IN THE SUPREME COURT OF THE STATE OF OREGON

JOSEPH ARNOLD, CLIFF ASMUSSEN, GUN OWNERS OF AMERICA, INC., and GUN OWNERS FOUNDATION, Plaintiffs-Adverse Parties v. KATE BROWN, Governor of the State of Oregon, in her official capacity; and ELLEN ROSENBLUM, Attorney General of the State of Oregon, in her official capacity, TERRI DAVIE, Superintendent of the Oregon State Police, in her official capacity, Defendants-Relators.	Harney County Circuit Court No. 22CV41008 Supreme Court No. S069998

MEMORANDUM OF THE NATIONAL POLICE ASSOCIATION AS *AMICUS CURIAE*

Ellen F. Rosenblum, OSB No. 753239
Attorney General
Benjamin Gutman, OSB No. 160599
Solicitor General
Robert A. Koch, OSB No. 072004
Assistant Attorney General
1162 Court St. NE
Tel: 503-378-4402
E-mail: robert.a.koch@doj.state.or.us
Attorneys for Defendants-Relators

James L. Buchal, OSB No. 921618
MURPHY & BUCHAL LLP
P.O. Box 86620
Portland, OR 97286
Tel: 503-227-1011
E-mail: jbuchal@mbllp.com
Attorney for Amicus Curiae National Police Association

January 27, 2023

Tyler D. Smith, OSB No. 075287
Tony L. Aiello, Jr., OSB No. 203404
TYLER SMITH & ASSOCIATES PC
181 N. Grant St., Ste. 212
Canby, OR 97013
Tel: 503-496-7177
E-mail: tyler@ruralbusinessattorneys.com
E-mail: tony@ruralbusinessattorneys.com
Attorneys for Plaintiffs-Adverse Parties

Hon. Robert S. Raschio
Harney County Circuit Court
Oregon Judicial Department
450 N. Buena Vista #16
Burns, OR 97720
Harney County Circuit Court Judge

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Preliminary Statement

The National Police Association believes that the only thing that stops an evildoer with a gun intending on massacring others is a good man or woman with a gun and the will to use it. That cannot be, and is not always, a police officer. Article I, § 27 of the Oregon Constitution, like the Second Amendment of the Oregon Constitution, represents a binding choice—short of a constitutional amendment—to a system of law that facilitates an armed people for individual defense, defense of others, and defense of the Nation.

The NPA is concerned that a public policy focus on attempts to prevent gun violence by restricting the rights of law-abiding citizens is fundamentally misguided, and cannot possibly offset the harm caused by other policy choices to elevate the rights of criminals to avoid bail, punishment and accountability for their crimes. The NPA notes that many Sheriff's departments across the Nation (and in Oregon[1]) have announced that they will refuse to enforce recent weapons restrictions, and the NPA believes it is important to support courts in setting bright lines striking down such laws to avoid placing law enforcement officers in the difficult position

[1] L. Manfield, "Three Oregon Sheriffs Say They Will Not Enforce Measure 114," *Willamette Week*, Nov. 12, 2022 (available at https://www.wweek.com/news/courts/2022/11/12/three-oregon-sheriffs-say-they-will-not-enforce-measure-114/, accessed 1/22/23).

of being bound to uphold laws they correctly believe are both counterproductive and unconstitutional.

The NPA will not address technical legal issues concerning the availability of the mandamus remedy here, but focus on the core issues presented by Measure 114: the scope of the constitutional right of self-defense and its impairment by the Measure. While the NPA believes that a historical focus on ensuring self-defense parity between ordinary Oregonians and armed criminals using commonly available weapons should be sufficient to find Measure 114 unconstitutional, the NPA also addresses probable public policy impacts, demonstrating that the loss of life associated with allowing Measure 114 is likely to exceed imagined benefits.

Summary of Argument

In the world far removed from courtrooms, judge's chambers and lawyers offices, Americans are using guns to defend themselves and others at shockingly high rates—up to 2.8 million times a year. The National Police Association and the officers for whom it advocates operate every day in this real world of homes, streets and businesses, where ordinary Americans are required to defend themselves from a rising tide of criminals.

The weapon of choice for this purpose is semi-automatic weapons with a magazine capacity of more than ten rounds, outlawed by Measure

114. As far back as recorded history goes, *e.g.*, 1 Samuel 13:19-22, the elite and powerful elements in a society have always regarded it as appropriate to limit the availability of weapons to the masses. The rise of mass shootings in America, fueled by policies that advance the civil rights of criminals at the expense of the rights of the non-criminals, now serves as the justification for action.

In fact, the Circuit Court properly found that as measured by lives saved, there is no cause to regard Measure 114 as a positive step at all. Any immeasurably tiny effects from causing a few more temporary pauses as mass shooters reload are offset by the substantially higher risks of leaving large numbers of innocent citizens out of ammo in their alarmingly common encounters with armed criminals. What stops mass shooters is a good person carrying an effective weapon.[2] That good person cannot always be a police officer. Measure 114's primary effect is to ensure that there are fewer good people carrying effective weapons in Oregon for their self-defense or the defense of others.

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[2] There is significant evidence that good people with guns reduce crime generally. *See, e.g.*, Kleck, "Crime Control Through the Private Use of Armed Force," 35 Social Problems 1, 15 (1988) (reporting a substantial drop in the burglary rate in an Atlanta suburb that required heads of households to own guns); *see generally District of Columbia v. Heller*, 554 U.S. 570, 701, 128 S. Ct. 2783, 2858 (2008) (collecting studies).

Article I, § 27 of the Oregon Constitution, like the Second Amendment to the U.S. Constitution, is a core component of Bills of Rights that were intended to forever protect Oregonians and all Americans against legislative infringements of their right to bear arms in self-defense. Article I, § 27 can and should be given the judicial deference and respect as Article I, § 8, and the First Amendment. Indeed, the Oregon Constitution, with its express recognition of the "Natural rights inherent in people" (Art. I, § 1), demands the utmost respect for all fundamental rights set forth in the Oregon Bill of Rights. All components of the Oregon Bill of Rights can and should be protected against legislative infringement outside of all but the narrowest historical exceptions.

In particular, this case provides a vehicle for this Court to expunge from Oregon law the notion that the only arms protected under Article I, § 27 are the guns in use back when the Oregon Constitution was adopted, a position that, although adopted by the Court of Appeals in *Or. State Shooting Ass'n v. Multnomah Cty.*, 122 Or. App. 540, 549, 858 P.2d 1315, 1321 (1993), is clearly erroneous. One might as well declare that there was no right of free speech on the Internet because it was not invented in 1859.

As to the other elements of Measure 114, no permit system is presently functional, and a requirement to purchase a firearm is as inconsistent with a fundamental right to bear arms as a requirement to undergo speech training and secure a permit before speaking would be inconsistent with the fundamental right to free speech. There are clearly less restrictive alternatives available to address the public policy concerns of the State.

Moreover, the State's request for a stay would in all likelihood cause more harm through loss of life to criminals. While we are all heartbroken over mass shooting events, crazy or evil individuals have caused large numbers of casualties throughout American history. It cannot be too frequently stressed that stopping these individuals from killing people with a gun could be a good person with a gun, and the primary effect of Measure 114 will be to reduce the number of good people with guns.

STATEMENT OF FACTS

A. Background Information on Arms and Self-Defense.

The largest sample of firearms owners ever queried about their firearms ownership and firearms use was conducted in 2021 by Dr.

William English of Georgetown University.[3] Approximately 31.9% of Americans own firearms, and those firearms are used defensively by 1.67 million times per year (English (2022), at 9)—but there is evidence to many additional uses, up to 2.8 million times a year, if self-defense uses of firearms by people not using their own gun are included. (*Id*. at 12 n.9.) This survey also does not include use of guns by private security guards. (*Id*. at 12.)

More than half of the incidents of self-defense involve more than one assailant (*id*. at 16), in which the ability to fire more defensive rounds obviously assumes more importance. Indeed, 3.2% of incidents involve five or more attackers (*id*.), where the ability to shoot more than ten rounds is obviously critical. It is not practical for citizens to carry multiple weapons for self-defense purposes, and even a homeowner awakened in the night by

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[3] W. English, "2021 National Firearms Survey," Georgetown McDonough School of Business Research Paper No. 388145 (Expanded Report: May 13, 2022) (available at https://deliverypdf.ssrn.com/delivery.php?ID=437004004092114097121090000122086100113004071015039058088004019119000124065103114025101010116127126036124016108120074003029017016015022093033077001025021086123075027005089055101015125006121120089121113030120008080072120080025112114112068123028104027086 (accessed 1/25/23)).

an intruder is likely to be able to reach only one weapon and not have time to gather spare ammunition. Criminals, by contrast, can and do arm themselves with multiple weapons and magazines.

In short, as well-armed criminals stalk the Nation, often wearing body armor, it becomes more and more clear that higher-capacity magazines are needed for effective self-defense, and experts in self-defense routinely recommend against magazine capacity limits.[4] Not surprisingly, then, *nearly half of gun owners have owned magazines that hold over ten rounds, and nearly a third have owned an AR-15 or similarly styled rifle with even larger magazine capacities.* (*See* English (2021), at 20.)

There are, of course, numerous reported incidents of citizens defending themselves who have been required to use more than ten shots to do so—or failing to defend themselves when only ten rounds were

[4] *See, e.g.*, M. Ayoob, "The Necessity of high capacity magazines: How many rounds are needed" (Wilson Combat Channel) (available at https://www.youtube.com/watch?v=_XJzxpn2vuA&t (accessed 1/17/23)).

available.[5] The NPA does not adopt the State's approach of presenting emotionally charged incidents in detail, but the evidence discussed more particularly in Point III suggests for every mass shooting incident, there is a mass of self-defense incidents where the ability to fire a large number of rounds is critical.

Because police officers are defending themselves against the same criminals as the citizens, their experience is highly relevant to the appropriate scope of self-defense. Over the years, police departments across the nation have abandoned service revolvers in favor of modern semi-automatic weapons with larger magazines. This is true even though police are often working together in groups, with even less need for higher capacity magazines than individual citizens attempting to defend themselves.

Police officers know that even if every shot they fire hits a criminal, there are some criminals who will withstand multiple gunshot wounds and keep on

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[5] *See, e.g.*, WIS News 10, "Gun shop owner shoots, kills man during attempted robbery," Aug. 9, 2012 (available at https://www.wistv.com/story/19236842/gun-shop-owner-shoots-kills-man-during-attempted-robbery/ (accessed 1/16/ 22)) ("the owner emptied a 30 round magazine before retreating to his room to get more ammunition"); Gus G. Sentementes & Julie Bykowicz, "Documents Detail Cross Keys Shooting," *Baltimore Sun*, Mar. 20, 2006 (16 rounds required to repel three assailants) (available at https://www.baltimoresun.com/news/bs-xpm-2006-03-21-0603210220-story.html (accessed 1/17/23)); Robert A. Waters, *Guns Save Lives: True Stories of Americans Defending Their Lives with Firearms* 149-59 (2002) (homeowner fails to stop home invader with ten rounds).

coming.[6] There is a standard police text book, "Street Survival," which shows police a famous autopsy photo of an armed robber who was shot 33 times with 9mm rounds before he stopped trying to kill the officers.[7]

A final and important reason larger-capacity magazines are vital for self defense (and the defense of police officers) is that most of the shots fired miss. A comprehensive study of firearm use in New York City by Rand Corporation showed that "between 1998 and 2006, the average hit rate was 18% for gunfights".[8] Ordinary Oregonians are not likely to do any better, and restricting them to magazines with a capacity of ten or less will be obviously insufficient

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[6] Sergeant Timothy Gramins was involved in a gunfight with a bank robber who "would not go down, even though he was shot 14 times with .45-cal. Ammunition—six of those hits in supposedly fatal locations. C. Remberg, "Why one cop carries 145 rounds of ammo on the job," Feb. 21, 2020 (available at https://www.police1.com/officer-shootings/articles/why-one-cop-carries-145-rounds-of-ammo-on-the-job-clGBbLYpnqqHxwMq/ (accessed 1/17/23)).

[7] *See also* "Why Good People Need Semiautomatic Firearms and 'High Capacity' Magazines: Part 1," Backwoods Home Magazine, Dec. 29, 2012 (available at https://www.backwoodshome.com/blogs/MassadAyoob/why-good-people-need-semiautomatic-firearms-and-high-capacity-magazines-part-i/comment-page-1/ (accessed 1/17/23)).

[8] B. Rostker *et al.*, "Evaluation of the New York City Police Department Firearm Training and Firearm-Discharge Review Process," at 14 (Rand Corp. 2008) (available at https://www.nyc.gov/html/nypd/downloads/pdf/public_information/RAND_FirearmEvaluation.pdf (accessed 1/25/23)).

in multiple-assailant situations, and generally impose higher risks of losing the gunfight, and winding up dead or injured, in all cases.

B. Mass Shootings and Measure 114's Ban of Magazines Holding More than Ten Rounds.

The State's focus is upon mass shootings in which ten or more victims are killed, which the State falsely attempts to assert are caused by the availability of magazines holding more than ten rounds of ammunition. The State does not discuss the nature of mass shooters, and in particular their practice of planning the attacks, and utilizing multiple weapons and magazines. Without really saying so, the State hypothesizes that shrinking the capacity of magazines to ten or fewer rounds will force mass shooters to change magazines more frequently to shoot the same number of rounds, and speculates that additional magazine change interruptions may somehow reduce the risk to the public.

There are many reasons to reject the hypothesis that regulating magazine size would have any appreciable effect on mass shooting deaths. First, the hypothesis requires an assumption that a mass shooter planning his attack will not have access to or acquire and use magazines of greater than ten-round capacity. The weakest link in the State's hypothesis is that at the precise instant a mass shooter runs out of ammunition, he must not simply switch to another one of his multiple guns, but change a magazine, and at

that instant, someone must standing close enough to him to be able to attempt to disarm him and have time to do so. The State has not provided any competent evidence to suggest how often this might actually happen. Based on the available evidence, the authors of Measure 114 committed fraud when they told Oregon voters that "the use of large-capacity magazines caused twice as many deaths" in recent mass shootings. (Preamble to Measure 114.)

Perhaps the best evidence against any practical benefit of Measure 114 in mass shootings was provided by a survivor of the 1991 mass shooting in Luby's Cafeteria in Killeen, Texas, Dr. Suzanna Hupp. Her testimony has been repeatedly presented to Congress, most recently before the House Subcommittee on Crime, Terrorism, and Homeland Security on May 20, 2021.[9] She explained:

> "I hear all this talk about how many bullets can go in a clip. I've been there, I can tell you it doesn't matter. It takes one second to switch out a clip. You can have one bullet or a hundred bullets. It doesn't matter God . . . I've been there. He goes stump, stump, just like that (gesturing). That's not enough time to rush a man, I promise you."

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[9] "An Unending Crisis: Essential Steps To Reducing Gun Violence And Mass Shooting," Hearing before the Subcommittee on Crime, Terrorism, and Homeland Security, 117th Cong., 1st Sess. (Nov. 20, 2021). The video of Dr. Hupp's testimony shown at that hearing is available at https://www.youtube.com/watch?v=PGPOYnvJjlY (accessed 1/15/23).

What *can* stop a mass shooter much longer than a magazine change is a mechanical failure or jamming of the weapon, which ironically occur more frequently with larger magazines.[10]

There is a persistent attempt upon the part of anti-gun elements to create the impression that mass shooters have been frequently overcome in the course of changing magazines, as increasing the frequency of such magazine changes is the only mechanism by which any benefit from Measure 114's magazine ban could be achieved. However, it is not clear that there is any evidence of a single mass shooter who was stopped because someone disarmed him during a magazine change, a point that trial before the Circuit Court may help establish.

The State claims, for example, citing the transcript of a plea hearing, that San Diego Synagogue shooter "was stopped from further carnage while trying to reload a magazine cartridge". (State Mem. 58.) Transcripts of plea hearings are not necessarily an accurate representation of events, and often constitute arranged statements to facilitate a judicial outcome. The Rabbi

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[10] M. Larosiere, "Losing Count: The Empty Case for 'High-Capacity' Magazine Restrictions," Cato Institute Legal Policy Bulletin No. 3, July 17, 2018(noting that in "the 2012 Aurora, Colorado shooting, for example, the perpetrator used a 100-round drum; it seized after a handful of shots, forcing him to switch to another weapon") (available at https://www.cato.org/legal-policy-bulletin/losing-count-empty-case-high-capacity-magazine-restrictions (accessed 1/25/23)).

told the media that "miraculously the gun jammed".[11] Others have claimed that children were able to escape from the Sandy Hook shooter because of intervals when he had to change magazines. The truth is that no one knows what caused the pause in the shooter's firing. He had reloaded frequently, and it is entirely possible his gun jammed.[12] Other incidents show the same lack of proof as to what was happening when a mass shooter was overpowered.[13] There are also multiple mass shooting incidents where, in the absence of any "good guy with a gun," a mass shooter has repeatedly

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[11] Associated Press, "Poway Rabbi Says Synagogue Shooter's Gun Jammed," April 29, 2019 (available at https://www.courthousenews.com/%ef%bb%bfpoway-rabbi-says-synagogue-shooters-gun-jammed/ (accessed 1/17/23)); *see also* N. Baker, "Rampage Miracle: Rabbi reveals evil 'teen' synagogue shooter's killing spree stopped after moments when assault rifle 'miraculously' jammed," April 29, 2019 (video of Rabbi's statement; available at https://www.thesun.co.uk/news/8960397/synagogue-shooter-rabbi-gun-jammed/ (accessed 1/17/23)).

[12] Hartford Courant, "Rifle jam at Sandy Hook may have saved lives," Dec. 24, 2012 (available online at https://www.pressherald.com/2012/12/24/rifle-jam-may-have-saved-lives_2012-12-24/ (accessed 1/16/23)).

[13] *See generally*, M. Ayoob, "Disarming Mass Murderers," Feb. 2, 2015 (discussing multiple incidents) (reprint from *American Handgunner*, available at https://dailycaller.com/2015/02/02/massad-ayoob-disarming-mass-murderers/ (accessed 1/18/23)).

changed magazines without interruption.[14]

C. Effects from Disarming Citizens Generally.

A 2013 survey of some 15,279 current or retired law enforcement personnel showed over half the law enforcement personnel rated legally armed citizens as being of the highest importance in reducing crime rates overall, and the survey respondents picked "more permissive concealed carry policies for civilians" as the most important single factor for preventing large scale shootings in public.[15] Eighty percent of those with law enforcement experience are confident that "casualties would likely have been reduced" if legally armed citizens had been present—and 6.2% thought innocent casualties might have been avoided altogether.[16] Indeed, more than

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[14] For example, in the Virginia Tech, police found seventeen empty magazines at the scene. *Mass Shootings at Virginia Tech April 16, 2007: Report of the Review Panel*, at 92 (Aug. 2007) (available at https://scholar.lib.vt.edu/prevail/docs/VTReviewPanelReport.pdf (accessed 1/18/23)).

[15] PoliceOne.com Survey, March 4-13, 2013 (Question Nos. 20-21) (available at https://www.gunowners.org/wp-content/uploads/2020/05/PoliceOnes-2013-Gun-Policy-Law-Enforcement-Survey-Results.pdf (accessed 1/18/23)).

[16] *Ibid.* (Question No. 22).

two-thirds of law enforcement personnel—with the most hands-on experience in fighting criminality—believe that limitations on magazine capacity are contrary to their self-interest.[17] As police departments across the country, including Oregon, face funding cuts that seriously limit the number of officers on patrol, the role of armed citizens in preventing public disorder becomes more and more important.

Though the State tries to portray citizen involvement in stopping mass shootings as limited (*e.g.*, ER244-45), its data is bad; in 2021, nearly half of the people stopping active shooters were civilians—a percentage that rises if one excludes events occurring in gun-free zones.[18] There are many, many

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[17] *Ibid.* (Question No. 24).

[18] CPRC, "Massive errors in FBI's Active Shooting Reports regarding cases where civilians stop attacks: Instead of 4.4%, the correct number is at least 34.4%. In 2021, it is at least 49.1%. Excluding gun-free zones, it averaged over 50%," Oct. 3, 2022 (available at https://crimeresearch.org/2022/10/massive-errors-in-fbis-active-shooting-reports-regarding-cases-where-civilians-stop-attacks-instead-of-4-4-the-correct-number-is-at-least-34-4-in-2021-it-is-at-least-49-1-excluding-gun-free-zon/, accessed 1/14/23).

reported incidents of such events.[19] After the Ma-alot Massacre in an Israeli school in 1974, that country took steps to ensure that good people with guns were present at all larger schools (as well as other measures), and they stopped the phenomenon of school shootings entirely.[20]

It is well-recognized that mass shooters often carefully plan their shootings and bring multiple weapons and magazines with them. This level of planning extends even to considering whether gun control provisions will provide the shooter an advantage; one shooter's manifesto said he "decided to carry it out in New York due to its strict open carry gun laws, which

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[19] *See, e.g.*, R. Martin, "'Saving countless lives.' Armed bystander praised for intervening in Greenwood mall shooting," IndyStar, July 18, 2022 (available at https://www.indystar.com/story/news/crime/2022/07/18/elisjsha-dicken-identified-as-man-who-killed-greenwood-park-mall-suspsect/65375869007/ (accessed 1/18/23)); M. Mooney, "The Hearing of the Sutherland Springs Shooting Is Still Reckoning with what Happened that Day," Texas Monthly, Nov. 2018 (available at https://www.texasmonthly.com/true-crime/stephen-willeford-sutherland-springs-mass-murder/ (accessed 1/18/23); Denver Post, "[Volunteer] Guard's hands 'didn't even shake' as she shot gunman," Dec. 10, 2007 (available at https://www.denverpost.com/2007/12/10/guards-hands-didnt-even-shake-as-she-shot-gunman/ (accessed 1/18/23)).

[20] C. Smith, "What if American Schools Were Protected Like Israeli Schools?," Newsweek, June 6, 2022 (available at https://www.newsweek.com/what-if-american-schools-were-protected-like-israeli-schools-opinion-1712864 (accessed 1/18/23)).

would make it harder for someone to stop him".[21]

D. Risks to Oregonians from Running Out of Ammunition.

Police officers are keenly aware of the risks of running out of ammunition, which is why earlier six-shot revolvers have been largely replaced with semi-automatic weapons with the kind of magazines outlawed by Measure 114. Americans exercising the right of self-defense have had, on at least one occasion, to discharge as many as 105 rounds of ammunition to repel a group criminal attack.[22]

While some cases where citizens defending themselves run out of ammunition may not prove fatal to the citizen victim,[23] there is every reason to believe such incidents often will be—with no one left to tell the story of how the loss of ammunition contributed to the fatality.

For ordinary citizens, it's not about the odds, but about the stakes. Ordinary citizens have the right to say "no" to policy advocates who say, I

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[21] M. Impelli, "Buffalo Shooter Saw New York's Gun Laws As His Advantage," Newsweek, May 16, 2022 (available at https://www.newsweek.com/buffalo-shooter-saw-new-yorks-gun-laws-his-advantage-1706982 (accessed 1/18/23)).

[22] M. Ayoob, "High Volume Shootout: The Harry Beckwith Incident," American Handgunner, Sept./Oct. 1995 (available at http://www.afn.org/~guns/ayoob.html (accessed 1/16/23)).

[23] CBS News, Dallas/Fort Worth, "61-Year-Old Woman Shoots Intruder, Then Burglars Attack Her," Mar. 28, 2016) (available at https://www.cbsnews.com/dfw/news/61-year-old-woman-shoots-intruder-then-burglars-attack-her/ accessed 1/15/23).

want to force you to run out of bullets if you are called upon to defend yourself, even if 99.7% of the time it won't matter—because ordinary citizens know they will often be dead in the other 0.3% of the times because they run out of bullets. The Circuit Court attempted to balance the speculative gains of increasing the number of magazine changes in mass shootings against the small percentage of times more than ten rounds needed to be used in self-defense, and properly found that the harm to self-defense outweighed any speculative gains.

Argument

I. MEASURE 114'S MAGAZINE RESTRICTIONS UNCONSTITUTIONALLY BURDEN OREGONIANS' RIGHT TO DEFEND THEMSELVES.

A. Measure 114's Magazine Restriction is a Restriction on Arms within the Meaning of Article I, § 27.

It should be obvious that restricting the number of rounds a weapon can shoot restricts a person's "right to bear arms for the defense of themselves". Or. Const., Art. 1, § 27.

The Circuit Court properly disposed of the State's argument that magazines were not "arms" in holding that no reasonable distinctions could be drawn between firearms and the magazines necessary for them to function. (ER707.) Rather than challenge this finding directly, the State misleadingly invokes careless diction in one of plaintiffs' filings that

characterized magazines as an “accessory” (State Mem. 16). An “accessory” is a “device that is not essential in itself but adds to the beauty, convenience or effectiveness of something else”. Merriam-Webster.com. But magazines are essential, as the firearm will not fire without them, and are not properly considered an accessory in the sense intended by the State.

In particular, firearms with magazines are manifestly arms, "as modified by [their] modern design and function, of the sort commonly used by individuals for personal defense during either the revolutionary or post-revolutionary era or in 1859 when Oregon's constitution was adopted." *State v. Delgado*, 298 Or. 395, 400, 692 P.2d 610 (1984) (footnote omitted). The core purpose of enabling effective self-defense would be lost if the right were restricted so ordinary citizens were restricted from ownership of a class of weapons routinely utilized by criminals—as well as law enforcement personnel.

The NPA understands that the Court of Appeals has attempted to limit the analysis in *Delgado* by suggesting that semi-automatic weapons are not constitutionally protected. *Or. State Shooting Ass'n v. Multnomah Cty*., 122 Or. App. 540, 549, 858 P.2d 1315, 1321 (1993). This Court should reject the Court of Appeals’ approach to assessing whether particular weapons were available “in the 1850’s either in Oregon or elsewhere”. *Id*. at 549 (quoting defendants’ expert). Fifteen years after *Oregon State Shooting Association* case, the U.S.

Supreme Court was able to review substantially more history and scholarship to reject this approach to constitutional interpretation as "bordering on the frivolous". *District of Columbia v. Heller*, 554 U.S. 570, 582, 128 S. Ct. 2783, 2791 (2008).

Moreover, as the dissenting opinion in *Oregon State Shooting Association* explained,

> "technological advancement in the mechanism of injecting a cartridge into the firing chamber was occurring in the mid-nineteenth century and the most sought-after characteristic in a firearm was the ability to engage in repetitive firing. In the early nineteenth century, the time required to reload a musket with powder and ball while the enemy was advancing cost many lives. Colt's revolving pistols and rifles were introduced in 1836 and the slide action to inject shells into a chamber was introduced in the late 1830's. By the 1850's, cartridge firearms that allowed repeating firearms to be used for the first time had been introduced. Primitive repeating firearms existed and were available although not commonly possessed, when the Oregon constitution was adopted in 1859. The Henry repeating rifle soon followed and its impact was felt throughout the West. The utility of those firearms was that they enabled the user to fire a weapon rapidly without pausing to reload for significant periods of time. Following the Civil War, such repeating firearms, having proven themselves in combat, were widely used by civilians. In the light of the historical background, it is clear that the framers would have been aware of the effort to continue to develop more efficient ways to inject a cartridge into a firing chamber."

Id. at 557 (Edmonds, J., dissenting).

An appropriate analysis of the constitutional right must refer to its core purpose of enabling effective self-defense, and the Court of Appeals'

insistence that "there is a point at which that advancement renders the constitutional protection inapplicable," *id*. at 546, necessarily renders the constitutional right a nullity after that point is passed in the evolution of weaponry. Under the approach of the Court of Appeals, the Philistines' early weapons control regulation would leave the Israelites with clubs as the Philistines evolved toward modern weapons. The arms Oregonians have a right to bear must evolve as the arms borne by those who threaten their lives evolve.

The State points to a recent federal court ruling that "arms" could only include arms "necessary" for self-defense (State Mem. 12), with the court reasoning that most self-defense incidents did not involve more than ten shots, so that such weapons were unnecessary. This approach to constitutional jurisprudence has been regrettably common in the federal courts, leading Ninth Circuit Justice Kozinski to criticize judges who "use some constitutional provisions as spring-boards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us". *Silveira v. Lockyer*, 328 F.3d 567, 568 (9th Cir. 2003) (Kozinski, J., concurring).

The U.S. Supreme Court has overturned this entire approach to Second Amendment jurisprudence, declaring that "[t]he constitutional right

to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees . . .'". *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2156 (2022).

An approach that assesses how often a particular weapon is used to determine whether it falls within the constitutional right of self-defense would obviously never be employed in assessing the scope of any other constitutional right. The vast majority of political speech does not involve "sexual conduct," but this Court has not hesitated to strike down a statute limiting such conduct on free speech grounds. *State v. Ciancanelli*, 339 Or. 282, 285, 121 P.3d 613, 615 (2005). The State's approach, adopted in the context of freedom of religion, would allow the government to outlaw any particular small sect or group of sects, so long as the vast majority of people exercised their religious freedom in a different manner.

B. Measure 114 Operates as a Categorical Ban on the Most Common Types of Modern Weapons.

A fundamental feature of Measure 114 is that it does not focus on regulating the manner of how weapons are used, but on prohibiting the mere possession of protected arms. In *State v. Blocker*, 291 Or. 255 (1981), this Court rejected the "total proscription of the mere possession of certain weapons," holding that "mere possession, insofar as a billy is concerned, is

constitutionally protected". *Id*. at 260. Where a citizen's weapons are deemed illegal, such that he or she can no longer carry them for self-defense, the self-defense conduct Article I, § 27 protects is crippled.

In *State v. Christian*, this Court, although rejecting overbreadth challenges, upheld a limitation on carrying loaded guns in public only because there was an exception for those licensed to carry a concealed weapon. As the Court explained,

> ". . . *the ordinance is not a total ban* on possessing or carrying a firearm for self-defense in public like those bans that this court held violated Article I, section 27, in previous cases. *See Blocker*, 291 Ore. at 259 (prohibition of "mere possession" of billy club in public without specific regulation of use or manner of possession a violation of Article I, section 27); *Delgado*, 298 Ore. at 403-04 (same holding with respect to mere possession of a switchblade knife in public: "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.").

State v. Christian, 354 Or. 22, 40-41, 307 P.3d 429, 441 (2013) (emphasis added).

Measure 114 makes unlawful a very large percentage of the weapons Oregonians currently own, because as the Circuit Court properly found, current magazines cannot be "permanently altered so that [they] are not capable, now in the future, of accepting more than ten rounds of ammunition" within the meaning of § 11(1)(d)(A) of Measure 114. (ER697; *see also* ER296 (only the factory could "permanently disable" magazines to

make them non-modifiable); ER299 (same).) The "most popular" brands of firearms do not even have fewer than ten round magazines available (ER296), and in effect, Measure 114 would outlaw all full-size handguns in Oregon (ER485), and 90% of all handguns (ER487).

At the least, it makes it unlawful for Oregonians (even if they owned the weapons before the ban) to carry their own weapons generally for self-defense. In short, the actual effect of Measure 114 will be to destroy the ability of most Oregonians to carry their own weapons for self-defense purposes. This is no prohibited "overbreadth" challenge here, because plaintiffs are suing to vindicate their own rights as infringed by Measure 114, not some chilling effect on "others not before the court". *Christian*, 354 Or. at 38 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973)).

Whether or not construed as an absolute ban on most weapons of choice for Oregonians to defend themselves, Measure 114's ban of larger magazines still constitutes an unreasonable burden on the constitutional right of self-defense. Conclusive evidence that the burden is unreasonable is found in § 11(4)(a)(A)'s exemption for use by law enforcement agencies (and the armed forces). Ordinary Oregonians find themselves confronted with the same armed criminals confronting Oregon law enforcement officers, and it is undisputed that Oregon law enforcement officers need the

larger magazines to defend themselves. The same is true for ordinary Oregonians. The Court may find it useful to read responses to the survey question whether respondents "have ever been in a situation . . . in which it would have been useful for defensive purposes to have a firearm with a magazine capacity in excess of ten rounds? If so briefly describe that situation".[24] The range of situations in which ordinary Americans find themselves under attack by violent criminals beggars the imagination.

C. The "Reasonable Exercise" of Police Power to Control Crime Should Be Narrowly Construed Because of the Fundamental Nature of the Self-Defense Right.

The police power to control crime, like all legislative powers, is limited by the express constraints of the Oregon Constitution. That Constitution begins with a ringing endorsement of "natural rights inherent in people" (Article I, § 1), and the Bill of Rights itself (Article I) is expressly intended to limit the scope of governmental power, including the legislative power, whether exercised by the Legislature or a tiny majority of the People. The "natural right of resistance and self-preservation" has long been recognized as "fundamental". *District of Columbia v. Heller*, 554 U.S. 570, 593, 128 S. Ct. 2783, 2798 (2008) (quoting Blackstone).

[24] English (2021), at 28-33.

Thus the U.S. Supreme Court has repeatedly recognized that allowing legislatures to assert state interests to outweigh Second Amendment rights as fundamentally inconsistent with enshrining the right of self-defense as a core provision of the Bill of Rights. As the *Bruen* Court explained,

> *Heller* and *McDonald* expressly rejected the application of any "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Heller*, 554 U. S., at 634, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (quoting id., at 689-690, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (Breyer, J., dissenting)); *see also McDonald*, 561 U. S., at 790-791, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (plurality opinion) (the Second Amendment does not permit—let alone require—"judges to assess the costs and benefits of firearms restrictions" under means-end scrutiny). We declined to engage in means-end scrutiny because "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Heller*, 554 U. S., at 634, 128 S. Ct. 2783, 171 L. Ed. 2d 637. We then0 concluded: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Ibid*.

Bruen, 142 S. Ct. at 2129 (2022).

We discuss in Section III the strengths of the State's cost and benefit evidence, but when the Circuit Court pointed out the weakness, rather than deny the flimsiness of its case, the State responded that this was in substance irrelevant because "the question is whether or not it's permissible [to

regulate under the] rational basis" test for reviewing legislation (ER666)—a test should never be employed when fundamental rights are at stake.

This Court has suggested that "the right to bear arms is not an absolute right," but this Court's conclusion that the legislature therefore has "wide latitude to enact specific regulations restricting the possession and use of weapons to promote public safety" (*Christian*, 354 Or. at 33) requires clarification to foreclose any notion that a mere "rational basis" for legislation supports the restriction of fundamental constitutional rights. The right to free speech is not absolute, but this Court has never suggested that the legislature has "wide latitude" to restrict speech on any rational basis of "promot[ing] public safety".

Rather, in the free speech context, this Court has followed an approach closely analogous to the approach of the United States Supreme Court in assessing the scope of the Second Amendment:

> To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 142 S. Ct. at 2156.

That is the same approach this Court has properly adopted for Article I, § 8 free speech cases, and the only way to give fundamental rights set forth in the Bill of Rights the force the Constitutional demands. Specifically, this Court asks if "the scope of the [free speech] restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach". *State v. Robertson*, 293 Or. 402, 412, 649 P.2d 569, 576 (1982). This Court should find the Supreme Court's recent Second Amendment cases that focus on the same historical approach rather than involving judges in public policy debates. Only if Measure 114 is consistent with some well-established historical exception to protecting the fundamental right of self-defense should it withstand constitutional scrutiny—and it is not, because there is no such historical exception.

Here the practical effect of Measure 114 is to ban small arms, rifles, shotguns and handguns that were certainly known to the authors of the Oregon Constitution and had existed for centuries with gradual improvements. There is no historical tradition in Oregon of outlawing the mere possession of such weapons.

Unleashing the legislature, or a bare majority of the People, to restrict Article I, § 27, on the basis of any perceived improvements to public safety amounts to a failure to give effect to this fundamental right protected by Oregon's Bill of Rights. The whole purpose of the Bill of Rights was to place the natural and fundamental right of self-defense, with arms, in a category where it was protected against passing fads about public safety.

Instead, a sizeable percentage of Oregon's population is now threatened with criminal prosecution for exercising one of the rights enshrined in the Bill of Rights. That they may have an affirmative defense to such prosecution, which may or may not be proved at enormous expense, is no answer. There is no other context in which a fundamental right is made a crime, subject to an affirmative defense.

It is clear that the authors of Measure 114 have rendered this important component of the Bill of Rights as "second class" right, treating it as a "senile relative" of those other rights to be restricted as merely "annoying". *Silveira*, 328 F.3d at 568. Many Oregonians clearly believe "ordinary people are too careless and stupid to own guns, and we would be far better off leaving all weapons in the hands of professionals on the government payroll," *id*. at 569, but unless and until Oregon's Constitution

is amended, that point of view should not be permitted to cripple Article I, § 27.

For these reasons, this Court may also wish to reconsider its holding that "the enforcement of an overbroad restriction on the right to bear arms does not tend to similarly deter or 'chill' conduct that that provision protects" as having been made without the factual record this case has generated and will generate at trial. *State v. Christian*, 354 Or. 22, 39, 307 P.3d 429, 440 (2013).

That is especially the case because there are so many alternatives for addressing the policy problem of gun violence, and mass public shootings in particular that do not involve infringing the constitutional rights of law-abiding Oregonians. These include actually punishing criminals who act out in Oregon's cities with guns, in many cases no longer a sure thing in Oregon.[25] They include improvements in mental health care, with

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[25] For example, Michael Reinoehl was arrested for brawling with police in Portland and illegally possessing a loaded firearm, but was released and never prosecuted; he went on to commit murder in Portland shortly thereafter. A. Ngo, "'I am 100% Antifa': Alleged Portland shooter was previously arrested—and released—for bringing illegal loaded gun to a riot," *Epoch Times*, Aug. 31, 2020 (available at https://thepostmillennial.com/i-am-100-antifa-alleged-portland-shooter-was-previously-arrested-and-released-for-bringing-illegal-loaded-gun-to-a-riot (accessed 1/18/23)).

concomitant advantages for other pressing social problems such as homelessness.

II. MEASURE 114'S PERMIT PROVISIONS CONSTITUTE AN UNCONSTITUTIONAL BURDEN ON OREGONIANS' RIGHT TO DEFEND THEMSELVES.

Even with a perfectly functioning permit system, the right to bear arms for self-defense must mean that a citizen can acquire arms fast enough to respond to threats. It is not consistent with Article I, § 27, to require a woman who suddenly learns she is being stalked by a violent ex—to wait months or even weeks to go through a burdensome permitting process.

Taking the fundamental natural right of self-defense seriously requires a court to consider less restrictive alternatives for any burdens place on that right in light of the legislative objectives. Safety-related goals of the permitting system can be met, for example, with an opportunity to demonstrate knowledge of safety principles. Modern technology allows for quick testing and results, and the State should not be permitted to advance its failures to address policy concerns with available technology as an excuse for infringing fundamental rights.

Finally, it is odd indeed for the State, having consented before United States District Court for the District of Oregon to a stay of Measure 114's permitting provisions, to attack the Circuit Court's ruling before this Court. It

should be obvious that a categorical requirement forbidding the purchase of arms without a permit when there is no permit program destroys the rights protected by Article I, § 27. The Circuit Court was aware of the federal proceedings, and counsel for the State agreed to at least the initial imposition of the temporary restraining order before the Circuit Court. (ER301.)

III. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST WEIGH HEAVILY AGAINST EXTRAORDINARY INTERFERENCE WITH THE CIRCUIT COURT PROCEEDINGS.

In general, all claims of harm to the State's interest are speculative, in contrast to the immediate and irreparable effects of Measure 114 on the fundamental rights of law-abiding Oregonians. A sizeable percentage of the Oregon population is now threatened with criminal prosecution, and forced compliance with a law that puts their lives at risk without any plausible, much less compelling, public policy reason for doing so.

A. Significant Restrictions of Fundamental Rights Cannot Be Supported by Speculation about Extraordinarily Tiny Risks.

At the outset, it is important to recognize, as the Circuit Court found, that the risks the State seeks to regulate are tiny. Mass shootings are rare, with 179 incidents over the last forty years, or less than five a year. (ER697.) Two of those incidents were in Oregon, or 0.05 per year. (*Id.*) In

Oregon, thirteen lives have been lost in mass shootings over the last forty years, or 0.325 lives per year. (*Id.*)

The relevant subset of mass shootings that matter are those in which Measure 114 would have a magazine-related effect—in the unlikely event that the shooter was limited to use of legal magazines. That figure remains to be developed at trial, but the record does reflect only 30 mass shootings with ten or more deaths since 1949, or 0.4 of such shootings per year, none of which have ever occurred in Oregon. While these are not a perfect proxy for incidents in which magazine changes could make a difference, they give a sense of the orders of magnitude involved, and signify that in only a minority of mass shooting incidents is there an opportunity for magazine changes to make a difference at all.

The State has conceded that Oregonians have only a "0.3 in a million chance of being injured or killed in a mass shooting". (ER661-62; *see also* ER700.) (The comparative absence of mass shooting events in Oregon may well be a byproduct of the fact Oregonians bear arms more frequently than other Americans.) Oregon public officials routinely make decisions that inflict risks of this magnitude upon Oregon citizens, as when they release, plea-bargain and even pardon violent criminals. The release of a single violent murderer probably imposes risk on Oregonians of a greater absolute

magnitude than any mass shooting benefit that could possibly arise from Measure 114.

The asserted benefit of the stay is some tiny reduction in the tiny risk of harm from mass shootings on account of increasing the number of times a mass shooter runs out of ammunition and must reload, change magazines or change weapons. Not surprisingly, what the State called the "best public policy evidence that's been presented to the Court" on magazine bans (ER665) found "there isn't statistical sample sufficient to make [a] scientific determination" of benefit (ER664).

Rather than provide any evidence on any causal relationship between the availability of larger capacity magazines and crazy or evil people killing more victims, the State asserts the causality, saying that "studies demonstrate the LCMs typically result in more victims shot, while LCM bans are associated with significantly fewer incidents . . .". State Mem. 5 (citing ER138-39, 244).

The first cited excerpt contains the conclusion of one professional anti-gun witness (ER121) that there is a correlation between higher fatalities and use of larger capacity magazines. This offers no proof of causality whatsoever, but merely reflects the fact that people who plan to kill larger numbers of innocent victims may choose larger capacity magazines; they

can just as easily achieve their objective with more smaller magazines or multiple weapons. The second cited excerpt reports a variety of similar statistically-based studies, some of which purport to show possible effects and some which do not, and concludes "there is great uncertainty about the impact of laws that reduce barriers to civilian gun carrying on fatal mass shootings".

In short, the Circuit Court was left with a State justification of reducing the tiny risks of a tiny phenomenon by some tiny amount. Even if the magazine ban reduced fatalities in mass shootings by 10%—most likely a gross overstatement, one is looking at effects on the order of 0.0325 lives per year in Oregon. In fact, because the Measure will provide no benefit in most cases, the effects are likely to be an order of magnitude lower, or 0.003 lives per year.

The Circuit Court properly held that it could not and should not "sustain a restraint on a constitutional right on [such] mere speculation that the restriction could promote public safety". (ER712.) Fundamental components of the Bill of Rights must demand more of an evidentiary showing to demonstrate that the restriction is "reasonable".

B. The Circuit Court's Preliminary Weighing of the Public Interest Represented the Sound Exercise of Judicial Discretion.

But Measure 114 is even more unreasonable because the tiny, speculative benefits are offset by larger (but still tiny) harms arising directly from infringement of the right of self-defense. The Circuit Court noted that the circumstances in which Oregonians would have to use more than ten rounds in self-defense would arise hundreds of times more often than the fatalities from mass shootings. (ER713 (comparing overstated 3/10,000 use rater to 0.3/1,000,000 fatality rate—*see infra* n.29).) It is clear that the infringement of the right is more significant than the circumstances in which any benefit could possibly arise.

While the State regards a "special terror" as involved in mass shootings (ER662), a judge balancing harms has no grounds to weighing any differently the terror of Oregonians defending themselves from armed criminals in a one-on-one basis (or many-on-one basis). The life of a citizen who dies because Measure 114 causes him or her to run out of ammunition while defending against armed attack counts the same as the life of a citizen saved because someone might be more likely to rush and overpower a mass shooter. The Circuit Court made a rational attempt to balance those lives in

a fashion that was not remotely the sort of abuse of discretion that would support mandamus relief.

The Circuit Court made a real effort to think through quantitative estimates of benefits. The State's own evidence suggested that in 0.3% of self-defense incidents, the individuals involved were required to fire more than ten rounds to defend themselves. (ER697.[26]) Applying this percentage to the 1.67 million self-defense incidents conservatively estimated by the 2021 survey discussed above produces approximately 5,000 self-defense incidents every year where individuals are required to fire more than ten rounds to defend themselves. It could easily be double that.

While the Circuit Court did not extend the analysis in this fashion, if self-defense incidents were distributed evenly by population, approximately 63 of

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[26] The Circuit Court repeats what may be a defense contention that the larger capacity magazines banned by Measure 114 are used in only 3 in 10,000 incidents of self-defense, a number that trial will show is erroneous. (ER697, 712 n.10, 713 & 717.) The Court appeared to draw its finding from an Allen Declaration (ER697) or "Defendants' Response, pg. 12" (ER712 n. 10.) The Allen Declaration reporting that more than 10 shots are fired in 0.3% of home defense incidents. (ER124 ¶ 10 (two of 736 incidents in

This is three in one thousand, not three in ten thousand. It is also important to note that the magazines are used in the sense of being brandished or fired at less than capacity in each and every incident in which these commonly held weapons are used. The proper way to think about the 3 in 1,000 number is that individuals using the larger capacity magazines are required to use the larger capacity feature (made illegal by Measure 114) three in 1,000 times to save their own lives.

the 5,000 incidents would occur in Oregon every year. (Four million Oregonians divided by 320 million Americans times the 5,000.) In other words, 63 times a year someone in Oregon is required to shoot more than ten rounds to defend themselves.

Some percentage of crime victims will die because they run out of ammunition because of Measure 114, an effect that common sense suggests is far less speculative that the magazine-change benefits touted by the State. No unlikely assumptions are required to reach this result, other than the criminal having the ability to continue to shoot when the victim runs out of bullets. Criminals are manifestly more likely to outgun their victims, both in the number of guns and the magazines, legal or illegal, that they carry.

It seems obvious that Measure 114's effect of causing one Oregonian a year to run out of bullets in a firefight with criminals is going to be associated with deaths. Adopting the same 10% (frankly speculative) assumption used above results in 6.9 lives a year lost from Measure 114 harm to self-defense interests, far more lives than the State speculates could be saved by the magazine-change effect. This is a number roughly consistent with the 122 homicides by firearm in Oregon in 2020 (ER697), in that it is not unreasonable to suppose that an appreciable percentage of those homicides involve criminal attacks on armed victims defending themselves, where every bullet counts.

What the data should tell the Court is that it can be reasonably sure that multiple lives will be lost from restricting Oregonians' ability to defend themselves every year, as contrasted with the tiny hundredths of lives involved in tiny effects on mass shooters.

These figures confirm that the State's hyperbolic rhetoric about the impacts of the Circuit Court's order should be disregarded. The record confirms that any negative effects of the Circuit Court's order are microscopic, probably less than the public health impact of paroling a violent criminal, and far, far less than the lives saved by the Circuit Court's order.

C. The General Disarmament Effect Is Contrary to the Goal of Public Safety.

There is a more subtle, long-term effect that goes to the core of why Article I, § 27 was adopted. It reflects a fundamental policy judgment that Oregon's interests are served by a population that has ready access to guns and knows how to use them. While the primary effect of Measure 114 will be to discourage law-abiding Oregonians, but not criminals, from bearing weapons with magazine capacities in excess of ten rounds to defend themselves, the longer-term impacts of increasing the expense and complexity of the ability of Oregonians to bear arms is to slowly reduce the proportion of good people with guns who are available to confront criminals and assist police.

Dr. Hupp was a personal victim of this very effect. She testified as to what happened in the middle of the shootings:

> "When I finally realized what was occurring, I thought, I got him, and I reach for my purse. He was maybe 12 feet away. You know, is it possible my gun could have jammed, sure. Is it possible I could have missed? Sure. But I can tell you I've hit much smaller targets at much greater distances.
>
> "But then I realized that a couple of months earlier I had made the stupidest decision of my life. I took my gun out of my purse and left it in my car because as you well know, in the State of Texas, it's sometimes a felony offense to carry a gun in your purse."

She then goes on to tell how her parents were murdered, and blames the legislators who made it illegal for her to carry her weapon.

It is no accident that as of 2018, approximately 94% of mass public shootings had occurred in so-called "gun free zones". Measure 114 is a significant step toward making Oregon a gun-free zone, as many Oregonians will not be able to afford new magazines, or even new guns given the Circuit Court's finding that the breadth of Measure 114's coverage of weapons that may be modified outlaws the guns and magazine technologies entirely. (ER696-97.)

In short, the most insidious and increasing impact of modern gun control laws is gradually disarming the citizenry, even as parallel legislative innovations reduce restrictions on criminal behavior, leading to rising public

disorder and killing more and more of the NPA's members. This Court need not go so far to consider "what did those conservative pioneer citizens have in mind" (*Jones v. Hoss*, 132 Or. 175, 178-79 (1930)) to conclude that Article I, § 27 requires the People (and the Legislature) to adopt less restrictive and more effective legislative responses to mass shootings than disarming ordinary Oregonians.

Conclusion

The weighty questions raised in this litigation should be considered, not through mandamus relief, but on appeal after a full trial record is assembled. That is especially the case where, as here, the claims of promoting public safety are based on no more than speculation and conjecture, and certainly not sufficient to set aside the sound judgment in Article I, § 27 that Oregon is better off when good people can bear arms to defend themselves and others.

DATED: January 27, 2023.

Respectfully submitted,

/s/ *James L. Buchal*
James L. Buchal, OSB No. 921618
Attorney for Amicus Curiae
National Police Association

CERTIFICATE OF SERVICE

I certify that on January 27, 2023, I directed the MEMORANDUM OF THE NATIONAL POLICE ASSOCIATION AS *AMICUS CURIAE* to be (1) electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system; and (2) served upon Tony L. Aiello, Jr. and Tyler D. Smith, attorneys for plaintiffs below, and upon Ellen F. Rosenblum, Benjamin Gutman and Robert A. Koch attorneys for defendants below, and upon Honorable Robert S. Raschio, circuit court judge, by mailing a true copy with postage prepaid, in an envelope addressed to:

Hon. Robert S. Raschio
Harney County Circuit Court
Oregon Judicial Department
450 N. Buena Vista #16
Burns, OR 97720

Tyler D. Smith
TYLER SMITH & ASSOCIATES PC
181 N. Grant St., Ste. 212
Canby, OR 97013

Ellen F. Rosenblum
Attorney General
1162 Court St. NE
Salem, OR 97301

Tony L. Aiello, Jr.
TYLER SMITH & ASSOCIATES PC
181 N. Grant St., Ste. 212
Canby, OR 97013

Benjamin Gutman
Solicitor General
1162 Court St. NE
Salem, OR 97301

Robert A. Koch
Assistant Attorney General
1162 Court St. NE
Salem, OR 97301

/s/ *James L. Buchal*
James L. Buchal, OSB No. 921618
MURPHY & BUCHAL LLP
Attorney for Amicus Curiae
National Police Association