

IN THE SUPREME COURT OF THE STATE OF OREGON

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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

SC \_\_\_\_\_

**MANDAMUS PROCEEDING**

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RELATORS' EMERGENCY MOTION FOR STAY

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TYLER D. SMITH #075287  
TONY L. AIELLO, JR. #203404  
Tyler Smith & Associates PC  
181 N Grant St, Ste 212  
Canby, OR 97013  
Telephone: (503) 496-7177  
Email:  
tyler@ruralbusinessattorneys.com  
tony@ruralbusinessattorneys.com

Attorneys for Plaintiffs-Adverse Parties

HON. ROBERT S. RASCHIO #013864  
Harney County Circuit Court  
Oregon Judicial Department  
450 N. Buena Vista #16  
Burns, OR 97720

Circuit Court Judge

ELLEN F. ROSENBLUM #753239  
Attorney General  
BENJAMIN GUTMAN #160599  
Solicitor General  
ROBERT KOCH #072004  
Assistant Attorney General  
1162 Court St. NE  
Salem, Oregon 97301-4096  
Telephone: (503) 378-4402  
Email: robert.a.koch@doj.state.or.us

Attorneys for Defendants-Relators

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**DEFENDANTS-RELATORS' EMERGENCY MOTION  
FOR A STAY UNDER ORAP 7.35**

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Yesterday, the Harney County Circuit Court issued a temporary restraining order barring defendants from enforcing the entirety of Measure 114, which the people of Oregon enacted at the November general election. The temporary restraining order will go into effect at 12:01 a.m. on December 8, 2022, the day on which the people's measure was to go into effect. Defendants ask this court to stay that order by 5:00 p.m. on December 7, 2022, while it considers their petition for a writ of mandamus vacating the order of injunctive relief.

**BACKGROUND**

In 2020 alone, 593 Oregonians died by firearm. The people of Oregon enacted Measure 114 specifically to minimize and prevent “horrific deaths and devastating injuries due to mass shootings, homicides and suicides.” (ER-28 (Measure 114, Preamble)). To that end, Measure 114 has two principal mechanisms challenged by plaintiffs. First, the measure restricts the purchase, sale, and transfer of large-capacity magazines that hold more than ten rounds of ammunition; every mass shooting in the United States since 2004 has used large-capacity magazines. (ER-38–39). Second, the measure implements a permit-to-purchase scheme that requires a criminal background check and firearm training before the sale or transfer of a firearm. (ER-29–38).

## ARGUMENT

Because mandamus directed at a trial court amounts to appellate review of an interlocutory order, the court considers the factors listed in ORS 19.350(3), which governs discretionary stays pending appeal. Those factors include:

- (a) The likelihood of the appellant prevailing on appeal.
- (b) Whether the appeal is taken in good faith and not for the purpose of delay.
- (c) Whether there is any support in fact or in law for the appeal.
- (d) The nature of the harm to the appellant, to other parties, to other persons and to the public that will likely result from the grant or denial of a stay.

ORS 19.350(3). The court also examines “any other factors the Court considers important.” ORS 19.350(5).

For the reasons explained in defendants’ memorandum in support of the mandamus petition, this court should grant an immediate stay of the trial court’s injunction. Defendants are likely to prevail in this mandamus proceeding; defendants seek mandamus in good faith and not for the purpose of delaying implementation of a valid court ruling; there is support in law for the mandamus petition; and the trial court’s order of injunctive relief threatens irreparable harm to public health and safety, which the people of Oregon specifically sought to protect and promote through Measure 114.

**A. The state enjoys wide latitude to promote and protect public safety under Article I, Section 27.**

Under Oregon law, it is long established that the right to bear arms provided by Article I, section 27, of the Oregon Constitution “is not an absolute right.” *State v. Christian*, 354 Or 22, 33, 307 P3d 429 (2013). This provision “guarantees the right to bear arms for purposes of defense.” *State v. Hirsch*, 338 Or 622, 671, 114 P3d 1104 (2005), *overruled on other grounds by Christian*, 354 Or at 40. But “the right to ‘bear arms’ does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances.” *State v. Kessler*, 289 Or 359, 369, 614 P2d 94 (1980).

As a threshold matter, the right extends only to weapons that constitute “arms” within the meaning and scope of the constitutional provision. Specifically, the right extends to the “kind of weapon, as modified by its modern design and function, [that] is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon’s constitution was adopted.” *State v. Delgado*, 298 Or 395, 400–01, 692 P2d 610 (1984) (footnote omitted). By contrast, the right does not extend to “advanced weapons of modern warfare [that] have never been intended for personal possession and protection.” *Kessler*, 289 Or at 369.

Even when Article I, section 27, is implicated, the state nevertheless “may specifically regulate the manner of possession and use of protected

weapons.” *Christian*, 354 Or at 38. To be sure, Oregon courts generally strike down absolute bans on the possession of a protected weapon. *See, e.g., Delgado*, 298 Or at 404 (switch-blade knife); *Kessler*, 289 Or at 372 (billy club). But the state otherwise may “restrict arms possession (and manner of possession) to the extent that such regulation of arms is necessary to protect the public safety.” *Hirsch*, 338 Or at 677. To pass constitutional muster, a restriction need only “satisfy the permissible legislative purpose of protecting the security of the community against the potential harm that results from the possession of arms.” *Id.* at 677–78. To that end, courts defer on the reasonableness of such restrictions, recognizing that the state “has wide latitude to enact specific regulations restricting the possession and use of weapons to promote public safety.” *Christian*, 354 Or at 33.

Moreover, judicial review of such restrictions is limited. “[A]s a general rule, the constitutionality of laws are traditionally determined in the context of an actual factual setting that makes a particular determination of the rights of the parties necessary.” *Id.* at 39. As a result, “overbreadth challenges are not cognizable in Article I, section 27, challenges.” *Id.* at 40. A party may raise a facial challenge to a weapons restriction, but such facial challenges are “limited to whether the [restriction] is capable of constitutional application *in any circumstance.*” *Id.* (emphasis added).

**B. The trial court erred as a matter of law in enjoining enforcement of Measure 114.**

As explained more fully in the memorandum in support of mandamus, the trial court committed fundamental legal error in concluding: (1) that Article I, section 27, facially prohibits the regulations enacted in Measure 114, and (2) that plaintiffs would experience irreparable harm absent immediate injunctive relief.

As pertinent here, large-capacity magazines are not “arms” under Article I, section 27. In 1859, they were effectively nonexistent, were not in common use, and were not used for personal defense. Even today, firearms can be used without large capacity magazines. As such, Measure 114’s restrictions on large-capacity magazines do not implicate Article I, section 27, at all. And even if they did, those restrictions are constitutionally valid safety regulations. Every mass shooting since 2004 has involved large-capacity magazines and, as already noted, firearms can operate without a large-capacity magazine. Restrictions on the purchase and use of large-capacity magazines thus reasonably relate to protecting public safety and thereby fall well within the wide latitude afforded by the Oregon Constitution.

As for the permit-to-purchase requirements, they similarly reasonably relate to public safety. They require only that an applicant obtain firearm training, pass a background check, and not give law enforcement an objective



basis to conclude that the applicant is a danger to self or others. (ER-29–31).

Permit decisions are subject to *de novo* review in the courts. (ER-31).

Moreover, enforcement of the permit requirement to purchase a firearm has already been enjoined by a federal district court for 30 days. (APP-1–43 (*Or. Firearms Fed’n, Inc. v. Brown*, No. 2:22-cv-1815 (D Or), ECF 39, Opinion & Order (Dec 6, 2022))).

In short, the trial court’s order enjoining enforcement of Measure 114 short lacks any basis in law and thereby exceeded the trial court’s discretionary authority. This court thus should immediately stay the trial court’s injunction to allow those firearm safety measures enacted by Oregon voters to take effect in accordance with the law.

**C. The public interest warrants an immediate stay of the trial court’s order.**

At today’s hearing, defendants orally requested a stay from the trial court, which the trial court denied. Absent action from this court, Measure 114 will be enjoined in its entirety as of December 8, 2022, at 12:01 a.m. (ER-347).

The public interest commands a stay in this case. The voters enacted Measure 114 to save lives. The state has a strong sovereign interest in enforcing any of its laws, but especially laws that promote public safety. And the law at issue here easily satisfies the requirements of Article I, section 27.

A recent tragedy in California illustrates the time-sensitive public interests at stake in this motion. California is one of 12 other states that prohibits large-capacity magazine sales. Its law was challenged in the U.S. District Court for the Southern District of California. On March 29, 2019, the district court granted summary judgment against California and issued a permanent injunction but ultimately stayed its injunction pending appeal. *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. 2019) (subsequent history omitted).

The following week, a 19-year-old man bought a rifle and several 10-round magazines in San Diego; the fact that the trial court's injunction had been stayed prevented him from purchasing large-capacity magazines. Two weeks later, wearing a tactical vest, he entered a synagogue and began shooting. His stated goal was to kill as many Jews as possible. He ultimately killed one congregant and injured three others; congregants were able to end his attack when he stopped shooting to reload a magazine cartridge. A large-capacity magazine would not have afforded that opportunity. *See United States v. Earnest*, No. 3:19-cr-1850 (SD Cal), ECF 125 at 14–16 (transcript of plea hearing) (Sept 17, 2021).

**D. This court also should stay the trial proceedings pending review of this mandamus petition.**

If this court stays the temporary restraining order, it also should stay trial proceedings pending resolution of this mandamus petition. The trial court scheduled the hearing on the preliminary injunction for next Tuesday, December 13, 2022. (ER-348). Without a stay of those proceedings, the trial court may well enter further injunctive relief that requires a second, largely identical, mandamus petition. Staying the trial proceedings so that this court can rule definitively on the legal issues presented will avoid duplicative proceedings in multiple courts.

**CONCLUSION**

The court should immediately stay the trial court's order of injunctive relief and further trial proceedings while this court considers defendants' petition for a writ of mandamus vacating the order. The people of Oregon enacted Measure 114 to prevent "horrific deaths and devastating injuries due to mass shootings, homicides and suicides." (ER-28). Doing so fell well within the wide latitude provided by Article I, section 27, which, as this Court has repeatedly indicated, allows the people to take such reasonable measures to protect and promote public safety.

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Defendants notified plaintiffs' counsel of this motion for an emergency stay of the trial court's order. Counsel indicated that they would review the filing before determining how to respond.

Respectfully submitted,

ELLEN F. ROSENBLUM  
Attorney General  
BENJAMIN GUTMAN  
Solicitor General

/s/ Robert Koch

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ROBERT KOCH #072004  
Assistant Attorney General  
robert.a.koch@doj.state.or.us

Attorneys for Defendants-Relators  
Kate Brown, et al

## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 7, 2022, I directed the original Relators' Emergency Motion for Stay Under ORAP 7.35 to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system.

I further certify that on December 7, 2022, I directed the Relators' Emergency Motion for Stay Under ORAP 7.35 to be served upon Tony L. Aiello, Jr. and Tyler D. Smith, attorneys for adverse parties, and upon Honorable Robert S. Raschio, circuit court judge, by mailing two copies, with postage prepaid, in an envelope addressed to:

Tony L. Aiello, Jr. #203404  
Tyler Smith & Associates PC  
181 N Grant St, Ste 212  
Canby, OR 97013

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

Tyler D. Smith #075287  
Tyler Smith & Associates PC  
181 N Grant St, Ste 212  
Canby, OR 97013

/s/ Robert Koch

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ROBERT KOCH #072004  
Assistant Attorney General  
robert.a.koch@doj.state.or.us

Attorney for Defendants-Relators

BG2:bmg/644750438