), at 57-58.

17. This is the document referred to in this Article as the "Committee amendments." It is worth noting that the "committee" proposing the amendments is not the committee that proposed the article (*e.g.*, the Committee on Bill of Rights), but the Committee of the Whole.

18. This is the document referred to in this Article as the "Engrossed Article."

19. The *Journal* entry for the session in which the Convention considered the amendments agreed to by the Committee of the Whole included the text of each of the amendments (and any additional amendments proposed during the discussion). It also recorded the fate of each proposed amendment. See, for example, the entry for the September 11, 1857 (a.m.) session, when the Convention took up the amendments to the article on bill of rights that had been agreed to by the Committee of the Whole. JOURNAL, *supra* note 1, at 58-62.

20. The *Journal* entry simply reported whether the article had been approved—*e.g.*,

> Mr. Grover, from the Committee on Bill of Rights, reported the article as truly engrossed.
>
> The Article on Bill of Rights was read a third time, and Mr. Logan moved to recommit the article to the Committee on Bill of Rights, with instructions to strike out so much of section six, as relates to chaplain. . . . . the motion was not agreed to.

been passed at the third reading, they were combined in a single constitution by the Committee on Enrollment and Arrangement of the Constitution. This Committee presented its report on September 18, 1857 (a.m.), and the Convention adopted the constitution.[21] In summary form, the following occurred (with the documents listed in the right-hand column, at the point in the process at which the delegates would have received or considered them):

Procedural Stage	Document
First reading of article	Report of the Committee[22]
Second reading of article	
Committee of Whole debates article	
Convention considers amendments reported by Committee of the Whole	Committee amendments[23]
Third reading	Engrossed article
Adoption of constitution	Enrolled constitution[24]

The question recurring upon the final passage of the Article on Bill of Rights as read, the yeas and nays being demanded, resulted as follows: . . .

So the article on Bill of Rights was passed.

Id. Sept. 12, 1857 (p.m.), at 70.

21. At the September 15, 1857 (a.m.) session, the Convention authorized the appointment of a committee on the enrolled constitution, "with instructions to arrange, number, and report the articles thereof for final action." *Id.* Sept. 15, 1857 (a.m.), at 77. The Committee made its report at the September 18, 1857 (a.m.) session. *Id.* Sept. 18, 1857 (a.m.), at 77-99. The Convention adopted the constitution, as enrolled, without amendment. *Id.* Sept. 18, 1857 (a.m.), at 97-99. An original copy of the enrolled constitution is housed at the State Archives Building in Salem, Oregon.

22. Sometimes there is a report of the Committee's report in the *Weekly Oregonian*'s account of the session at which the Report was read for the first time. While generally one would regard the Report of the Committee as authoritative, there are times when the *Weekly Oregonian*'s report is the only record we have of the original section. For instance, see the discussion *infra* of sections 4 and 6.

23. There is a duplication of sources to determine which amendments were proposed by the Committee of the Whole. The Committee amendments are one source, and the other is the listing of amendments in the *Journal* for the session at which the Convention took up the amendments proposed by the Committee of the Whole. Presumptively, the *Journal* entry is authoritative, but occasionally the *Journal* is silent, or incomplete, and the Committee amendments contain clues as to what happened at a particular session. For instance, see the discussion *infra* of section 4.

24. There is no indication that each delegate received a copy of the enrolled constitu-

A close tracing of the legislative history frequently yields clues as to the meaning of a particular provision, as viewed by the Convention delegates. In some cases, it may be unclear how the bare text of a constitutional provision applies to a particular legal issue.[25] In other cases, it appears that the text in the codified Oregon Constitution differs from the text of the sections approved by the delegates in Convention.[26] To what extent does the intent of the delegates matter in these instances?

Arguably, the intent of the delegates is of relatively little importance; it is the text of the constitution, as it was presented to the voters in November 1857 that is determinative.[27] First, if there is any

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tion. The document is fairly lengthy, and there was less than twenty-four hours between the morning and afternoon sessions of September 17, 1857 (when the delegates were still making amendments to various articles) and the morning session of September 18, 1857 (when the Committee on Enrollment and Arrangement of the Constitution reported that the constitution was truly enrolled). The delegates dispensed with the reading of the enrolled constitution. JOURNAL, *supra* note 1, Sept. 18, 1857 (a.m.), at 97-99. Presumably the delegates could have viewed the enrolled constitution before voting on it on September 18, 1857 (a.m.), but it seems unlikely that many examined it in detail.

25. *See* Putnam v. Douglas County, 6 Or. 328, 331 (1877) (it is unclear from text alone whether requirement of "just compensation," as used in article I, section 18 of the Oregon Constitution, is satisfied when the net compensation to be paid a landowner whose land is taken for a road is determined by offsetting the value of the land taken by the benefits to the remaining land resulting from the location of the road), *overruled by* State Highway Comm'n v. Baily, 319 P.2d 906 (Or. 1957).

26. Sometimes these changes were apparently inadvertent (*e.g.*, the change in the wording from "secured" to "secure" in article I, section 2). *See, e.g., infra* notes 93-107 and accompanying text. In other instances, the changes may have been intended, but not taken according to proper procedures. For example, the deletion of section 4 in article I is not reported in the *Journal*. *See infra* notes 138-146 and accompanying text.

27. The Convention took several steps to insure that the voters were familiar with the proposed constitution. It ordered 5,000 copies of the constitution to be printed, which were to be mailed to postmasters and auditors, for distribution to voters. JOURNAL, *supra* note 1, Sept. 18, 1857 (a.m.), at 97. A copy of that publication is at the Oregon Historical Society library. It is titled *Constitution for the State of Oregon*. The title page contains the further information that it was "Passed by the Convention, Sept. 18, 1857." It also states that it was printed in Salem, Oregon, by Asahel Bush, Printer to the Convention, in 1857.

Further, the Convention provided for the printing of the constitution in the papers of the territory. JOURNAL, *supra* note 1, Sept. 17, 1857 (p.m.), at 87. Copies of the editions of the *Weekly Oregonian, Oregon Argus, Democratic Standard,* and *Oregon Statesman* that contained the constitution are available on microform at various libraries in the state. It is unclear what the newspapers used as their source for the text. Asahel Bush was the printer for the Convention and also the editor of the *Oregon Statesman*. The full text of the constitution appeared in the *Oregon Statesman* on September 29, 1857. OREGON STATESMAN, Sept. 29, 1857. Not until October 13, 1857, does a notice appear in the *Oregon Statesman* that the pamphlet containing the constitution has been printed and will be mailed that week

intent to be investigated, it is the intent of the voters, not the intent of the delegates, that matters, since it was their affirmative vote that was required for the adoption of the constitution.[28] Further, determining intent with respect to a particular provision is problematic when an entire constitution, with a large number of disparate provisions, is presented as a single document. All you can say is that a majority of the voters concluded that, on balance, the good features

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to postmasters and auditors. *Id.* Oct. 13, 1857. Yet the constitution was printed some time earlier in the *Democratic Standard,* Oct. 1, 1857, the *Oregon Argus,* Oct. 3, 1857, and the *Weekly Oregonian,* Oct. 3, 1857. Further, there are differences between the text in the official publication and the text as printed in those newspapers. For example, the official publication reports article I as containing 34 sections, whereas the versions of article I reported in newspapers other than the *Oregon Statesman* contain only 33 (corresponding with the number of sections in article I of the enrolled constitution). The apparent additional section in the official publication's version of article I occurs because the printer split section 16 into two sections, and numbered them sections 16 and 17.

28. The Oregon Territorial Legislative Assembly did not draft a constitution itself, but submitted to the voters the question of whether the voters favored a convention to form a constitution for a state government. At that election, the voters also selected delegates, and only "if . . . it shall appear that a majority of all the votes cast shall be in favor of convention, then and in that case it shall be the duty of the delegates elected to meet at the seat of government on the third Monday in August next, and proceed to the formation of a State constitution." An Act to Provide for taking the Sense of the People for or against the formation of a State Government, § 5, *reprinted in* LAWS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY OF OREGON ENACTED DURING THE EIGHTH REGULAR SESSION THEREOF 25-26 (1857). Section 8 of this act also specified that the Convention did not have the authority to adopt a constitution, but was to submit it to the people.

> That the constitution herein provided for before taking effect, shall be submitted for adoption or rejection, to a vote of the qualified voters within the boundaries of the proposed State. Such vote to be taken in like manner and in conformity to the laws of this Territory regulating elections at such time as said convention may designate.

Id. at 26.

The Preamble of the Constitution refers to its source in the people. "We, the people of the State of Oregon, to the end that justice be established, order maintained, and liberty perpetuated, do ordain this Constitution." OR. CONST. pmbl. The Schedule of the Constitution provides for submission of the constitution to the voters for their approval or rejection. Section 1 of the Schedule provides, "For the purpose of taking the vote of the electors of the state for the acceptance or rejection of this Constitution, an election shall be held on the second Monday of November, in the year 1857, ..." OR. CONST. art. XVIII, § 1. Section 3 of the Schedule is even clearer:

> If a majority of all the votes given for, and against the Constitution, shall be given for the Constitution, then this Constitution shall be deemed to be approved, and accepted by the electors of the State, and shall take effect accordingly; and if a majority of such votes shall be given against the Constitution, then this Constitution shall be deemed to be rejected by the electors of the State, and shall be void.

OR. CONST. art. XVIII, § 3.

of the proposed constitution outweighed the bad, and the majority was willing to adopt the entire constitution. There is a further, practical problem: the discussion of the proposed constitution that appears in the newspapers for the period during which the voters were considering whether to adopt the proposed constitution is relatively sparse, consisting of general assertions of support for statehood (and the new constitution) or comments on just a few particularly controversial issues. We thus have little information from which to determine how the voters understood a particular provision. So, by default, when investigating the voters' under-standing of a provision, one searches the records relating to the Convention to determine the delegates' understanding at the Convention and indulges in the presumption that the voters shared that understanding.[29]

There is both direct and circumstantial evidence that the Convention delegates viewed the constitution's provisions as familiar and easily susceptible to understanding by the common man. Delazon Smith, when arguing for the addition of a bill of rights, asserted:

> It is a sort of manual—a sort of textbook of weighty maters, placed there multum in parvo, and the reference of the most common mind to the constitution of Indiana teaches that mind its rights under our government. They are there in monosyllables; and although individuals of common capacity, or of ordinary pursuits, may not be regarded as expounders of the constitutional law, yet the doctrine is contained, the declarations embodied in that bill of rights, and the meanest capacity can understand them.[30]

David Logan, when arguing against the hiring of a reporter to record the debates of the Convention, stated:

> [T]he constitution that we may make, and every principle we can engraft into it, has been discussed and decided time and again. It is no solution of new principles; it is no solution of new doctrines. We have a number of new models before us, and have

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29. This is not an unreasonable presumption. The delegates were popularly elected by their neighbors, for the specific purpose of forming a constitution. An Act to Provide for taking the Sense of the People for or against the formation of a State Government, §§ 1, 6 & 7, *supra* note 28, at 25-26. Presumably the electors chose persons to be delegates whom they believed had sound judgment and a commonality of value with their electors. The delegates were drawn from the common walks of life among the settlers—there were farmers (30), lawyers (19), mechanics (3), miners (3), physicians (2), a printer (1), an editor (1), and a surveyor (1). George H. Himes, *Constitutional Convention of Oregon*, 15 OR. HIST. Q. 217, 218 (1914).

30. WEEKLY OREGONIAN, Aug. 29, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 102.

> only to select such as are applicable to the country at this time. Among the mass of principles which are already settled, we are only looking to the solution of those which are applicable to the present circumstances of Oregon.[31]

At the conclusion of the Convention, when the delegates were discussing the date for the election at which the voters would decide whether to adopt the proposed constitution, some delegates argued that the complexity of the document argued in favor of a distant date.[32] Reuben Boise's response to this argument was reported by the *Oregon Statesman*. It was brief: "Mr. Boise said there was nothing new in th[e] Constitution—there was no intelligent man in the country who would read it who would find in it anything he had not seen before."[33] When the delegates provided for the printing and distribution of multiple copies of the constitution,[34] presumably they did so because they assumed that Oregon voters would read and understand it, and thus would be able to cast an informed vote—for or against the constitution—in November 1857. All of this supports the argument that the text is relatively self-explanatory, needing little investigation into how the Convention delegates (or voters) understood a particular provision.

In fact, though, lawyers and judges frequently confront constitutional provisions that are far from self-explanatory, insofar as application to the issue at hand is concerned. From the beginning, the practice of Oregon judges (many of whom had been delegates to the Convention) was to consult sources in addition to the plain text of the constitution.[35]

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31. WEEKLY OREGONIAN, Sept. 5, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 141.

32. Paine Page Prim, William Farrar, John Kelsay, David Logan, and Stephen Chadwick all made this argument. OREGON STATESMAN, Sept. 22, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 359-68.

33. *Id.* at 361.

34. *See supra* note 27.

35. *See* United States v. Walsh, 1 Deady 281, 283, 28 F. Cas. 391, 393 (D. Or. 1867) (opinion by Judge Matthew Deady, using history that led to adoption of bars on imprisonment for debt generally as an aid in determining whether a penal fine was a "debt" within the meaning of article I, section 19); Putnam v. Douglas County, 6 Or. 328 (1877) (opinion by Chief Justice P.P. Prim, referring to the apparent origin of article I, section 18 in the corresponding provision of the Indiana Constitution of 1851, and then drawing on the contemporary Indiana understanding of that provision), *overruled by Bailey*, 319 P.2d 906 (Or. 1957); Rugh v. Ottenheimer, 6 Or. 231, 234-35 (1877) (opinion by Justice Reuben Boise, referring to patterns of property ownership among the wives of delegates to the convention as an aid to interpreting article XV, section 5). All of these opinions were authored

Occasionally the text appears to be clear, yet there is extrinsic evidence that the text does not reflect the intention of the drafters of that document. In one such early case, the Oregon Supreme Court consulted the Convention records to determine the intent of the Convention, and followed that intent (rather than the text of the constitution, as it had been approved by the voters). In *Oregon ex rel. Caples v. The Hibernian Savings and Loan Association*,[36] the question was whether issuance of a corporate charter to a savings and loan association was consistent with article XI, section 1 of the Oregon Constitution, which reads:

> The Legislative Assembly shall not have the power to establish, or incorporate any bank or banking company, or monied institution whatever; nor shall any bank company, or institution exist in the State, with the privilege of making, issuing, or putting in circulation, any bill, check, certificate, promissory note, or other paper, or the paper of any bank company, or person, to circulate as money.[37]

The District Attorney for the Fourth Judicial District of Oregon, who challenged the issuance of a charter to the association, asserted that section one contained two independent clauses, as indicated by the semi-colon following the word "whatever," and that the first independent clause prohibited the issuance of a charter to any banking company.[38] The Hibernian Savings and Loan Association argued that the section should be read as a whole, and that the intended prohibition was only on issuance of charters to those banking institutions that proposed to issue paper that would circulate as money.[39] The Chief Justice of the Oregon Supreme Court, James K. Kelly, had been a delegate at the Convention, and his recollection was that the delegates had not approved a ban on issuance of corporate charters to all banks.[40] He made arrangements to consult with Matthew Deady, then U.S. District Judge for the District of Oregon. Judge Deady's diary entry for Sunday, February 29, 1880, relates the following:

> Judge Kelly called on me at my chambers and consulted me about the construction of the first sec [sic] of the Constitution art

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by men who had been delegates at the Constitutional Convention.

36. 8 Or. 396 (1880).

37. *Id.* at 399.

38. *Id.*

39. *Id.* at 401-02.

40. *Id.* at 400.

> 11 in relation to corporations. I had the original report of the Committee, the amendments and engrossed bill as it passed the convention from which it [appears] that the semicolon after the word "whatever" is a typographical error, and the prohibition in the section only extends to establishing or permitting to exist banks or institutions with power to issue paper to circulate as money. I let him have the documents and he seemed to think they would settle the question in the supreme court in favor of the power of the State to incorporate any other kind of a Bank—as a savings bank, and I hope it may as I know that it ought.[41]

The Court's opinion in *Oregon ex rel. Caples v. The Hibernian Savings and Loan Association*,[42] authored by Judge Kelly, relates the legislative history of article XI, section 1, beginning with a discussion of the evil that concerned the delegates—the dangers of bank notes that circulated as money.[43] The opinion then examines the text of the section, as contained in the report of the Committee on Corporations and Internal Improvements, the amendment to that section, and the section as it was stated in the engrossed article on corporations and internal improvements.[44] The opinion concludes:

> The section, as engrossed, is without any punctuation whatever. We are, therefore, well satisfied that the convention did not intend to separate that part of the section which preceded the amendment from the context which followed the amendment. It follows from this that the semicolon, placed immediately after the word "*whatever*" in the printed constitution, was a clerical mistake, and that it was not entitled to have the force and effect claimed for it by the respondent.[45]

Modernly, as well, Oregon courts consult the legislative history of provisions in the Oregon Constitution.[46]

Thus, both because it is intrinsically interesting and because Oregon courts consider it relevant in deciding cases, it is worthwhile to survey the available materials relating to the legislative history of

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41. 1 PHARISEE AMONG PHILISTINES 300 (Malcolm Clark, Jr. ed., 1975).

42. 8 Or. 396 (1880).

43. *Id.* at 399-400.

44. *Id.* at 400-01.

45. *Id.* at 401.

46. Priest v. Pearce, 840 P.2d 65, 67 (Or. 1992) (establishing that Oregon courts, when construing provisions of the Oregon Constitution, will consider the specific wording of a provision, the case law interpreting it, and the historical circumstances that led to its adoption).

the Oregon Constitution of 1857.[47] This Article considers only the materials relating to the Preamble, article I (Bill of Rights) and article II (Suffrage and Elections) of the Oregon Constitution. Later articles in this series will take up the material pertinent to the remainder of the Constitution.

PREAMBLE AND ARTICLE I (BILL OF RIGHTS)

INTRODUCTION

Had the original plan prevailed, Oregon's Constitution would not have had a bill of rights (at least not in the form of a separate article, placed at the beginning of the constitution). The Convention's Committee on Rules and Regulations proposed ten standing committees: nine were to prepare proposed articles on various subjects, and one was to consider the expenses of the Convention.[48] The Committee did not propose a separate committee to prepare an article on a bill of rights, and this omission drew the attention of the delegates when the Committee's report was presented on August 19, 1857. Delazon Smith moved to amend the Committee's report to add a committee on a bill of rights. He argued that the constitutions of a majority of states had bills of rights and that it was necessary for the constitution to remain true to this form.[49] He stated that Indiana's Constitution (of 1851) seemed to be the best modern model for a constitution, and it incorporated a separate bill of rights:

It is gold refined; it is up with the progress of the age. Many

47. This Article concentrates on the history of the Oregon Constitutional Convention of 1857. Those interested in a fuller understanding of the provisions of the Oregon Constitution may consult the historical record of the state constitutions from which the Oregon provisions were drawn. Without question, the state constitution that was drawn on most frequently was the Indiana Constitution of 1851. W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200, 214 (1926). The starting places for research on the Indiana Constitution of 1851 are: JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION (1851); 1 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA (1850); 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA (1850); INDEX TO THE JOURNAL AND DEBATES OF THE INDIANA CONSTITUTIONAL CONVENTION 1850-1851 (Jessie P. Boswell, compiler, 1938); and 1 CHARLES KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA, 1780-1851 (1916).

48. JOURNAL, *supra* note 1, Aug. 19, 1857 (a.m.), at 10.

49. WEEKLY OREGONIAN, Aug. 29, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 101.

> changes have taken place since our fathers first formed constitutions.
>
> I remember the time very well, when a man who hadn't constitutional faith—statutory faith—that extended into eternity, was not to [be] believed upon oath, and when a poor man, because he hadn't a dollar in his pockets, was sent to the county jail. And I remember a great many other things which people held entirely republican and right, which subsequent experience and the progress of the age taught us are blots upon our national escutcheon. And this preamble to the constitution of Indiana recognizes this progress, and thus recognizing embodies them in her bill of rights. She nobly reasserts what our fathers said about the natural rights of man to the pursuit of life, liberty and happiness, but she proceeds to assert the civil rights of the citizens as ascertained in those 70 years of progress.[50]

He concluded (for the moment) by arguing that these declarations would command universal respect from the people and the attention of courts.[51]

Smith and Erasmus Shattuck then turned to the location of a bill of rights. They argued that it is best to put the most vital and important rights in the forefront of the constitution so that they are easily accessible for all to see.[52] Frederick Waymire suggested another reason for placing the bill of rights at the beginning: "Put a good bill of rights in the beginning of the constitution, and the voters would read that, and vote for the whole constitution without ever reading the constitution at all. (Laughter)"[53] Shattuck made a more serious argument, that a bill of rights served to restrain a "fractious" legislature.[54]

The chief opponent to the motion to add a committee on a bill of rights was George Williams, delegate from Marion County, and Chief Justice of the Supreme Court of the Territory of Oregon. As to Shattuck's last point, the usefulness of a bill of rights to restrain the legislature, Williams' response was that you can trust the people.[55] And, more generally, he argued that bills of rights make sense

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50. *Id.* at 101-02.

51. *Id.* at 102.

52. *Id.*

53. OREGON STATESMAN, Aug. 25, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 105.

54. WEEKLY OREGONIAN, Aug. 29, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 102.

55. *Id.* at 103.

when you have a despotic ruler, but "[t]he people here are sovereign—there is no king to declare against; no power above them to curtail their rights."[56] Williams apparently viewed bills of rights as of little value, commenting that

> [a] bill of rights is a sort of Fourth of July oration put into the constitution, and has been the subject of very much legislation and contention in the older states, as to the effect of certain provisions in a bill of rights; whether its provisions are directory or not; or whether they are absolutely binding.[57]

Last, as a matter of form, Williams thought it made more sense to place the substance of a bill of rights throughout the constitution—for example, placing those provisions most pertinent to the executive branch in the article for that department.[58] In the end, the Convention voted in favor of Delazon Smith's motion to have an additional committee, charged with the responsibility to prepare an article on a bill of rights.[59]

President Matthew Deady appointed the following delegates to serve on the Committee on Bill of Rights: La Fayette Grover (Chair) (Marion County), John Reed (Jackson County), Frederick Waymire (Polk County), S.J. McCormick (Multnomah County), John Crooks (Linn County), Nicholas Shrum (Marion County), and Solomon Fitzhugh (Douglas County).[60]

The Convention took up the article on Bill of Rights on the following dates:

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56. *Id.*

57. *Id.* at 76.

58. *Id.* at 76, 103; OREGON STATESMAN, Aug. 25, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 105.

59. JOURNAL, *supra* note 1, Aug. 19, 1857 (p.m.), at 15.

60. *Id.* Aug. 20, 1857 (a.m.), at 16; *id.* Aug. 18, 1857 (a.m.), at 14-15. The names of the delegates appointed to the Committee are reported in the *Journal* for August 20, 1857 (a.m.). The counties represented by the delegates are reported in the *Journal* for August 18, 1857 (a.m.). *Id* Aug. 18, 1857 (a.m.), at 3-4.

1st Reading	2nd Reading	Committee of the Whole	Convention	3rd Reading
8/22/1857 (a.m.)[61]	8/26/1857 (a.m.)[62]	9/8/1857 (p.m.) (§§ 1-unknown)[63] 9/9/1857 (a.m.) (§§ unknown-19)[64] 9/9/1857 (p.m.) (§§ 19-24)[65] 9/10/1857 (a.m.) (§§ 24-36)[66]	9/11/1857 (a.m.)[67]	9/12/1857 (p.m.)[68]

The evidence is circumstantial, but strong, that the members of the Committee on Bill of Rights drew heavily on the Bill of Rights

61. *Id.* Aug. 22, 1857 (a.m.), at 20.

62. *Id.* Aug. 26, 1857 (a.m.), at 28.

63. WEEKLY OREGONIAN, Oct. 3, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 296-301; OREGON STATESMAN, Sept. 15, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 301-06. Newspaper reports of the September 8, 1857 (p.m.) session devote most of their coverage to the debate on section 6, although the *Weekly Oregonian*'s report contains a brief reference to section 7. WEEKLY OREGONIAN, Oct. 3, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 301.

64. WEEKLY OREGONIAN, Oct. 3, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 309-11; OREGON STATESMAN, Sept. 15, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 311-12. The *Weekly Oregonian*'s and the *Oregon Statesman*'s reports of the September 9, 1857, (a.m.) session begin with section 10 and end with section 19. Sections 8 and 9 could have been considered at either the September 8, 1857 (p.m.) session or the September 9, 1857 (a.m.) session.

65. WEEKLY OREGONIAN, Oct. 3, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 313-15; OREGON STATESMAN, Sept. 15, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 315-16.

66. WEEKLY OREGONIAN, Oct. 3, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 317-18; OREGON STATESMAN, Sept. 15, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 321.

67. JOURNAL, *supra* note 1, at 59-62.

68. *Id.* Sept. 12, 1857 (p.m.), at 69-71. The Article on Bill of Rights was passed at the third reading by a vote of 25-10. *Id.*

of the Indiana Constitution of 1851 when drafting Oregon's Bill of Rights. Delazon Smith had spoken approvingly of the Indiana Constitution and its Bill of Rights when he argued in favor of including a bill of rights in Oregon's Constitution.[69] The order of the sections in the Report of the Committee on Bill of Rights is remarkably similar to the order of the corresponding sections in the Indiana Bill of Rights.[70] Finally, the text of the corresponding sections is frequently identical or greatly similar.[71] The parentage of the final three sections of the article proposed by the Committee on Bill of Rights is less clear.[72] Sections 34 and 36 were probably modeled on the Iowa Constitution of 1857.[73] Palmer asserts that section 35 was modeled on article I, section 22, of the Maine Constitution.[74] The presumed sources of the different sections in the Report of the Committee on Bill of Rights are as follows:

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69. *See supra* text accompanying note 50. Further, La Fayette Grover, Chairman of the Committee on Bill of Rights, in the course of debate on section 6 of the proposed Article on a Bill of Rights, suggested that the Indiana Constitution had been the source of the section 6 that the Committee had proposed. OREGON STATESMAN, Sept. 15, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 302.

70. *See infra* table set out on pages 117-18.

71. *See, e.g., infra* sections 2, 3, 5, 8, 10, and 13 of the Committee's report. In the discussion below of each section of the report, we begin by setting out the text of the section as contained in the report. We then set out in a footnote the text of the presumed source of that section.

72. The last three sections of article I may have been an afterthought. In the Report of the Committee on Bill of Rights, these sections are written in a different hand than the hand that wrote the first thirty-three sections.

73. The language of sections 34 and 36 is nearly identical to the corresponding provisions in the Iowa Constitution. Further, the delegates to the Oregon Constitutional Convention were clearly aware of the Iowa Constitution of 1857. George Williams, when opposing the creation of a separate Bill of Rights for the Oregon Constitution, argued:

> Lately there has been a convention to frame a constitution in the state of Iowa, and they put in a long bill of rights, a sort of parody on the Declaration of Independence, asserting the natural equality of mankind, and already the papers in the state are fighting and quarreling about its meaning. . . . The convention, being black republican, put in a great many grand flourishes about "natural and inalienable rights," and a great many contend that it favors the equality of the negro race.

WEEKLY OREGONIAN, Aug. 29, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 103-04.

74. Palmer, *supra* note 47, at 202.

Report of Committee on Bill of Rights [75]	Presumed Source
Preamble	Ind. Const. pmbl.
§ 1	Ind. Const. art. I, § 1 (amended 1984)
§ 2	Ind. Const. art. I, § 2 (amended 1984)
§ 3	Ind. Const. art. I, § 3
§ 4	Ind. Const. art. I, § 4 (amended 1984)
§ 5	Ind. Const. art. I, § 5
§ 6	Ind. Const. art. I, § 6
§ 7	Ind. Const. art. I, § 7
§ 8	Ind. Const. art. I, § 8
§ 9	Ind. Const. art. I, § 9
§ 10	Ind. Const. art. I, § 10
§ 11	Ind. Const. art. I, § 11
§ 12	Ind. Const. art. I, § 12 (amended 1984)
§ 13	Ind. Const. art. I, § 13 (amended 1996)
§ 14	Ind. Const. art. I, § 14
§ 15	Ind. Const. art. I, § 15
§ 16	Ind. Const. art. I, § 16
§ 17	Ind. Const. art. I, § 17

75. WEEKLY OREGONIAN, Sept. 5, 1857, *reprinted in* OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 119-20. The copy of the Report of the Committee on Bill of Rights contained in the Oregon Historical Society library was altered considerably from the original report and reflects the changes that the Committee of the Whole made in the Article on Bill of Rights. Among those changes is a renumbering of many of the sections. The section numbers contained in the table above reflect the section numbers as reported in the *Weekly Oregonian's* account of the August 22, 1857 (a.m.) session, when article I received its first reading.

§ 18	Ind. Const. art. I, § 18
§ 19	Ind. Const. art. I, § 19
§ 20	Ind. Const. art. I, § 20
§ 21	Ind. Const. art. I, § 21 (amended 1984)
§ 22	Ind. Const. art. I, § 22
§ 23	Ind. Const. art. I, § 23
§ 24	Ind. Const. art. I, §§ 24, 25; Iowa Const. art. I,§ 6 (or Cal. Const. of 1849 art. I, § 11)
§ 25	Ind. Const. art. I, § 26
§ 26	Ind. Const. art. I, § 27
§ 27	Ind. Const. art. I, §§ 28, 29
§ 28	Ind. Const. art. I, § 30
§ 29	Ind. Const. art. I, § 31
§ 30	Ind. Const. art. I, §§ 32, 33
§ 31	Ind. Const. art. I, § 34
§ 32	Ind. Const. art. I, § 35
§ 33	Ind. Const. art. I, § 36
§ 34	Iowa Const. art. I, § 22
§ 35	Me. Const. art. I, § 22
§ 36	Iowa Const. art. I, § 25

PREAMBLE

1. Text

As introduced:

> We, the people of the State of Oregon, to the end that justice be established, order maintained, and liberty perpetuated, do

approved any amendments to section 29.[441] There was no reported comment or debate on section 29 when the Convention passed article I at the third reading at the September 12, 1857 (p.m.) session.[442]

SECTION 30 (ARTICLE I, § 27)

1. Text

As introduced:

> The people shall have the right to bear arms for the defence of themselves and the State, but the military shall be kept in strict subordination to the civil power.[443]

As approved at the third reading:

> The people shall have the right to bear arms for the defence of themselves and the State, but the military shall be kept in strict subordination to the civil power.[444]

As contained in the enrolled constitution:

> The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.[445]

As contained in the constitution printed and distributed to voters:

> The people shall have the right to bear arms for the defence of themselves and the State, but the military shall be kept in strict subordination to the civil power.[446]

2. Discussion of Section 30 at the Convention

Any discussion of section 30 that followed the second reading

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441. The Committee amendments for article I contain no amendment for section 29. Committee Amendments (Bill of Rights), at 1-2 (1857). The *Journal* for the September 11, 1857 (a.m.) session at which the delegates, sitting as a Convention, took up amendments to article I made by the Committee of the Whole and considered further amendments, is silent as to any amendments of section 29. JOURNAL, *supra* note 1, at 58-62.

442. OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 343.

443. Report of Committee on Bill of Rights, at 4 (1857); *compare* IND. CONST. art. I, § 32 ("The people shall have a right to bear arms for the defense of themselves and the State.") *and* IND. CONST. art. I, § 33 ("The military shall be kept in strict subordination to the civil power.").

444. Engrossed art. I, at 5-6 (1857).

445. Enrolled CONST. art. I, § 27 (1857).

446. CONSTITUTION FOR THE STATE OF OREGON art. I, § 28 (1857); *see supra* note 27.

of article I occurred on September 10, 1857 (a.m.)[447] and September 11, 1857 (a.m.).[448] There was no reported debate on section 30 at either of those sessions.[449] There is no evidence that the delegates approved any amendments to section 30.[450] There was no reported comment or debate on section 30 when the Convention passed article I at the third reading at the September 12, 1857 (p.m.) session.[451]

SECTION 31 (ARTICLE I, § 28)

1. Text

As introduced:

> No soldier shall in time of peace be quartered in any house without the consent of the owner; nor in time of war except in manner prescribed by law.[452]

As approved at the third reading:

> No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, except in manner prescribed by law.[453]

As contained in the enrolled constitution:

> No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, except in manner prescribed by law.[454]

As contained in the constitution printed and distributed to voters:

> No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, except in manner prescribed by law.[455]

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447. OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 317, 321.

448. JOURNAL, *supra* note 1, at 58-62.

449. OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 317, 321, 329-30.

450. There is no amendment of section 30 in the article I Committee amendments. Committee Reports (Bill of Rights), at 1-2 (1857). The *Journal* for the September 11, 1857 (a.m.) session at which the delegates, sitting as a Convention, took up amendments to article I made by the Committee of the Whole, is silent as to any amendments of section 30. JOURNAL, *supra* note 1, at 58-62.

451. OREGON CONSTITUTION AND PROCEEDINGS, *supra* note 2, at 343.

452. Report of Committee on Bill of Rights, at 5 (1857); *cf.* IND. CONST. art. I, § 34 ("No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war but in a manner to be prescribed by law.").

453. Engrossed art. I, at 6 (1857).

454. Enrolled CONST. art. I, § 28 (1857).

455. CONSTITUTION FOR THE STATE OF OREGON art. I, § 29 (1857); *see supra* note

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I certify that this **PETITION FOR REVIEW OF PLAINTIFFS** complies with the word-count limitation in ORAP 9.10(3). This brief's word count is 4,995. I certify that the size of the type in this brief is not smaller than 14 point for both the text of the Petition for Review and footnotes as required in ORAP 5.05(1)(d)(ii).

I certify that I filed this **PETITION FOR REVIEW OF PLAINTIFFS** with the Appellate Court Administrator on April 14, 2025.

I certify that service of a copy of this **PETITION FOR REVIEW OF PLAINTIFFS** will be accomplished on the following participant(s) in this case, who are registered users of the appellate courts' eFiling system, by first class mail as provided in ORCP 9 to the addresses below and by the appellate courts' eFiling system at the participant's email address as recorded this date in the appellate eFiling system:

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