

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 Coddling, Superintendent of the Oregon State Police, in his official capacity,
Defendants-Appellants,
Respondent on Review

Harney County Circuit Court No.
22CV41008

Oregon Court of Appeals
A183242

Oregon Supreme Court
S071885

BRIEF ON THE MERITS OF PETITIONERS ON REVIEW

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

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

July 31, 2025

Continued...

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I.

INDEX

	<u>Page</u>
I. INDEX	ii
II. INDEX OF AUTHORITIES	vi
Cases Cited	vi
Rules Cited	ix
Other Sources	xi
III. INTRODUCTION	1
A. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW	2
B. SUMMARY OF FACTS.....	5
1. Background.....	5
2. Permit-to-Purchase and Completed Background Checks	5
a. Permit-to-Purchase	6
b. Gun Dealer Transfers.....	6
c. Person-to-Person Transfers.....	7
d. Gun Shows.....	8
3. Magazine Ban.....	8
a. The Crime and Affirmative Defenses.....	8

b. Defining “Large-Capacity Magazine”	8
C. NATURE OF THE ACTION.....	9
D. NATURE OF RELIEF SOUGHT IN TRIAL COURT	9
E. NATURE OF JUDGMENT RENDERED BY TRIAL COURT.....	9
IV. SUMMARY OF ARGUMENT	9
A. SUMMARY OF ARGUMENT SUPPORTING PLAINTIFFS’ FIRST PROPOSED RULE OF LAW	10
B. SUMMARY OF ARGUMENT SUPPORTING PLAINTIFFS’ SECOND PROPOSED RULE OF LAW	10
C. SUMMARY OF ARGUMENT SUPPORTING PLAINTIFFS’ THIRD PROPOSED RULE OF LAW	11
V. ARGUMENT	12
A. ARUGUMENT SUPPORTING PLAINTIFFS’ FIRST PROPOSED RULE OF LAW	15
1. Supreme Court Precedent Requires Historical Support	16
a. Manner of Possession or Use Restrictions	18
b. Dangerous Criminals Restrictions.....	19
c. Unchanged Christian Analysis	20
2. The Opinion Erred by Adopting a “Reasonability” Inquiry	21
3. The Magazine Ban Fails This Test.....	24

4. The Permit and Completed Background Check Provisions Fail This Test.....	27
a. Permit Provisions.....	27
i. Christian is inapplicable	28
ii. The Permit is not directed at dangerous manners of possession or use	29
iii. The Permit is not directed at dangerous criminals.....	29
iv. The firearm training and psychological examination are not directed at dangerous criminals.....	31
b. Completed Background Check Provisions.....	33
B. ARGUMENT SUPPORTING PLAINTIFFS' SECOND PROPOSED RULE OF LAW.....	35
1. Precedent Allows Public Safety Evidence	37
2. The Opinion Erred by Disregarding Trial Court Factfinding.....	39
3. The Magazine Ban Fails This Test.....	42
4. The Permit and Completed Background Check Provisions Fail This Test.....	44
C. ARGUMENT SUPPORTING PLAINTIFFS' THIRD PROPOSED RULE OF LAW.....	46
1. Precedent Allows for Factfinding to Determine Whether Laws Unduly Burden the Right to Bear Arms.....	48

2. The Opinion Erred by Disregarding Trial Court Factfinding.....	49
3. The Magazine Ban Fails This Test.....	49
a. Statutory Interpretation Errors.....	50
b. Section 11 Infringes Upon the Right to Bear Arms.....	54
4. The Permit and Completed Background Check Provisions Fail This Test.....	57
a. Statutory Interpretation Errors.....	57
b. Sections 3-5 Infringe Upon the Right to Bear Arms.....	59
c. Sections 6-9 Infringe Upon the Right to Bear Arms.....	62
VI. CONCLUSION	64

II.

INDEX OF AUTHORITIES**Cases Cited**

<i>A.G. Edwards & Sons, Inc. v. McCollough</i> , 967 F2d 1401 (9th Cir 1992)	48
<i>Anderson v. Oregon Railroad Co.</i> , 45 Or 211, 77 P 119 (1904)	41
<i>Arnold v. Kotek</i> , 338 Or App 556, 2025 Or App LEXIS 406 (2025)..... 1, 5, 14, 22, 23, 24, 26, 27, 28, 29, 32, 36, 39, 40, 46, 47, 50, 51, 53, 55, 58, 59, 60, 62, 63	
<i>Bellshaw v. Farmers Ins. Co. of Or.</i> , 373 Or 307, 567 P3d 434 (2025)	52
<i>Chamber of Commerce of the United States v. Whiting</i> , 563 US 582, 131 S Ct 1968 (2011)	31, 61
<i>Columbia Riverkeeper v. United States Coast Guard</i> , 761 F3d 1084 (9th Cir 2014)	31
<i>Couey v. Atkins</i> , 357 Or 460, 355 P3d 866 (2015)	15
<i>Crawford v. Jackson</i> , 252 Or 552, 451 P2d 115 (1969)	41
<i>Ecumenical Ministries v. Oregon State Lottery Commission</i> , 318 Or 551, 871 P2d 106 (1994)	39
<i>Farmers Ins. Co. v. Mowry</i> , 350 Or 686, 261 P3d 1 (2011)	25
<i>Jones v. Hoss</i> , 132 Or 175, 285 P 205 (1930)	15, 16

<i>Hammond v. Hammond (In re Estate of Hammond),</i> 246 Or App 775, 268 P3d 691 (2011)	36
<i>Knopp v. GriffinValade,</i> 372 Or 1, 543 P3d 1239 (2024)	52, 58
<i>Lovelace v. Bd. Of Parole & Post-Prison Supervision,</i> 183 Or App 283, 51 P3d 1269 (2002)	26
<i>M.A.B. v. Buell,</i> 366 Or 553, 466 P3d 949 (2020)	13, 25, 36, 46
<i>Magno-Humphries, Inc. v. Apex Label & Sys., Inc.,</i> 269 Or App 561, 344 P3d 1139 (2015)	5, 36
<i>McDonald v. City of Chicago,</i> 561 US 742, 130 S Ct 3020 (2010)	24, 43, 60
<i>Muzzy v. Uttamchandani,</i> 250 Or App 278, 280 P3d 989 (2012)	36
<i>Nakashima v. Bd. of Educ.,</i> 204 Or App 535, 131 P3d 749 (2006)	48
<i>NYSRPA v. Bruen,</i> 597 US 1, 142 S Ct 2111 (2022)	17
<i>OSSA v. Multnomah County,</i> 122 Or App 540, 858 P2d 1315 (1993)	13, 14, 53
<i>State v. Blocker,</i> 291 Or 255, 630 P2d 824 (1981)	18, 21, 24, 25, 26, 27, 29, 64
<i>State v. Boyce,</i> 61 Or App 662, 658 P2d 577 (1983)	14, 18, 28, 35, 37, 46
<i>State v. Briney,</i> 345 Or 505, 200 P3d 550 (2008)	53

<i>State v. Cartwright</i> , 246 Or 120, 418 P2d 822 (1966)	19
<i>State v. Christian</i> , 354 Or 22, 307 P3d 429 (2013)	 13, 14, 16, 20, 21, 27, 28, 35, 37, 38, 45, 46, 47, 48, 51, 56, 57, 62, 63
<i>State v. Delgado</i> , 298 Or 395, 692 P2d 610 (1984)	 13, 18, 19, 21, 23, 24, 25, 26, 27, 41, 43, 47, 54, 64
<i>State v. Gaines</i> , 346 Or 160, 206 P3d 1042 (2009)	52
<i>State v. Gortmaker</i> , 60 Or App 723, 655 P2d 575 (1982)	53
<i>State v. Hirsch/Friend</i> , 338 Or 622, 114 P3d 1104 (2005)	 17, 19, 20, 21, 24, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 45, 47, 48, 50, 60
<i>State v. H.N.</i> , 330 Or App 482, 545 P3d 186 (2024)	32
<i>State v. Hubbell</i> , 371 Or 340, 537 P3d 503 (2023)	9, 58
<i>State v. Kammeyer</i> , 226 Or App 210, 203 P3d 274 (2009)	41
<i>State v. Kessler</i> , 289 Or 359, 614 P2d 94 (1980)	 16, 17, 21, 24, 25, 26, 27, 38, 42, 46, 47, 64
<i>State v. Owenby</i> , 111 Or App 270, 826 P2d 51 (1992)	32
<i>State v. Robinson</i> , 217 Or 612, 343 P2d 886 (1959)	19

<i>State v. Sandoval</i> , 342 Or 506, 511-12, 156 P3d 60 (2007).....	55
<i>State ex rel. Gladden v. Lonergan</i> , 201 Or 163, 269 P2d 491 (1954)	15
<i>Wang v. Dep’t of Revenue, No. TC-MD 150422C</i> , 2016 Or Tax LEXIS 90 (TC June 28, 2016)	30, 31
<i>Washington v. Glucksberg</i> , 521 US 702, 117 S Ct 2258 (1997)	23, 24

Rules Cited

Oregon Revised Statutes

ORS 19.415	36
ORS 28.010-28.160.....	9
ORS 161.209	55
ORS 166.055	8
ORS 166.270	20, 31
ORS 166.291	58
ORS 166.412	7
ORS 166.435	7
ORS 166.438	8
ORS 166.510	18
ORS 166.527	32, 59
ORS 166.645	13
ORS 174.010	52

ORS 174.040	5
-------------------	---

Oregon Administrative Rules

OAR 257-010-0035	7, 62
------------------------	-------

OAR 635-065-0700	13
------------------------	----

Oregon Rules of Civil Procedure

ORCP 45 D	58
-----------------	----

Oregon Rules of Appellate Procedure

ORAP 5.40	36
-----------------	----

ORAP 5.45	5, 36
-----------------	-------

ORAP 9.10	5, 14
-----------------	-------

United States Constitution

18 USC §922	7, 8
-------------------	------

Oregon Constitution

Or. Const. Art. I, section 2	61
------------------------------------	----

Or. Const. Art. I, section 3	61
------------------------------------	----

Or. Const. Art. I, section 8	61
------------------------------------	----

Or. Const. Art. I, section 11	61
-------------------------------------	----

Or. Const. Art. I, section 17	61
-------------------------------------	----

Or. Const. Art. I, section 26	61
-------------------------------------	----

Or. Const. Art. I, section 27	1, 47, 60
-------------------------------------	-----------

Or. Const. Art. I, section 30	61
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Other Sources

Cal Penal Code §32310 PC	9
--------------------------------	---

Mass. Gen. Laws Ann. Ch. 140, §121	9
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NY Penal Law §265.00	9
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RCW 9.41.370.....	9
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R.I Gen Laws §11-47.1-2.....	9
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BRIEF ON THE MERITS OF PETITIONERS ON REVIEW

III.

INTRODUCTION

Oregon’s constitution provides that: “The people shall have the right to bear arms for the defence of themselves, and the State[.]” Or. Const. Art. I, §27. Ballot Measure 114 (“BM114”) imposes novel and significant restrictions on Oregonians’ right to bear arms guaranteed by that constitutional provision. Additionally, *Arnold v. Kotek*, 338 Or App 556, 2025 Or App LEXIS 406 (2025) (the “Opinion”) effectively degrades that right into a *privilege* to be denied when government finds that denial is subjectively *reasonable*.

BM114 bans so-defined large-capacity magazines (“LCMs”) and requires a permit-to-purchase firearms (“Permit”) and completed a background check for each firearm transfer (“Completed Background Check”) irrespective of the delay imposed by the Oregon Department of State Police (“OSP”). Neither history nor caselaw support such restrictions. Nevertheless, the Opinion upended generations of Oregon law and culture by turning Oregonians’ *right* to bear arms into a *privilege* to be granted or denied by government and upholding a ban on a protected arm for the first time in Oregon’s history.

On review, the Court should uphold Oregon’s constitution as understood by its pioneer founders, reverse the Opinion, and affirm the trial court’s ruling.

A. QUESTIONS PRESENTED 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* arms are possessed or used refers to the way arms are possessed or used, not *whether* arms can be possessed or used. Proscriptions on merely possessing or using protected arms are always unconstitutional.

Prior restraints on acquiring firearms neither restrict dangerous manners of possessing or using firearms nor prohibit possession or use by dangerous criminals. Proscribing the mere ownership, possession, or use of arms does not restrict dangerous manners of possessing or using the arm. Restricting magazine capacity does not restrict dangerous manners of possessing or using firearms.

Second Question Presented:

Does Article I, section 27, require 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 a clear threat to public safety. Further, any restriction must satisfy the purpose of protecting public safety, which requires government to demonstrate that the restriction protects public safety. This may be shown through historical analogy or, for novel restrictions, fact evidence.

When there is insufficient evidence of a public safety threat requiring Permits and completed background checks prior to receiving a firearm, or no demonstrable link between those restrictions and public safety, the restrictions are unconstitutional. Likewise, when there is insufficient 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 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 if the restrictions 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 arms, 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 pre-1859 laws or, for novel restrictions, show that restrictions impose the same or lesser burden than historical analogues. It is appropriate to consider expert testimony on the reach of laws to assess undue burden.

Imposing prior restraints on acquiring firearms by compelling Oregonians to pay for and complete two firearm classes, undergo an in-person psychological evaluation, 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 allowed—without due process imposes undue delay, difficulty, and expense. Lastly, absolutely proscribing merely owning, possessing, or carrying protected arms imposes a total burden on the right to bear *that arm* for self-defense.

B. SUMMARY OF FACTS

1. Background.

BM114 has two major provisions. (SER-224). First, Sections 1-9 create the Permit requiring applicants to complete a firearm education program, in-person firearm demonstration, and background check, and then requires another completed background check for all firearm transfers. Second, Section 11 bans so-defined LCMs.

Plaintiffs address the Permit and Completed Background Check provisions together because they are not severable. ORS 174.040(2)-(3). (ER-767-78). The Opinion did not disturb this ruling. *Arnold*, 338 Or App at 568. Additionally, Defendants did not assign error to the ORS 174.040(3) ruling, which is an independently sufficient ground to decline to sever. ORAP 5.45(1), (3), (4)(ii); *Magno-Humphries, Inc. v. Apex Label & Sys., Inc.*, 269 Or App 561, 566-67, 344 P3d 1139 (2015). Further, Defendants did not include any contingent request for review. ORAP 9.10(1). Therefore, if any provision of Sections 3-9 is unconstitutional, the entirety is unconstitutional.

Below, Plaintiffs obtained a temporary restraining order and preliminary injunction. After a six-day trial, the trial court permanently enjoined and declared all of BM114 unconstitutional. On appeal, the Opinion reversed.

2. Permit-to-Purchase and Completed Background Checks.

Sections 3-9 govern firearm transfers through federally licensed firearm

dealers (“FFLs”), person-to-person transfers, and gun shows. Under BM114, exercising the right to bear arms without government permission via the Permit and Completed Background Check is unlawful.

(a) Permit-to-Purchase.

Section 3 designates sheriffs and police chiefs as Permit Agents. (BM114, §3(5)). Among other qualifications, applicants are qualified after completing a two-part firearm safety course, paying a fee, submitting to a so-called psychological examination, and “successfully completing” the background check. (BM114, §4(1)(b)(D)-(E)). The firearm safety course requires both an educational class, (BM114, §4(8)(c)(A)-(C)), and in-person demonstration, (BM114, §4(8)(c)(D)). There are no limitations on how long the safety courses may take, or their cost.

After passing the firearm safety course, applicants wait up to 30 days for OSP to process the background check and the Permit Agent to identify any “reasonable grounds” to disqualify the applicant. (BM114, §§4(3)(a), 5(2)). BM114 provides an appeal when applicants are denied or not approved within 30 days. (BM114, §5).

(b) Gun Dealer Transfers.

Under BM114, FFLs verify the purchaser’s Permit then request a background check. (BM114, §6(2)(d)). OSP must immediately process the background check and notify the dealer of the purchaser’s disqualification or

provide a “unique approval number indicating” approval. (BM114, §6(3)(a)). However, if OSP cannot complete the background check within 30 minutes, OSP must notify the FFL and provide “an estimate of the time” for OSP’s determination. (BM114, §6(3)(b)).

During this time, purchasers are *in limbo* without official status (approved, delayed, or denied) or due process *indefinitely*. Only after OSP formally denies or delays transactions for research may purchasers request to review and correct any disqualifying information. OAR 257-010-0035(1), (3). There is no time within which OSP must respond, creating another indefinite delay. *Id.* at (3). Due process is only afforded after OSP refuses to correct the record. *Id.* at (4).

Pre-BM114, FFLS *could*, but did not *have to*, transfer firearms if OSP failed to deny or approve transactions “by the close of the gun dealer’s next business day[.]” ORS 166.412(3)(c) (2021) (amended 2022). In practice, this was inapplicable because federal law provides three days. 18 USC §922(t). Under BM114, FFLs cannot transfer firearms without approved background checks. (BM114, §§6(3)(c), (14)).

(c) Person-to-Person Transfers.

Pre-BM114, person-to-person transfers went through FFLs, and allowed transfers without completed background checks after three days. ORS 166.435(3) (2021) (amended 2022); ORS 166.412(3)(c) (2021) (amended

2022); 18 USC §922(t). BM114 prohibits this practice. (BM114, §7(3)(d)).

(d) Gun Shows.

Pre-BM114, non-FFLs at gun shows could not transfer firearms without complete background checks. ORS 166.438(1) (2021) (amended 2022). BM114 only adds the Permit requirement. (BM114, §§8(2), 9(1)(a)).

3. Magazine Ban.

(a) The Crime and Affirmative Defenses.

Section 11 criminalizes so-defined LCMs. (BM114, §11(2)). Violations are Class A Misdemeanors, (BM114, §11(6)), subject to three affirmative defenses referencing a non-existent statute. (BM114, §11(5) (“ORS 166.055”)).

The first affirmative defense applies to so-defined LCMs owned pre-BM114 and requires that owners prove they never maintained the magazine other than as approved; self-defense is absent from the *approved* list. (BM114, §11(5)(c)). The second applies to those inheriting so-defined LCMs from owners who legally possessed the so-defined LCM. (BM114, §11(5)(b)). The acquiring heir must prove they are, and the decedent was, in legal possession. (BM114, §11(5)(c)). The third is for persons who have “permanently and voluntarily relinquished” the so-defined LCM “prior to commencement of prosecution by arrest, citation or a formal charge.” (BM114, §11(5)(d)).

(b) Defining “Large-Capacity Magazine.”

“LCM” is political term foreign to firearm terminology. (BM114,

§11(1)(d)(A)-(C)). BM114’s definition differs substantially from other states’ definitions. *See* RCW 9.41.370; Cal Penal Code §32310 PC; NY Penal Law §265.00(23); Mass. Gen. Laws Ann. Ch. 140, §121; R.I Gen Laws §11-47.1-2. BM114’s broader definition created questions concerning the *borrowed statute rule*. (ER-783-87); *State v. Hubbell*, 371 Or 340, 354-55, 537 P3d 503 (2023). For instance, under BM114, all magazines must be “permanently altered” so they are “not capable, now or in the future, of accepting more than 10 rounds[.]” (BM114, §11(1)(d)(A)). This definition is intentionally broader than other states’ definitions.

C. NATURE OF THE ACTION

Plaintiffs sought declaratory and injunctive relief under the Oregon Uniform Declaratory Judgment Act (ORS 28.010-28.160).

D. NATURE OF RELIEF SOUGHT IN TRIAL COURT

Plaintiffs sought a declaration that BM114 is facially unconstitutional under Article I, section 27, and a permanent injunction against its enforcement.

E. NATURE OF JUDGMENT RENDERED BY TRIAL COURT

The trial court declared BM114 facially unconstitutional and permanently enjoined enforcement. Plaintiffs were also awarded attorney fees and costs.

IV.

SUMMARY OF ARGUMENT

**A. SUMMARY OF ARGUMENT SUPPORTING PLAINTIFFS’
FIRST PROPOSED RULE OF LAW**

Consistent caselaw holds that constitutional restrictions on arms must have pre-1859 historical analogues demonstrating that Oregon’s constitutional drafters understood these types of laws were constitutional. The Court’s caselaw identifies two types of analogous restrictions: (1) laws proscribing dangerous *manners* of possessing or using arms; or (2) laws restricting certain groups of dangerous criminals (*e.g.*, felons) from bearing arms. Defendants did not attempt to support any other historical analogue. Also, consistent caselaw holds that proscribing the mere possession or use of protected arms is always unconstitutional.

Rather than analyzing history or applying earlier holdings, the Opinion adopted a subjective *reasonability* test foreign to caselaw and devoid of objective criteria. The Opinion concluded that BM114 is *reasonable* because it does not ban all firearms and eventually allows Oregonians to obtain firearms.

Under the correct analysis, no BM114 provision is remotely analogous to any law upheld pre-1859. Moreover, because the Opinion held that so-defined LCMs are constitutionally protected arms, the Opinion should have adhered to the doctrine of *stare decisis* and held Section 11 unconstitutional.

**B. SUMMARY OF ARGUMENT SUPPORTING PLAINTIFFS’
SECOND PROPOSED RULE OF LAW**

If reached, the second step of the Court’s analysis requires that

restrictions on arms be necessary for, and satisfy the purpose of, protecting public safety.

Oregon's caselaw traditionally approaches this step by seeking pre-1859 support for labeling certain criminals or manners of possessing or using arms as public safety threats. Caselaw reasoned that, if adopted, analogous restrictions were necessary to protect and did protect against those threats. However, there are no historical analogues for BM114's novel restrictions, so Defendants attempted to factually prove that BM114 satisfies this step. The trial court considered the parties' admissible evidence, made factual findings, and found in Plaintiffs' favor.

On appeal, the Opinion substituted its own bare conclusions divorced from the record and entirely reliant on BM114's Preamble. That analysis offers insufficient protections for Oregonians because it simply adopts the proponents' representations, is entirely subjective, and is subject to subjective policy preferences. Instead, when there is no historical analogue, courts should consider evidence and determine whether novel restrictions satisfy this step.

The trial court's findings are well-supported by the record and unchallenged on appeal. Therefore, the Opinion should have accepted the trial court's findings.

C. SUMMARY OF ARGUMENT SUPPORTING PLAINTIFFS' THIRD PROPOSED RULE OF LAW

If reached, the last analytical step provides that restrictions cannot unduly

frustrate, burden, or infringe upon the right to bear arms. Caselaw fails to identify any objective criteria courts consider on this step. However, the trial court appropriately analyzed BM114's meaning and *reach* utilizing expert testimony and evidence for foundational information on firearms, gunsmithing, and the firearm market to conclude BM114 unduly infringes upon the right to bear arms. On appeal, the Opinion substituted its bare conclusions ostensibly derived from subjective policy preference. The Opinion also speculated that government *might* delay firearm purchases for less time than BM114 allows.

At trial, Plaintiffs demonstrated that Section 11 prohibits the vast majority of firearm magazines and effectively prohibits any firearm utilizing tubular or detachable magazines. More importantly, it prohibits using so-defined LCMs for self-defense. Likewise, the trial court concluded that Sections 3-9 impose undue delay, expense, and difficulty for firearm transferees, and offers insufficient protections for Oregonians.

In sum, BM114 unduly frustrates, burdens, and infringes upon the right to bear arms by banning essential firearms and firearm parts, imposing unjustifiable delays and expenses, and subjecting Oregonians to onerous requirements without adequate procedural protections. The trial court's findings are well-reasoned and supported.

V.

ARGUMENT

Below, the parties’ arguments focused on the Court’s entire Article I, section 27, test. Plaintiffs articulated the five-part test. The first two parts determine whether Article I, section 27, applies. (Pl. Ans. Br., 10-12). If protections apply, then the latter three parts determine whether the law is constitutional. (Id., 12-16). Defendants proposed a two-part test. The first part determines whether Article I, section 27, applies to the challenged law, (Id., 17-18), and the second part merely asks whether the law is *reasonable*, mirroring federal rational basis, (Id., 18-19). The Opinion largely adopted Plaintiffs’ test.

Briefly, Plaintiffs’ two-part test for determining whether constitutional protections apply first asks whether the challenged law regulates arms for self-defense purposes. *State v. Christian*, 354 Or 22, 30, 307 P3d 429 (2013). Article I, section 27, does not apply to laws with no effect on self-defense, such as hunting laws. *E.g.*, ORS 166.645; OAR 635-065-0700. This is a question of law. *M.A.B. v. Buell*, 366 Or 553, 564, 466 P3d 949 (2020) (stating standards of review for legal determinations and factual findings). The second step asks whether the regulated arms are “protected arms[,]” *Christian*, 354 Or at 30, under the test articulated in *State v. Delgado*, 298 Or 395, 400-01, 692 P2d 610 (1984). This is a mixed question of law and fact. *M.A.B.*, 366 Or at 564; *OSSA v. Multnomah County*, 122 Or App 540, 544, 858 P2d 1315 (discussing the “battle of the experts”). However, when a law generally applies to all firearms, courts do not engage in firearm-by-firearm analyses like when unique arms are

affected (*e.g.*, billys and switchblades); instead, Article I, section 27, automatically applies and courts apply the three-step analysis. *Compare Christian*, 354 Or at 22 (proceeding through the three-step constitutional analysis for a ban on carrying any loaded firearm); and *State v. Boyce*, 61 Or App 662, 658 P2d 577 (1983) (same); *with OSSA*, 122 Or App 540 (analyzing twenty-six firearms).

Below, Defendants unsuccessfully argued that so-defined LCMs are not *protected arms*. *Arnold*, 228 Or App at 576. Both lower courts agreed that Article I, section 27, applies to the entirety of BM114, and Defendants did not include any contingent request for review. ORAP 9.10(1).

Therefore, on review, the question is whether BM114 is constitutional, not whether it applies. The three-step tests asks whether BM114:

- (1) is the type of law that has been historically upheld in the face of the right to bear arms, *e.g.*, manner of possession and use restrictions, or dangerous criminal restrictions, *Christian*, 354 Or at 30;
- (2) is necessary to protect, and satisfies the purpose of protecting, public safety, *Id.* at 31; and
- (3) infringes or unduly frustrates the right to bear arms, *Id.* at 30, 33.

The Opinion largely adopted this test, except it substituted Defendants' *reasonability* analysis for Plaintiffs' historical inquiry ("(1)"). Additionally, for steps two and three, the Opinion rejected the trial court's factfinding and recited

its own bare conclusions. These are the issues on review.

A. ARGUMENT SUPPORTING PLAINTIFFS’ FIRST PROPOSED RULE OF LAW

The Opinion disregarded decades of constitutional interpretation by adopting a *reasonability* test that is both foreign to Oregon constitutional law and repugnant to constitutional liberties. Oregon’s judiciary has only recognized two types of laws that do not offend Oregonians’ right to bear arms: (1) laws restraining dangerous manners of possessing or manners of using arms; and (2) laws excluding certain groups of persons guilty of serious criminal conduct from bearing arms. Because BM114 neither is—nor was drafted to be—either type of law, BM114 is facially unconstitutional, and the inquiry goes no further.

Caselaw provides that Oregon’s constitution receives “liberal interpretation in favor of” citizens, especially on provisions “designed to safeguard the liberty and security” of their “person and property.” *State ex rel. Gladden v. Lonergan*, 201 Or 163, 177, 269 P2d 491 (1954). The judiciary’s purpose is to discern what those “conservative pioneer citizens” had in mind, *Jones v. Hoss*, 132 Or 175, 178-79, 285 P 205 (1930), and “not to freeze the meaning of the state constitution to the time of its adoption,” but “instead to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform... application of the constitutional text to modern circumstances[.]” *Couey v. Atkins*, 357 Or 460, 490, 355 P3d 866 (2015). The

judiciary cannot *reinterpret* constitutional rights to comport with modern policy preferences shared by *some*, or even *most*, Oregonians. As the Court previously articulated:

We are not unmindful that there is current controversy over the wisdom of a right to bear arms... Our task, however, in construing a constitutional provision is to respect the principles given the status of constitutional guarantees and limitations by the drafters; it is not to abandon these principles when this fits the needs of the moment.

State v. Kessler, 289 Or 359, 362, 614 P2d 94 (1980).

With respect, these principles were not honored on appeal. Instead, the Opinion created a new test capable of upholding *any* restriction on any arm, including restrictions on merely acquiring, possessing, and using protected arms if government decides that doing so is subjectively *reasonable*.

1. Supreme Court Precedent Requires Historical Support.

If Article I, section 27, applies, courts first determine whether Oregon’s constitutional drafters and voters would consider the restriction unconstitutional. *Jones*, 132 Or at 178-79. This requires historical inquiry.

Since *Kessler*, the Court has “considered early American examples of restrictions” on the right to “‘carry or use’ personal weapons” to analyze this step. *Christian*, 354 Or at 30 (citing *Kessler*, 289 Or 359). *Kessler* cited statutes

that restricted the “manner of carrying personal weapons.” 289 Or at 370.¹ The Court approvingly cited “statutes prohibiting the carrying of concealed weapons... and statutes prohibiting possession of firearms by felons” as historically permissible laws. *Id. Kessler* reversed a conviction for “the mere possession of a [billy] club” which was unconstitutional. *Id.* at 370-72 (concerning possession in the home).

This historical reliance was reiterated as recently as 2019 by the Honorable Justice Landau, (ER-758-59) (quoting JACK LANDAU, An Introduction to Oregon Constitutional Interpretation, 55 Willamette L. Rev. 261, 265-66, Spring 2019), and remained part of the Court’s analysis through *State v. Hirsch/Friend* which utilized pre-1859 sources to determine which restrictions Oregon’s constitutional drafters would have found constitutional. 338 Or 622, 674, 114 P3d 1104 (2005). This inquiry “is not limited to the text of Article I, section 27, or even to the Oregon historical circumstances” but includes caselaw and “broader historical circumstances that surround that provision.” *Id. Hirsch/Friend* analyzed constitutional debates in Oregon, Indiana, and other states; restrictions pre-dating statehood in the Oregon territory, other states, and federally; and English and Colonial American

1. *Kessler* references the 1327 English Statute of Northampton, which is analyzed in greater detail in *Bruen*. See *NYSRPA v. Bruen*, 597 US 1, 40-46, 142 S Ct 2111 (2022).

history. *Id.* at 643-673.

The historical analysis yielded two types of potentially constitutional laws: (1) laws restraining dangerous manners of possessing or using arms, *Id.* at 641; and (2) laws excluding certain criminals from bearing arms, *Id.* at 677. Defendants did not attempt to support another type of *historically analogous* law. Therefore, any BM114 provision must be analogous to these restrictions to be upheld.

(a) Manner of Possession or Use Restrictions.

Caselaw universally holds that proscribing the *mere* possession or use of protected arms is always unconstitutional.

State v. Blocker reiterated, “[t]he legislature is forbidden by the constitution from outlawing the mere possession” of protected arms. 291 Or 255, 258-59, 630 P2d 824 (1981) (possession outside of the home). *Blocker* reversed a conviction because the statute “is not, nor is it apparently intended to be, a restriction on the manner of possession or use of” arms but “is written as a total proscription of the mere possession of certain weapons[.]” *Id.* at 260.

Boyce upheld a conviction for publicly possessing a firearm in a *loaded manner*. 61 Or App at 664. *Boyce* adhered to the dangerous manner of possession or use limitation and upheld the ordinance because it “regulate[d] the manner of possession[.]” *Id.* at 665-66.

Delgado reiterated approval for laws restricting “the manner in which

weapons are carried, the intent with which they are carried, the use to which they may not be put and the status of a person that results in forbidding his possessing a weapon.” 298 Or at 400. *Delgado* struck down proscriptions on switchblades:

We stress again, as we have stressed before, that this decision does not mean individuals have an unfettered right to possess or use constitutionally protected arms *in any way they please*. The legislature may... regulate possession and use... The problem here is that ORS 166.510(1) absolutely proscribes the mere possession or carrying of such arms. This the constitution does not permit.

Id. at 403-04 (emphasized).

No case purported to disturb the rule that constitutional restrictions must be consistent with pre-1859 limitations. *Hirsch/Friend*, 338 Or at 639-43 (summarizing precedent articulating that the legislature is generally precluded “from prohibiting the mere possession of constitutionally protected arms by ‘any person’” but “may regulate the manner of possession and the use of constitutionally protected arms.”).

(b) Dangerous Criminals Restrictions.

Caselaw also recognizes government’s authority to restrict certain dangerous criminals from bearing arms.

Early caselaw upheld prohibitions on “unnaturalized foreign-born persons and certain convicted felons from owning or possessing” certain firearms. *Hirsch/Friend*, 338 Or 622 (summarizing *State v. Robinson*, 217 Or 612, 343 P2d 886 (1959)); *see also State v. Cartwright*, 246 Or 120, 418 P2d

822 (1966). However, these holdings “erroneously relied on the notion of ‘police power’ as a source of constitutional authority[.]” *Hirsch/Friend*, 338 Or at 638-39. The Court rejected this and announced its new analysis. *Id.* (“those cases were wrongly analyzed.”).

The *Hirsch/Friend* review of history found that:

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 exercise of the constitutional guarantee by members of those groups.

Id. at 677-78 (emphasized). However, the Court clarified that this authority is not “so broad as to be unlimited. Rather, any restriction must satisfy the purpose of that authority in the face of Article I, section 27: the protection of public safety.” *Id.* The Court also stated, “the legislature is not free to designate any group without limitation as one whose membership may not bear arms.” *Id.* Importantly, Oregon already imposes these restrictions. *E.g.*, ORS 166.270(2).

(c) Unchanged *Christian* Analysis.

Christian did not purport to change this test but *relied* on it.² 354 Or at 8 (“The history and scope of Article I, section 27, have been thoroughly and authoritatively discussed and reviewed... We see no benefit in rehearsing that work here beyond restating its relevant conclusions[.]”), 30-34 (citing the

2. *Christian* did overturn overbreadth challenges. 354 Or at 38-39.

Court’s “extensive summary in *Hirsch/Friend*”). *Christian* used this historical inquiry and upheld Portland’s prohibition on carrying recklessly not-unloaded firearms (*manner of possession*) in public without a concealed handgun license (“CHL”).

Christian approvingly cites caselaw holding that mere possession or use prohibitions are unconstitutional, but restrictions on dangerous manners of possession or use *can be* constitutional. 354 Or at 30-31 (citing *Kessler*, 289 Or at 370; *Blocker*, 291 Or 255; *Delgado*, 298 Or 395). Additionally, *Christian* re-approves the *Hirsch/Friend* test for determining whether a group of persons can be restricted from bearing arms. *Id.* at 32 (citing *Hirsch/Friend*, 338 Or at 679).

Because *Christian* does not alter the established test or cast doubt on Plaintiffs’ articulation of it, the Opinion should have analyzed whether any BM114 provision is analogous to either type of historically upheld law.

2. **The Opinion Erred by Adopting a “Reasonability” Inquiry.**

Discarding the precedential historical inquiry, the Opinion adopted a *reasonability* analysis, supposedly in reliance on *Christian*.

The Opinion divined this *reasonability* analysis from an out-of-context quote stating, “[w]e 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[.]” *Id.* at 33. However, the Opinion elided the lengthy

explanation of what laws constitute *reasonable regulations* in the pages preceding the quote. *Id.* at 30-33. In short, restrictions which are analogous to pre-1859 restrictions are constitutional, *viz. reasonable*. Instead, the Opinion used the word “reasonable” to erase decades-old precedent.

The Opinion described its *reasonability* analysis as follows:

[T]he 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. **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.**

Arnold, 338 Or App at 566-67 (citations omitted) (emphasized). This analysis presents numerous problems.

First, the Opinion did not explain what constitutes reasonable regulations or any objective criteria. *Id.* Ostensibly, the Opinion merely relied on policy preference; it certainly did not reference historical analogues to BM114 or other objective criteria. This type of subjective analysis is vulnerable to bias. Moreover, government cannot deny constitutional rights based on evolving and subjective policy preference.

The Opinion repeatedly recited conclusory statements of policy preference to determine *reasonability*, such as stating that Sections 3-9 are reasonable because they are “not a total ban on obtaining firearms” and banning

so-defined LCMs does not ban “any particular type of firearm” but prohibits “possessing magazines that allow a firearm to discharge more than 10 rounds without having to reload.” *Id.* at 571, 576-77. However, as addressed below, this conclusion contradicted other portions of the Opinion which agreed that (1) magazines (including so-defined LCMs) are constitutionally protected arms, and (2) it is inappropriate to analyze firearm components separately from the rest of the firearm. *Id.* at 576. In short, the Opinion concluded that, because BM114 does not ban all firearms and will eventually allow firearm transfers, it is *reasonable*.

Next, the Opinion said that constitutional restrictions must govern “the possession and use of” arms. *Id.* at 566-67. The Opinion elided consistent caselaw stating that government may restrict dangerous *manners* of possession or use—not the *mere* possession or use—of arms. *Delgado*, 298 Or at 403-04.

Further, the Opinion mixed its reasonability analysis with its public safety inquiry, stating that BM114’s constitutionality depends on the “purpose and the reasonableness of the regulation to achieve that purpose” and “whether the regulation is directed at and drafted to achieve the public-safety purpose.” *Arnold*, 338 Or App at 566-67. No Oregon case allows infringement simply if the law *intends* to further public safety. Moreover, that test mirrors federal rational basis, which only requires that laws be “rationally related to legitimate government interests.” *E.g., Washington v. Glucksberg*, 521 US 702, 728, 117 S

Ct 2258 (1997).

The Opinion created a test that antifiarm laws cannot fail if they recite *magic words* about public safety. *McDonald v. City of Chicago*, 561 US 742, 783, 130 S Ct 3020 (2010) (The Second Amendment “is not the only constitutional right that has controversial public safety implications.”).

However, the restrictions in *Kessler*, *Blocker*, and *Delgado* were certainly directed at and drafted to achieve public safety purposes but were unconstitutional because they prohibited merely possessing or using protected arms rather than any dangerous manner of possession or use.

Last, the Opinion did not apply the *Hirsch/Friend* analysis for determining whether certain criminals may be restricted from bearing arms. 338 Or at 677-78. The Opinion recited only half of the standard, *Arnold*, 338 Or App at 572-73, and omitted the rule’s limited applicability to persons guilty of “serious criminal conduct[.]” *Hirsch/Friend*, 338 Or at 677.

If all Oregon’s constitution requires is that the judiciary determine whether restrictions are subjectively reasonable, Oregonians no longer have the *right* to bear arms.

3. The Magazine Ban Fails This Test.

BM114’s proscription on the mere possession or use (and manufacture, purchase, ownership, transfer, etc.) of so-defined LCMs is unconstitutional because it does not restrict any dangerous *manner* of possessing or using so-

defined LCMs, which both lower courts agreed are protected arms. Therefore, Section 11 is facially unconstitutional.

BM114, prohibits the “manufacture, importation, possession, use, purchase, sale” or other transfer of so-defined LCMs. (BM114, §11(2)). This language is nearly identical to the language at issue in *Kessler*, *Blocker*, and *Delgado*,³ which unconstitutionally proscribed the mere possession or use of certain protected arms: “any person who manufactures, causes to be manufactured, sells, keeps for sale, offers, gives, loans, carries or possesses” a billy (*Kessler* and *Blocker*) or a switchblade (*Delgado*) “commits a Class A misdemeanor.” *Kessler*, 289 Or at 361 n 1; *Blocker*, 291 Or at 257; *Delgado*, 298 Or at 397; see *Farmers Ins. Co. v. Mowry*, 350 Or 686, 692-94, 261 P3d 1 (2011) (addressing *stare decisis*).

As a legal matter, BM114 does not restrict any dangerous *manner* of possession or use. *M.A.B.*, 366 Or at 564. The word *manner* presupposes that mere possession or use is allowed, but the *way* the arm is possessed or used is restricted—*e.g.*, loaded, concealed, openly carried, etc.⁴ The appropriate

3. The language differs slightly from case-to-case.

4. “While in public” would not be a *manner* of possession pursuant to *Blocker* which upheld the public carry of protected arms. 291 Or at 258-60.

dictionary definition of “manner” is a “mode of procedure or way of acting.”⁵

Lovelace v. Bd. Of Parole & Post-Prison Supervision, 183 Or App 283, 287, 51 P3d 1269 (2002).

Despite BM114’s text and symmetry with *Kessler*, *Blocker*, and *Delgado*, the Opinion asserted that BM114 regulates “the manner of possession or use of firearms” by restricting “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.” *Arnold*, 338 Or App at 577. However, this conclusion ignores BM114’s plain text which criminalizes the mere purchase, possession, or use of so-defined LCMs even while unloaded and separated from firearms. Moreover, restricting magazine capacity does not restrict any *dangerous manner* of possessing or using firearms.

More importantly, this holding irreconcilably contradicted the Opinion’s rejection of Defendants’ “argument that magazines are not” protected arms. *Id.* at 576 (“it is undisputed that ammunition magazines are required for firearms to be operable.”). The Opinion concluded that parceling “out a firearm component from the firearm itself” is inappropriate, and so-defined LCMs “are part of constitutionally protected arms[.]” *Id.* This part of the Opinion comported with

5. Merriam-Webster, Manner, MERRIAM-WEBSTER ONLINE DICTIONARY (6/26/2025), <https://www.merriam-webster.com/dictionary/manner>.

Delgado, which foreclosed arguments distinguishing between arms and *parts of arms* by refusing to find switchblades unprotected by virtue of the addition of modern components (springs) to knives. 298 Or at 403. By the Opinion's logic, *Delgado* is incorrect because the law regulated the manner of possession or use of knives in that it restricted the springs that can be used with knives to make them operable; it was not a restriction of the mere possession of operable knives themselves. *Compare, Arnold*, 338 Or App at 577.

Instead, since so-defined LCMs are protected arms, government can regulate dangerous manners of possession or use but cannot prohibit them. Therefore, Section 11 is unconstitutional without continuing the analysis. *Kessler*, 289 Or 359; *Blocker*, 291 Or 255; *Delgado*, 298 Or 395.

4. The Permit and Completed Background Check Provisions Fail This Test.

As ostensibly uncontested by Defendants and agreed in the Opinion, Article I, section 27, applies to Sections 3-9 because (1) the law restricts Oregonians' ability to purchase firearms for self-defense, *Christian*, 354 Or at 30; and (2) the provisions apply to all firearms, *Id.* at 22, 30; (SER-185(4)); (ER-779). Because Sections 3-9 neither regulate any dangerous manner of possessing or using firearms nor narrowly restrict dangerous criminals, these provisions are unconstitutional.

(a) Permit Provisions.

Requiring Oregonians to obtain government permission before merely

obtaining firearms does not restrict any dangerous *manner* of possession or use. Additionally, the Permit restricts all Oregonians and is not limited to dangerous criminals. At minimum, the firearm training, (BM114, §4(1)(b)(D)), and so-called psychological examination requirements, (BM114, §4(1)(b)(C)), are unconstitutional.

(i) Christian is inapplicable.

The Opinion held that Plaintiffs' challenge is foreclosed by *Christian* which upheld a local proscription on possessing *loaded* firearms in public without a CHL. *Arnold*, 338 Or App at 571. However, that ordinance targeted a manner of possessing firearms: while *loaded*. *Christian*, 354 Or at 28; *Boyce*, 61 Or App at 665. If, consistent with *Boyce*, absolute proscriptions on publicly carrying *loaded* firearms are constitutional, then similar restrictions excepting CHL licensees are even less restrictive. Again, *Christian* did not purport to deviate from the dangerous manners of possession or use limitation. If *Christian* had any effect on earlier cases, it cast doubt on *Boyce* by requiring exceptions for CHLs.

In sum, if government can absolutely proscribe a manner of possessing firearms, it can license that manner of possession. However, because government cannot proscribe the mere acquisition of firearms, it cannot license the same conduct thereby prohibiting unlicensed individuals from merely acquiring, possessing, or using firearms.

(ii) The Permit is not directed at dangerous manners of possession or use.

The Opinion claimed the court must decide whether BM114 “is a reasonable regulation on the possession or use” of firearms. *Arnold*, 338 Or App at 571. However, at no point did the Opinion articulate what *dangerous manner* of possession or use the Permit restricts. Instead, the Opinion stated that the Permit targets threats “posed by untrained and dangerous persons obtaining firearms.” *Id.* at 573. Caselaw does not support requiring government training or permission before Oregonians exercise *their right* to bear arms. Nevertheless, without any historical analysis or explanation, the Opinion proclaimed that Permits are “the type of legislative response” that Oregon’s constitutional drafters “did not intend to prohibit.” *Id.* at 572. This bare conclusion concerning Oregon’s *pioneer drafters* is utterly unsupported by history.

Further, BM114 does not require that Permittees comply with their *training* or prohibit any dangerous manner of possessing or using firearms. Therefore, the training requirement does not restrict any “manner of possession or use” of firearms. *Hirsch/Friend*, 338 Or at 641; *see Blocker*, 291 Or at 260 (noting the challenged law “is not, nor is it apparently intended to be a *restriction* on the manner of possession or use” of arms. (emphasized)).

Therefore, the Permit is unconstitutional unless it narrowly restricts serious criminals from bearing arms. *Hirsch/Friend*, 338 Or at 677.

(iii) The Permit is not directed at dangerous criminals.

No Permit provision restricts certain groups of dangerous criminals from exercising the right to bear arms.

Government may designate certain persons as identifiable threats “by virtue of *earlier commission of serious criminal conduct*” and restrict the right to bear arms from those persons. *Hirsch/Friend*, 338 Or at 677 (emphasized). However, government cannot “designate any group without limitation as one whose membership may not bear arms.” *Id.* Under BM114, the group that cannot bear arms are those without the Permit; those without Permits are not criminals.

The only Permit provision *arguably* directed at criminals is the background check. However, the legislature cannot designate all Oregonians as dangerous criminals until OSP determines that they are not disqualified. Permits generally, like licenses, are “permission” or “a written warrant or license granted by one having authority.”⁶ Among its synonyms is “license” which likewise grants “permission to act” and is “permission granted by competent authority to engage in a business or occupation or in an activity *otherwise unlawful*.”⁷ See *Wang v. Dep’t of Revenue*, No. TC-MD 150422C, 2016 Or Tax

6. Merriam-Webster, License, MERRIAM-WEBSTER ONLINE DICTIONARY (6/24/2025), <https://www.merriamwebster.com/dictionary/license> (emphasized); Merriam-Webster, Permit, MERRIAM-WEBSTER ONLINE DICTIONARY (6/24/2025), <https://www.merriam-webster.com/dictionary/permit>.

7. *Ibid.*

LEXIS 90, at *17 n 3 (TC June 28, 2016); *Chamber of Commerce of the United States v. Whiting*, 563 US 582, 595, 131 S Ct 1968 (2011) (“A license is ‘a right or permission granted in accordance with law... to engage in some business or occupation, to do some act, or to engage in some transaction which *but for such license would be unlawful.*’” (emphasized)); *Columbia Riverkeeper v. United States Coast Guard*, 761 F3d 1084, 1093 (9th Cir 2014) (permits or licenses have “the legal effect of granting or denying permission to take some action.”). Oregonians already have the right to bear arms and do not require permission to exercise that right, especially in their home. Because government lacks authority to prohibit firearm purchases, it lacks authority to grant or deny permission to purchase firearms.

Permits are not among the types of laws contemplated by *Hirsch/Friend*, which contemplated laws like ORS 166.270. Permits do not prohibit dangerous criminals from bearing arms; rather, BM114 restricts *all Oregonians* without Permits from bearing arms and makes exercising the right to bear arms *generally unlawful* until Oregonians receive a government-issued permission slip to exercise the right they already have.

(iv) The firearm training and psychological examination are not directed at dangerous criminals.

The Opinion failed to cite historical support for requiring government trainings or *so-called* psychological examinations before bearing arms.

Therefore, at minimum, the firearm training, (BM114, §4(1)(b)(D)), and so-

called psychological examination requirements, (BM114, §4(1)(b)(C)), are unconstitutional. If they cannot be severed, the Permit is unconstitutional in its entirety.

First, being *untrained* is not “serious criminal conduct[.]” Nor do individuals supposedly untrained by government pose identifiable threats to public safety. *Hirsch/Friend*, 338 Or at 377. There is no historical support for requiring that citizens obtain government training before exercising *their right* to bear arms, nor is there any evidence in the record of threats posed by supposedly untrained individuals. Therefore, the firearm safety training requirement is unconstitutional.

Second, the so-called assessment of “mental or psychological state” requirement, (BM114, §4(1)(b)(C)), is also unconstitutional. The Opinion failed to meaningfully analyze this provision. However, at trial, Defendants cited *State v. Owenby*, 111 Or App 270, 826 P2d 51 (1992)). The Opinion cited *H.N.*, arguing that “limitations on people with mental disorders possessing firearms are in fact ‘longstanding[.]’” *Arnold*, 338 Or App at 573 (quoting *State v. H.N.*, 330 Or App 482, 491, 545 P3d 186 (2024)).

Both *Owenby* and *H.N.* are inapt because they concern judicial involuntary commitments—not proactive, non-judicial determinations by law enforcement that a person cannot bear arms. These types of orders, like Extreme Risk Protection Orders (ORS 166.527), are subject to heightened

evidentiary standards, entered in the Law Enforcement Data System, and shown on point-of-transfer background checks. Neither case concludes that law enforcement may prospectively deny the right to bear arms under a reasonability standard. (BM114, §§5(2), (6)). Additionally, the level of violence contemplated for involuntary commitment satisfies *Hirsch/Friend*, but the Permit provisions lack that high standard. (BM114, §§4(1)(b)(C), 5(2)).

If these two requirements are unenforceable, then the only remaining substantive Permit requirement is another background check which duplicates existing point-of-transfer background checks. Therefore, this requirement only acts to frustrate Oregonians' right to bear arms by layering hurdle-upon-hurdle, and prophylaxis-upon-prophylaxis, to delay firearm transfers.

(b) Completed Background Check Provisions.

Requiring completed background checks for firearm transfers infringes on Oregonians' right to bear arms and is not consistent with historically upheld restrictions. Additionally, though ignored on appeal, Plaintiffs reiterate that Defendants did not assign error concerning Subsection 6(13)(b). (Pl. Ans. Br-48 n 20).

The Completed Background Check provisions do not restrict any dangerous manner of possessing or using firearms; therefore, these provisions must designate a certain group of dangerous criminals and restrict the right to bear arms only from that group to be upheld. *Hirsch/Friend*, 338 Or at 677. The

Completed Background Check provisions designate all Oregonians who have not completed a background check as the group that cannot bear arms; persons who have not completed background checks are not criminals.

Sections 6-9 presume that all Oregonians pose identifiable threats to public safety based on the *assumption* that they *might have* committed serious crimes and indefinitely restrict all Oregonians from merely acquiring firearms. BM114's Preamble makes no specific findings, arguments, or justifications for requiring completed background checks. Therefore, the Opinion incorrectly held that background checks "restrict the possession of arms by the members of a group whose conduct demonstrates an identifiable threat to public safety." *Id.* at 679. Rather, all Oregonians are restricted unless or until OSP decides they *are qualified*.

The difference between the pre- and post-BM114 requirements is that, pre-BM114, Oregonians were only temporarily paused for three days (under federal law)⁸ from obtaining firearms to afford OSP the opportunity to search for disqualifying information. However, post-BM114, these provisions totally bar firearm transfers unless or until OSP completes the background check and approves the transfer.

This type of restriction was not contemplated in *Hirsch/Friend* or

8. Oregon's constitution does not restrain federal law.

supported by history. Therefore, it is unconstitutional.

B. ARGUMENT SUPPORTING PLAINTIFFS' SECOND PROPOSED RULE OF LAW

Defendants failed to demonstrate any clear threat to public safety necessitating BM114 or that, if implemented, its restrictions satisfy the purpose of protecting public safety. On appeal, the Opinion disregarded these factual findings and relied on bare conclusions and BM114's Preamble to reverse. Because no provision is necessary to protect, or satisfies the purpose of protecting, public safety, BM114 is unconstitutional.

When restrictions meet the first step, the second step requires that restrictions be *necessary* to protect public safety. *Christian*, 354 Or at 31 (citing *Hirsch/Friend*, 338 Or 622). For restrictions to be necessary, there must be a clear and significant public safety threat necessitating the law. *Boyce*, 61 Or App at 666. Additionally, “any restriction must *satisfy* the purpose of that authority in the face of Article I, section 27: the protection of public safety.” *Id.* at 33 (quoting *Hirsch/Friend*, 338 Or at 677-78) (emphasized). Absent supporting caselaw or history, it is impossible to determine whether laws protect public safety without considering fact evidence because the text only shows the *intent*, which is not what *Christian* or *Hirsch/Friend* require.

At trial, the parties presented testimony and evidence concerning public safety and the trial court determined that no BM114 provision is *necessary* to protect—and *satisfies* the purpose of protecting—public safety. *Id.* Specifically,

the trial court found that the Permit negatively impacts public safety, “particularly in rural communities[,]” (ER-771-72, 779-80), and that banning so-defined LCMs “does not enhance public safety to a degree necessary to burden the right to bear arms[,]” “has a negative public safety consequence[,]” and that there was “no scientific or analytical reasoning on this record that a ten-round limitation will increase public safety in any meaningful way[,]” (ER-790-94, 798-99).

On appeal, Defendants failed to assign error to the trial court’s findings. ORAP 5.45(1), (3); *Magno-Humphries, Inc.*, 269 Or App at 566-67. Further, Defendants failed to request *de novo* review, and the factors disfavored *de novo* review. *Muzzy v. Uttamchandani*, 250 Or App 278, 280, 280 P3d 989 (2012); *Hammond v. Hammond (In re Estate of Hammond)*, 246 Or App 775, 777-78, 268 P3d 691 (2011) (noting petitioner had not explained why it should be exercised among the reasons for declining *de novo* review); ORAP 5.40(8); ORS 19.415(3)(b); (Pl. Ans. Br-6-7).

Instead of accepting the findings or examining the record, *M.A.B.*, 366 Or at 564, the Opinion disregarded all facts. *Arnold*, 338 Or App at 563. This is particularly troubling because, especially for novel laws, if the judiciary’s conclusions are not grounded history, precedent, or the *record*, what are they grounded in?

1. Precedent Allows Public Safety Evidence.

Some laws are historically recognized for protecting public safety (*e.g.*, concealed carry restrictions). For these laws, courts defer to early-American support to reach public safety conclusions. However, courts cannot apply that analysis to novel laws without historical analogues. Therefore, the proponent must produce evidence of a “clear threat” to public safety, *Boyce*, 61 Or App at 666, that the challenged law remedies (*i.e.*, the law is *necessary* to protect public safety), and evidence that the chosen law protects public safety (*i.e.*, the chosen law *satisfies* the purpose of protecting public safety). *Christian*, 354 Or at 31, 33 (citing *Hirsch/Friend*, 338 Or 622, 677-78). Concluding otherwise renders any public safety analysis meaningless. If, consistent with the Opinion, the judiciary simply adopts *magic words* from preambles as non-falsifiable fact, then it is impossible for any plaintiff (or criminal defendant) to prevail on this step. Indeed, this is especially troubling because the legislature would never openly admit when laws are not intended to protect, and do not protect, public safety. Here, the Opinion simply accepted Defendants’ representations as true and disregarded all contrary evidence and argument; this contrived test does not protect Oregonians’ rights.

Hirsch/Friend reiterated that government may restrict dangerous manners of possessing or using arms “to the extent that such regulation of arms is necessary to protect public safety[,],” and restrict the exercise of the right to bear

arms from dangerous criminals “posing identifiable threats” to community safety. 338 Or at 677. Moreover, the Court stated that this authority is not “so broad as to be unlimited” but that restrictions must *satisfy* the purpose of protecting public safety. *Id.* It is difficult to understand how courts can determine whether laws meet this step without relying on either history or fact evidence.

Christian did not purport to alter these public safety requirements and relied extensively on prior analyses. 354 Or at 31, 33 (quoting *Hirsch/Friend*, 338 Or at 677)). However, precedent provides no explanation for how courts analyze this step. Most cases address modern laws with clear historical analogues such as restrictions on:

- (1) **Concealed carry of weapons**, *Kessler*, 289 Or at 370; *Hirsch/Friend*, 338 Or at 677 (“those societies generally directed such regulations toward public safety concerns -- such as restrictions... on the carrying of concealed weapons[.]”);
- (2) **Public carry of loaded firearms**, *Christian*, 354 Or 22;
- (3) **Arms ownership by convicted felons**, *Hirsch/Friend*, 338 Or at 677-78;
- (4) **The manner in which arms may be used**, *see generally Kessler*, 369-70 (addressing a “1678 Massachusetts law”); and
- (5) **The intent with which arms may be carried or used**, *see generally Id.* (addressing the “English Statute of Northampton” from 1327) (discussed, *supra* at n 1).

Those cases relied on the historical recognition that those persons or manners of possessing or using arms threaten—and the restrictions protect—public safety.

However, BM114 imposes novel restrictions foreign to Oregon until BM114, and the United States until the late 20th to early 21st centuries. Therefore, neither history nor precedent support the conclusion that BM114's provisions further public safety. Therefore, the trial court properly considered the parties' admissible evidence and argument, and the Opinion erred by disregarding those findings and adopting bare conclusions from BM114's Preamble devoid of judicial scrutiny.

2. The Opinion Erred by Disregarding Trial Court Factfinding.

The Opinion called the trial court's findings "irrelevant" and solely relied on bare conclusions and the Preamble instead. *Arnold*, 338 Or App at 563. The Opinion concluded that the trial court erred by considering the parties' admissible evidence, citing caselaw holding that neither party bears the *burden of persuasion* before the judiciary of "*proving* that the statute prohibits conduct that Article I, section 27, protects" and that ambiguities "in the constitution or in a statute" do not create issues of fact. *Hirsch/Friend*, 338 Or at 630-31 (quoting *Ecumenical Ministries v. Oregon State Lottery Commission*, 318 Or 551, 558, 871 P2d 106 (1994)). However, *Hirsch/Friend* does not prohibit factual inquiries when historical support is absent. Moreover, the parties' evidence did not concern constitutional or statutory *ambiguity*; rather, the only argument about "burdens of persuasion" concerned evidence supporting BM114's public safety assertions, which would obviously be presented by

Defendants.

Nevertheless, the Opinion made several *factual findings* of its own without reference to the record. First, the Opinion adopted the Preamble’s conclusion that “untrained and dangerous persons” are obtaining firearms and posing risks to the public which will be protected by imposing the Permit and Completed Background Check provisions. *Arnold*, 338 Or App at 571-73. Additionally, the Opinion adopted the Preamble’s conclusion that “advancements in technology and the availability of those advancements to the public” have “created observable threats to public safety.” *Id.* at 578-79. The word *observable* implies the ability to *observe* through fact evidence. Further, for so-defined LCMs, the Opinion stated that:

By the findings contemplated by the people of Oregon... 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.

Id. at 579 (emphasized). Likewise, if an assertion’s *truth* is *clear* and *observable*, it should be demonstrable; Defendants failed to do so. Moreover, the Opinion could substitute any number for the number “10” and repeat the same bare conclusion since the number “10” is wholly arbitrary and the conclusion is devoid of any analysis, logic, reasoning, or reliance on the record. Moreover, magazines exceeding 10-rounds have been common for centuries,

and the increase from the extremely common 6-round Colt revolver to standard capacity magazines exceeding 10-rounds is an un-astonishing technological development. *Delgado*, 298 Or at 400 n 4, 403-04.

In short, the Opinion concluded that—because the Preamble uses *magic words*—Defendants’ assertions are true. If this is the constitutional analysis the Court expects lower courts to apply, then the inquiry is worthless because it merely adopts one side’s bare conclusions and is immune to counterevidence or counterargument.

In addition to simply adopting the Preamble, the Opinion ignored contrary assertions of fact contained in the voter pamphlet. (SER-246-52). If courts will only consider legislative history, not facts, courts should at least consider *both sides* of the argument. Otherwise, the fate of Oregonians’ right to bear arms is, at least for this step, subject to the majority’s tyranny.

Last, the Opinion erred by ignoring that Defendants sought to introduce so-called *public safety evidence* over Plaintiffs’ objection, (Tr-1446:15-22), were allowed to present their evidence, (Tr-1440-64), (Tr-466:12-17), and then appealed that issue after losing. Defendants invited this purported *error*, and the Opinion erroneously reversed on this ground. *State v. Kammeyer*, 226 Or App 210, 214, 203 P3d 274 (2009) (citing *Anderson v. Oregon Railroad Co.*, 45 Or 211, 216-17, 77 P119 (1904); *Crawford v. Jackson*, 252 Or 552, 555, 451 P2d 115 (1969)).

3. **The Magazine Ban Fails This Test.**

The trial court found that Section 11's ban is not necessary to protect public safety because the firearm murders, and especially mass shootings, BM114's Preamble asserts it was adopted to prevent "are very rare." (ER-793). Indeed, of 155 nationwide events from 1976-2018, only two mass shooting events occurred in Oregon. (ER-796). Moreover, on Defendants' admissible evidence, the trial court found that banning so-defined LCMs would not significantly improve public safety and, therefore, concluded that Section 11 does not satisfy the purpose of protecting public safety. (ER-793). Indeed, the trial court found that the definition of "LCMs" is completely arbitrary. (ER-793). Nevertheless, Defendants relied on the highly improbable contention that mass shooters who have no regard for human life or law will adhere to Oregon's magazine restriction and be compelled to pause 2-5 seconds to change magazines, which will allow time to tackle the mass shooter.

Further, the trial court gave appropriate and substantial weight to testimony from law enforcement officials, including Defendant Coddling, concerning why they issue so-defined LCMs to their deputies and officers for self-defense and defense of others both *on* and *off* duty. (ER-790-91); *see Kessler*, 289 Or at 371-72 (considering arms also utilized by law enforcement). This is especially important for rural Oregon communities where law enforcement depends on their armed citizenry for community protection when

they cannot reach those they protect. (ER-792). Indeed, lone Oregon civilians must defend themselves against the same armed criminals which law enforcement confronts as a group. (ER-791).

However, even without the trial court's findings, there is no evidence in history or caselaw indicating that firearm capacity was a recognized public safety threat, or that restricting capacity protects public safety. Indeed, the Preamble's public safety claims cannot be uniquely tied to magazines having 30, 20, 17, 15, 10, 5, or any other specific number of rounds. Firearms, like any arm, are dangerous and can be used unlawfully. *Delgado*, 298 Or at 399-400. And Article I, section 27, is not the only right that sometimes produces safety concerns. *McDonald*, 561 US at 783 (quoted, *supra*). Essentially, the Preamble claims that illegal and violent actions are sometimes taken using firearms equipped with so-defined LCMs. The Preamble also claims that total prohibitions reduced fatalities and injuries in other jurisdictions. However, it says nothing about the overall rates of illegal and violent deaths or injuries themselves, only that deaths and injuries in shooting incidents supposedly reduced. Moreover, it fails to explain *why* or *how* the policy and its supposed results are linked, only spuriously correlating the two, or why "10" is the *magic number*.

Because no caselaw or history supports Defendants' public safety claims, the trial court appropriately considered the parties' admissible trial evidence.

The trial court's findings are well-supported by the record, and Defendants failed to assign error to any finding. Therefore, the Opinion erred by substituting its bare conclusions based entirely on the Preamble.

4. The Permit and Completed Background Check Provisions Fail This Test.

Defendants produced no admissible evidence demonstrating public safety threats necessitating the Permit or Completed Background Check provisions. Although not reached below, Defendants complained that their expert was excluded based on *their motion* against Plaintiffs' evidence. (Pl. Ans. Br-63-65). However, all evidence Defendants *could have used* was not excluded. Specifically, Defendants failed to show the percentage of mass shootings, murders, suicides, or accidents completed with newly and legally acquired firearms—as opposed to firearms stolen, unlawfully acquired, or lawfully owned for years—or link them to a lack of training, Permit, or completed background check. (SER-211:5-22). Defendants failed to even articulate the *problem* BM114 sought to solve, let alone how BM114 protects public safety.

Nevertheless, on Plaintiffs' evidence, the trial court found Sections 3-9 would negatively affect public safety by frustrating Oregonians' right to procure firearms for self-defense, especially in rural communities.

However, even without the trial court's findings, there is no evidence in history or caselaw indicating that supposedly *untrained* persons or persons without government-issued permits are clear public safety threats. History and

caselaw do conclude that certain dangerous criminals present dangers to the community if allowed to bear arms. *Hirsch/Friend*, 338 Or at 677. However, Defendants do not articulate any threat necessitating BM114's changes to existing background check requirements, why those changes protect public safety, why OSP cannot timely complete background checks, or why Oregonians' rights should be diminished for OSP's ineptitude.

On the contrary, BM114's intentions are plain. The Preamble evinces legislative intent to *reduce* how many Oregonians lawfully obtain firearms. Indeed, it cites "the availability of firearms" as one concern it seeks to remedy. (BM114, Preamble). Moreover, it cites amorphous "studies" claiming that firearm ownership increases suicide and homicide. *Id.* By placing unnecessary, expensive, and burdensome hurdles between *Oregonians* and their right to bear arms, BM114's proponents hope to reduce firearm ownership. Seeking to dissuade law-abiding Oregonians from exercising any constitutional right is an **illegitimate goal of government**, no matter the purported benefit. It is also not contemplated or supported by *Hirsch/Friend* or *Christian*.

Because there is no caselaw or history supporting Defendants' public safety claims, the trial court appropriately considered the parties' admissible evidence. Therefore, the Opinion erred by disregarding these findings in favor of adopting bare conclusions based entirely on the Preamble.

C. **ARGUMENT SUPPORTING PLAINTIFFS' THIRD PROPOSED RULE OF LAW**

Plaintiffs successfully demonstrated that BM114 unduly frustrates, burdens, and infringes upon Oregonians' right to bear arms. The trial court made mixed findings of fact and conclusions of law, which the Opinion rejected in favor of adopting mere conclusory statements which ostensibly reflect policy preferences.

If restrictions satisfy the first two steps of the analysis, they still cannot unduly frustrate, burden, or infringe upon the *right to bear arms* for self-defense. *Christian*, 354 Or at 33, 38; *Kessler*, 289 Or at 370. The correct analysis asks whether the restriction unduly frustrates, burdens, or infringes upon the right to use the arm for self-defense. *Boyce*, 61 Or App 66 (analyzing the hindrance imposed by loading an unloaded firearm). At trial, the parties presented expert testimony to educate the trial court on firearms, the firearm market, and gunsmithing and provide understanding of BM114's reach. With this understanding, the trial court concluded that BM114 unduly frustrates, burdens, and infringes upon the right to bear arms. (ER-769-80, 781-89, 797-98). Defendants failed to assign error to any finding or request *de novo* review.

Instead of accepting the trial court's findings or examining the record for support, *M.A.B.*, 366 Or at 564, the Opinion disregarded those findings. *Arnold*, 338 Or App at 563. As addressed below, the Opinion erred by disregarding the trial court's well-reasoned and well-founded findings of fact and conclusions of

law determining the scope and effect of BM114, *viz.* the degree to which BM114 frustrates, burdens, or infringes upon the right to bear arms.

Additionally, and more importantly, the Opinion repeatedly misconstrued this step as determining whether BM114 unduly frustrated “the right to armed self-defense” rather than the right *to bear arms* for self-defense. *Arnold*, 338 Or App at 567, 571, 573-74, 576, 579-80 (“we emphasize that the right is one of armed *defense* of person or property.”). The Opinion appeared to be insinuating that it found so-defined LCMs are not defensive but so-called *offensive weapons*; the Court has rejected this argument. *Delgado*, 298 Or at 399-400. Moreover, this phrasing is a rhetorical trick often employed by antifiarm advocates who claim that the right to bear arms does not recognize the individual’s right to own, possess, or use any specific arms but the right to self-defense with only those arms government allows. However, that phrase and interpretation are utterly absent, until now, from Oregon’s caselaw. *Christian*, 354 Or at 38 (stating that the legislature may not “unduly frustrate the *right to bear arms*”) (emphasized); *Hirsch/Friend*, 338 Or at 632 (“Article I, section 27, clearly guarantees *the right to bear arms* for purposes of defense[.]”) (emphasized); *Kessler*, 289 Or at 365. More importantly, the Opinion’s description disregarded the plain text and well-established meaning of Oregon’s constitution. Or. Const. Art. I, §27.

1. **Precedent Allows for Factfinding to Determine Whether Laws Unduly Burden the Right to Bear Arms.**

The trial court considered expert testimony and evidence concerning so-defined LCMs. Because determining whether laws unduly frustrate, burden, or infringe upon the right to bear arms necessarily requires courts to determine *what* frustrations, burdens, or infringements the law imposes, the trial court appropriately considered this evidence to determine BM114's scope and reach.

Christian stated that its “threshold task is to interpret the meaning and reach of the contested” law. 354 Or at 26. While a law’s *meaning* comes from the text alone, the law’s *reach* can depend on facts. Indeed, it is impossible to determine whether frustrations, burdens, or infringements are undue—*viz.* excessive, inordinate, unwarranted—without considering their *effect*, which can depend on facts.⁹ *Nakashima v. Bd. of Educ.*, 204 Or App 535, 551, 131 P3d 749 (2006); *see also A.G. Edwards & Sons, Inc. v. McCollough*, 967 F2d 1401, 1403-04 (9th Cir 1992) (“‘Undue’ means ‘more than necessary; not proper; illegal,’ and ‘denotes something wrong, according to the standard of morals which the law enforces.’” (quoting Black’s Law Dictionary 1697 (Rev 4th ed 1968))). In *Christian*, the ordinance’s meaning and reach were easily determinable from the text alone. However, here, firearm experts were required

9. Merriam-Webster, Undue, MERRIAM-WEBSTER ONLINE DICTIONARY (6/26/2025), <https://www.merriam-webster.com/dictionary/undue>.

to educate the trial court on, for example, what firearms are affected by BM114 and whether magazines could be “permanently altered” so that they are “not capable, now or in the future, of accepting more than 10 rounds of ammunition[,]” (BM114, §11(1)(d)(A)).

2. The Opinion Erred by Disregarding Trial Court Factfinding.

For Section 11, the Opinion ignored facts derived from experts in firearms, gunsmithing, and the firearm market which informed the trial court’s conclusions. With respect to the judiciary, judges and lawyers are not experts in these areas; this is why all parties utilized experts to explain how BM114 frustrates, burdens, and infringes upon the right to bear arms so the trial court could determine whether it was *undue*.

On the Permit, the only factfinding relevant to, and disregarded by, the Opinion is the undisputed fact—established by admission—that the FBI will not process the background checks required for the Permit. (SER-102:14-103:2). However, because the Opinion determined that the FBI background check is not required, this is irrelevant unless that conclusion is reversed.

3. The Magazine Ban Fails This Test.

BM114 unduly burdens Oregonians’ right to bear arms by criminalizing so-defined LCMs which are standard and allow the most common and useful firearms to operate. Because nearly all detachable and tubular magazines meet BM114’s extremely broad definition of “LCMs,” BM114 deprives Oregonians

of all ability to possess or use these protected arms, thereby imposing the ultimate infringement upon the right to bear arms and sending *law-abiding* Oregonians back to the metaphorical stone age of firearms.

(a) Statutory Interpretation Errors.

Without any analysis, the Opinion rejected Plaintiffs’ “characterization of the regulation as a ban on the mere possession or use of nearly any firearm.” *Arnold*, 338 Or App at 577. The Opinion also stated that it had discerned that the voters’ intent was to restrict magazine capacities for the magazines that allow firearms to operate, not to restrict the mere possession of operable firearms. *Id.* The argument the Opinion ostensibly rejected is that BM114 bans the vast majority of magazines used in modern firearms, thereby rendering the firearms useless. (Pl. Op. Br-33-36).

The Opinion rejected the plain text definition of so-defined LCMs. (BM114, §11(1)(d)). As addressed above, this definition is extremely broad and includes any magazine that “can be readily restored, changed, or converted to accept, more than 10 rounds of ammunition” and only expressly allows Oregonians to acquire, possess, or use magazines that have “been permanently altered so that [they are] not capable, now or in the future, of accepting more than 10 rounds of ammunition.” (BM114, §11(1)(d)(A)). In other words, BM114 bans standard capacity magazines exceeding 10 rounds even when altered using at-home or factory modifications because, as Mr. Springer

demonstrated, *no modification* is *permanent*. Moreover, BM114 bans virtually all capacity-compliant magazines which are universally capable of accepting magazine extensions. These magazines are therefore capable of being readily restored, changed, or converted to accept more than 10 rounds *and* are not “permanently altered” so that they are “not capable, now or in the future,” of accepting more than 10 rounds. *Id.*

The Opinion rejected this analysis for two reasons. *Arnold*, 338 Or App at 377 n 10. The first is that “it does not demonstrate that Measure 114 is incapable of constitutional application in any circumstance.” *Id.* However, the purpose of the trial court’s analysis is to show the level of frustration, burden, or infringement upon the right to bear arms, not overbreadth. The trial court appropriately determined the *reach* of Subsection 11(1)(d). *Christian*, 354 Or at 26. It defies reason to instruct lower courts to examine a law’s reach and then reverse because it considered the scope of arms banned under the statute. Moreover, the Opinion provided no analysis of what constitutional application possibly exists for the prohibition. The trial court, with the aid of a firearm education from experts and BM114’s text, took care to determine what BM114 *prohibits* and whether that prohibition unduly infringes.

The second reason is that the Opinion did “not think the circuit court’s expansive reading” of Section 11 comported with legislative intent, “which was not intended to ban all magazines.” *Arnold*, 338 Or App at 377 n 10.

As recently reiterated, “[d]isregarding clear text in search of ‘purpose’ is perilous.” *Bellshaw v. Farmers Ins. Co. of Or.*, 373 Or 307, 327 567 P3d 434 (2025). Rather, “[w]here the text is clear” courts “presume that the text reflects the legislature’s policy goals and that those goals are best carried out by applying the statute as it is written.” *Id.* at 326-27 (quoting *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009)). Plaintiffs agree that firearm-ignorant individuals drafting firearm legislation is problematic; however, the judiciary cannot disregard plain text or correct language chosen by uninformed drafters. ORS 174.010. The Opinion provided no explanation of what materials it used to determine the legislative intent of BM114’s drafters and nearly 1-million voters, and nothing in the voter’s pamphlet supports the Opinion’s narrow and counter-textual reading. *Knopp v. Griffin-Valade*, 372 Or 1, 9, 543 P3d 1239 (2024).¹⁰ Moreover, although the Opinion disputed the trial court’s interpretation of “readily” in Subsection 11(1)(d), it failed to explain why it disregarded the “permanently altered” and “now or in the future” language. (BM114, §11(1)(d)(A)).

As to the term *readily* in Subsection 11(1)(d), the trial court relied on the

10. Oregon Public Broadcasting, *Oregon Measure 114, the gun control measure, explained*, YouTube (10/12/2022), 2:21-41 <https://www.youtube.com/watch?v=INbmuNLzfh4&t=139s> (“Second, any magazine *capable* of holding more than 10 rounds of ammunition would be banned... Guns that have built-in magazines holding more than 10 rounds would have to be modified in order to be legally transported or used.”)

interpretation from *State v. Gortmaker*, which held that “a gun that could be made operable in three to four minutes at a cost of \$6 was ‘readily capable’ of use as a weapon.” 60 Or App 723, 742, 655 P2d 575 (1982); *see OSSA*, 122 Or App at 548 n 9 (addressing reversible firearm modifications). Meanwhile, the Opinion relied on *Briney* which considered bizarre facts; specifically, the defendant demonstrated that the pistol’s replacement firing pin “was at least an overnight delivery interval away[.]” *State v. Briney*, 345 Or 505, 508, 200 P3d 550 (2008). Plaintiffs do not dispute that “readily” has temporal and degree-of-difficulty elements. *Arnold*, 338 Or at 577 n 10. However, the Opinion should not have applied the outlier definition from *Briney*.

Here, Plaintiffs demonstrated that no at-home or factory modification can render a standard capacity magazine into a *capacity-compliant* magazine because capacity-compliant magazines can be returned to standard capacity in minutes without specialized training by using standard home tools. Meanwhile, magazines with a standard capacity below 10 rounds can be increased in seconds using magazine extensions.

Next, the permanency requirement under Subsection 11(1)(d)(A) is impossible to satisfy, as demonstrated, especially for magazines exceeding 10 rounds. The Opinion’s interpretation, while professing to seek voter intent, cited no legislative history to support its conclusions. Indeed, the voter’s pamphlet says *nothing* about what voters intended when defining “LCMs” beyond calling

them “LCMs” or “high-capacity magazines.” However, one argument in opposition supports one of Plaintiffs’ arguments. *E.g.*, (SER-250 (“Everyday shotguns can accommodate more than 10 ‘mini’ shot-shells”).

Last, as the trial court agreed, the persuasive authority of other states’ definitions is diminished by stark differences in Oregon’s definition. (ER-784-89). Here, Oregon’s voters adopted much broader language, ostensibly seeking to close perceived gaps in other states’ definitions. The Opinion should have given the voters’ words their plain meanings.

(b) Section 11 Infringes Upon the Right to Bear Arms.

Precedent provides no objective criteria for determining whether restrictions *unduly* frustrate the right to bear arms. However, BM114 plainly imposes the ultimate frustration, a total proscription, on merely owning so-defined LCMs for defense in public and at home. So-defined LCMs are, as found by both lower courts, protected arms; that is sufficient for the Court to conclude that Section 11 is unconstitutional. *E.g.*, *Delgado*, 298 Or at 403-04.

Further, the trial court agreed that Section 11 prohibits the vast majority of firearm magazines which enable firearm function. While BM114 does not *state* that it proscribes most firearms, Section 11 effectively bans most firearms because firearms cannot operate without magazines, and capacity-compliant magazines do not and *cannot* exist. (Pl. Ans. Br-33-35). BM114 sends *law-abiding* Oregonians back to the metaphorical stone age of firearms by

prohibiting detachable and tubular magazines and limiting Oregonians to certain fixed magazines (*e.g.*, revolving magazines) that are capacity-compliant and cannot be extended, as well as double-barreled shotguns and single-shot muskets.

However, even under the Opinion’s narrow interpretation, the ban applies to the vast majority of modern firearms (nearly all of which use so-defined *magazines*), unduly infringing upon the right to bear arms. BM114 totally inhibits Oregonians’ ability to own *standard capacity magazines* made for firearms that are effective for self-defense and unquestionably in common use. (ER-797).

Further, the trial court considered BM114’s effect on self-defense at home and in public, which is not merely an argument based on “an individual’s desire to use” so-defined LCMs, *Arnold*, 338 Or App at 579, but of Oregonians’ right to meet violence with the level of force necessary to repel it. *State v. Sandoval*, 342 Or 506, 511-12, 156 P3d 60 (2007) (use of the word “necessary” in ORS 161.209 “pertains to the degree of force which a person threatened with unlawful force reasonably believes to be required[.]”). The number of rounds one must fire in defense of person or property—including from humans, wild pack animals like wolves and coyotes, or large animals like bears and cougars—are defined by the situation, not averages. Restricting law-abiding Oregonians’ self-defense capabilities puts Oregonians in danger; self-defense is

fast, chaotic, can involve multiple threats, and often occurs in unfavorable situations (*e.g.*, at night) making it more difficult to hit targets. No person firing in self-defense was ever glad to have *less* ammunition because reloading under fire is difficult and dangerous. Additionally, capacity-limiting modifications cause firearm malfunctions. (Tr-800-03). BM114 removes superior self-defense tools from law-abiding Oregonians, unduly frustrating self-defense.

Moreover, capacity limitations require Oregonians to use larger-caliber firearms to achieve the same force (calculated as *power factor*, colloquially called *stopping power*). (Tr-867-68; 871-77). Generally, larger-caliber rounds have greater power factor. For physically weaker individuals who cannot handle firearms utilizing large-caliber rounds, increasing capacity offsets reduced power factor for small-caliber firearms. (Tr-876-77). Further, especially for older individuals, increased capacity offsets diminished reaction times, eyesight, and aim. (Tr-1039). Additionally, large-caliber firearms are not appropriate in most urban and suburban environments. (Tr-1841-50). Section 11 unduly frustrates, burdens, and infringes upon the right to use the appropriate level of force when necessary.

Lastly, BM114's affirmative defenses are insufficient. (BM114, §11(5)); (ER-797-98); *Christian*, 354 Or at 26, 40 (considering exceptions while assessing undue frustration). Plaintiffs' un rebutted evidence shows that BM114's affirmative defenses are impossible to prove because magazines are

not serialized. (Tr-877). Therefore, citizens must waive their right against self-incrimination to raise this affirmative defense. Indeed, one cannot prove compliance with Subsections 11(5)(c)(A)-(E) without testifying at the mercy of the jury's credibility determination. The Opinion rejected this analysis and said that it must be raised as-applied. However, just as *Christian* considered the exception for CHL licensees, the trial court appropriately considered exceptions to Section 11 under this step of the analysis. 354 Or at 40-41.

4. The Permit and Completed Background Check Provisions Fail This Test.

BM114 unduly burdens Oregonians' right to bear arms by regarding all Oregonians as *ineligible* and *unfit* until they complete the lengthy, expensive, and arduous Permit process and point-of-transfer background check.

(a) Statutory Interpretation Errors.

First, the Opinion rejected the trial court's assessment of this step based on the time applicants must wait before they are afforded due process. On facial challenges, courts can neither assume that Permits will be issued instantly, nor that OSP will take months to process background checks. Therefore, the trial court appropriately assessed the level of burden based on the due process date, *viz* the time government is *allowed* to process the application consistent with BM114. This is an appropriate inquiry for determining the *reach* of the statute, *viz* what infringement the statute authorizes. *Christian*, 354 Or at 26.

The Opinion offered no deeper analysis beyond stating that Permit

Agents might act quicker. *Arnold*, 338 Or App at 570. Disregarding the delay imposed by BM114 and assuming government will issue Permits immediately is inconsistent with a facial challenge because it assumed a specific application that departed from the minimum statutory requirements. BM114 authorizes Permit Agents to impose a 30-day delay during which Oregonians cannot seek review. That is the appropriate timeline to review.

Second, the Opinion disagreed that applicants must successfully complete the FBI background check. *Id.* Because the FBI stated that it would not process the background checks because BM114 does not comply with federal law, (SER-52-53; 73-74; 102; 114; 126); (Tr-508-09; 1877-78); ORCP 45 D, the trial court determined applicants must seek judicial review which imposes undue frustration. (ER-777-78); (SER-184(1)).

The Opinion concluded that OSP must only request an FBI background check. This contradicted BM114’s use of “successfully completing” and “completion[,]” (BM114, §4(1)(b)(A), (e)), and ignored BM114’s context—specifically, proponents *opposed* merely requesting background checks. (BM114, §§6–9). Additionally, the Opinion disregarded the stark differences between FBI background checks for the Permit and CHLs. *Compare* ORS 166.291(3)(b) (optional); *with* (BM114, §4(1)(b)(A)) (required); *Hubbell*, 371 Or at 355. Moreover, the Court has highlighted the importance of the voter’s pamphlet for ballot measures. *Knopp*, 372 Or at 9. The Summary and

Explanatory Statement both state that applicants must *pass the criminal background check* and make no exception for the FBI. (SER-223-24).

Last, the Opinion disagreed that Section 5’s due process protections are insufficient. While the Opinion focused on the trial court’s conclusion that “the administrative review ‘flip[s] the burden’ to the applicant to prove they are not dangerous[,]” *Arnold*, 338 Or App at 570, the more important conclusion is that the “reasonable grounds” denial standard does not sufficiently protect Oregonians. (ER-774-75); (BM114, §§4(1)(b)(C), 5(2), (6)). This is especially true when comparing other procedures which deprive Oregonians of the right to bear arms, including criminal proceedings (imposing the highest standard of proof) and extreme risk protection order hearings (imposing heightened evidentiary standards). *E.g.*, ORS 166.527(6)(a). While “reasonable grounds” may be sufficient to deny CHLs, which caselaw calls a privilege, the right to purchase, possess, and use firearms is a *right* which cannot be denied on a mere *reasonability* standard.

(b) Sections 3-5 Infringe Upon the Right to Bear Arms.

For the Permit, the Opinion simply declared that BM114 “will not unduly frustrate” the “right to armed self-defense because a qualified individual will be able to obtain a firearm” and that the constitution “does not confer the right to obtain a firearm immediately in all circumstances[.]” *Arnold*, 338 Or App at 574. The Opinion did not support either proclamation. Ostensibly, the Opinion

determined that restrictions do not unduly frustrate the right to bear arms if they *eventually* allow firearm transfers. Last, again, the Opinion misstated Oregonians' Article I, section 27, right to be "a right to defend oneself using constitutionally protected arms." *Id.* This is not what Article I, section 27, is or does. The constitution protects the *right to bear arms*, and neither the plain text of the constitution, nor caselaw or history, support prospectively barring Oregonians from exercising that right until they demonstrate their *worthiness*.

The Opinion misleadingly cited *Hirsch/Friend* to state that "[a]ny constitutional limitation on a reasonable regulation to promote public safety 'must be found within the language or history of the constitution itself.'" *Arnold*, 338 Or App at 567. Regardless, the limitation is plain in the text: "[t]he people shall have the right to bear arms for the defence of themselves, and the State[.]" Or. Const. Art. I, §27. The constitution does not provide that the people *may* have the right to bear arms, have the right after training, or that government can prospectively deny the right pending approval. Oregonians have this right, which is denied when they must first seek government permission and approval to exercise it.

In the United States, including Oregon, there is no support for treating the right to bear arms "as a second-class right, subject to an entirely different body of rules" than other constitutional rights guaranteed in the bill of rights. *See McDonald*, 561 US at 780. While permits are *sometimes* required for certain

public exercises of other rights (*e.g.*, parades), these are *at best* analogous to requiring permits for publicly carrying arms. However, Oregon's government is powerless to require government permission before Oregonians freely worship God, exercise religious opinion, speak, protest, print, etc., when *not* in public. Or. Const. Art. I, §§2-3, 8, 11, 17, 26, 30. While the right to bear arms may not be *absolute* in that Oregonians cannot possess or use arms in *all manners*, neither caselaw nor history support the Opinion's conclusion that law-abiding Oregonians lack the *absolute right* to merely acquire firearms.

As addressed above, any permit or license renders the conduct *unlawful* except when done with permission.¹¹ *Accord Whiting*, 563 US at 595.

Therefore, BM114 criminalizes the mere acquisition of firearms unless done with additional government permission. The Opinion failed to support its contention that government may prohibit firearm transfers, even if subject to a permit exception, and explain how imposing permit requirements would not offend other constitutional rights, or else why those rights are afforded greater protections. Likewise, neither caselaw nor history support requiring Oregonians to pay fees, pay for government-authorized trainings, pass training courses, and submit to so-called psychological examinations prior to exercising any constitutional right, let alone the right to bear arms.

11. *Supra*, n. 6.

The Permit provisions impose undue delay and expense on Oregonians acquiring firearms. Absent these requirements, all the Permit requires is a duplicate background check which is intended to dissuade and delay Oregonians from exercising their right to bear arms, as is laid bare in the Preamble.

(c) Sections 6-9 Infringe Upon the Right to Bear Arms.

The Opinion concluded that background checks imposing “delay in obtaining” firearms are constitutional. *Arnold*, 338 Or App at 573. However, the Opinion failed to consider the effect of BM114 or cite caselaw or history supporting *any* delay whatsoever.

As addressed above, Sections 6-9 allow indefinite delay in merely acquiring firearms and provide no due process or procedure for Oregonians. There is no statutory time limit for OSP to approve, delay, or deny transfers, and Oregonians must be delayed or denied before they can examine the supposedly disqualifying information. OAR 257-010-0035(1), (3). After requesting this information, there is no time within which OSP must respond, creating a second indefinite timeline. *Id.* at (4).

On this facial challenge, the Opinion inappropriately assumed that every firearm purchase would be completed without delay rather than analyzing what level of infringement BM114 authorizes. The Opinion, therefore, failed to analyze the meaning and *reach* of BM114. *Christian*, 354 Or at 26. The

Opinion should have asked whether laws that allow indefinite delay to merely acquire firearms and provide no due process or procedure unduly frustrate, burden, or infringe upon the right to bear arms.

Despite *Christian*'s instruction to analyze the meaning and *reach* of laws, 354 Or at 26, the Opinion said this challenge must be as-applied. *Arnold*, 338 Or App at 574. However, the infringement Plaintiffs identify is textual and structural, and not a matter of enforcement. Imposing completed background checks without prescribing a reviewable timeline gives government unfettered discretion to allow or disallow firearm acquisition.

This constitutional problem is neither speculative nor dependent on future enforcement decisions. It would not offend a facial challenge to conclude that a law restricting firearm transfers only to persons the government decides are worthy is facially unconstitutional even though *some* individuals *may* be found worthy. Likewise, it does not offend a facial challenge to conclude that, because BM114 allows government to impose indefinite delay, it is facially unconstitutional. Rather, the Opinion speculated that government *might not* impose indefinite delay in the future despite being allowed by statute.

It is sufficient under *Christian* to conclude that the law's reach unduly burdens the right to bear arms, *in all its applications*, by preventing Oregonians from acquiring firearms while OSP is allowed indefinite time to approve, delay, or deny the transfer.

VI.

CONCLUSION

BM114 is accurately dubbed the nation's most extreme antifiarm law. This case pits Defendants' overstated, under-supported, and sensationalized public safety claims against Oregonians' constitutional right to bear arms. Oregon's constitution requires that individual liberty prevail.

The Opinion substantially departed from the robust protections afforded by caselaw and adopted a *reasonability* test that is foreign to caselaw and repugnant to individual liberty. This wholly subjective test is essentially impossible for antifiarm laws to fail. Moreover, the Opinion hollowed the last two steps of the analysis into subjective inquiries that are unduly deferential to government actors seeking to disarm law-abiding Oregonians. Even the Opinion's analyses of these last two steps provided nothing more than bare conclusions ostensibly derived from policy preference and totally absent from history and precedent.

If the Opinion's test is correct, it is difficult to understand how the laws considered under *Kessler*, *Blocker*, and *Delgado*, were unconstitutional. Many people might agree that prohibiting billys and switchblades are *reasonable* regulations directed at and drafted to achieve public safety purposes. Indeed, prohibiting billys and switchblades might prevent some violent crime utilizing those arms. Moreover, Plaintiffs do not dispute that alternatives to billys and

switchblades exist for self-defense, and that prohibiting those instruments does not burden self-defense with other arms. This is the test the Opinion utilized; however, it is not, and has never been, the test required by Oregon's constitution or the Court.

Plaintiffs have demonstrated that the Opinion distorted the Court's precedential five-step test and, under the correct test, BM114 is facially unconstitutional. Therefore, Plaintiffs ask that the Court uphold Oregon's constitution as it was drafted and understood by the pioneers who founded this state and adopted Oregon's constitution by reversing the Opinion and affirming the trial court's ruling.

Respectfully submitted,

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