IN THE SUPREME COURT OF THE STATE OF OREGON

JOSEPHY ARNOLD, CLIFF ASMUSSEN, GUN OWNERS OF AMERICA, INC., and GUN OWNERS FOUNDATION,

Plaintiffs-Adverse Parties,

v.

TINA KOTEK, 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

S069998

PLAINTIFFS-ADVERSE PARTIES' MEMORANDUM IN OPPOSITION TO DEFENDANTS-RELATORS' PETITION FOR A PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS

PLAINTIFFS-ADVERSE PARTIES' MEMORANDUM IN OPPOSITION TO DEFENDANTS-RELATORS' PETITION FOR A PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS

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PLAINTIFFS-ADVERSE PARTIES' MEMORANDUM IN OPPOSITION TO DEFENDANTS-RELATORS' PETITION FOR A PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS

I.

INTRODUCTION

Defendant-Relators ("Defendants") seek mandamus to overturn a preliminary circuit court order that preserves the status quo on an enumerated constitutional right that is deeply rooted in Oregon's history and pioneer spirit. In 2022, Oregon voters narrowly passed Ballot Measure 114, which was presented by an advocacy group and creates arguably one of the most restrictive firearms laws in the nation. The circuit court issued two relevant preliminary orders enjoining enforcement of Measure 114, which had an enforcement date of December 8, 2022.

The first order relates to the permit to purchase section of the ballot measure that Defendants requested be stayed before the federal district court. On that section, the Defendants now seek to overturn that temporary restraining order and require Oregonians to obtain a *permit to purchase* a firearm that is unobtainable due to Defendants' inability to implement the program. Because the permit is unavailable, this acts as a total ban on the transfer of firearms in Oregon. The second section relates to a portion of the ballot measure that makes the vast majority of modern firearms illegal in the state of Oregon. The applicable case law

explains that banning this entire class of firearms is unconstitutional, yet Defendants urge this Court to intervene, compel the circuit court to change preliminary factual findings in a way not allowed by mandamus, and adopt a new test for examining the constitutionality of arms regulations that would make every modern firearm ban-able in Oregon, save a handful of antiques.

Mandamus is wholly inappropriate in this case for several reasons, chief of which is the fact that Defendants' disagreement with the circuit court's ruling is due to the circuit court's findings of fact, not any abuse of discretion or fundamental legal error. To the contrary, the circuit court correctly applied the law and remained within the scope of its discretion under ORCP 79. Further, Defendants' articulation of the law is not based in this Court's precedents, but rather in Defendants' desire to nullify an enumerated constitutional right under Oregon's constitution. Indeed, were Defendants' interpretation adopted, Article I, Section 27 would be meaningless. While Defendants may argue that this Court should change its precedent, it does not constitute "clear legal error" or "abuse of discretion" for the circuit court to apply this Court's precedent simply because doing so commands a result with which Defendants disagree. Finally, at least with regard to the permit to purchase program and the background check amendment provisions in that program, Defendants have a plain, speedy and adequate remedy at law that precludes mandamus.

II.

BACKGROUND

A. Factual Overview of Measure 114 and its Changes to the Present Law

Measure 114 presents two changes to Oregon's current firearm laws. First, Measure 114, Sections 1–10 create a permit to purchase a firearm which Oregonians must obtain before they are allowed to purchase a firearm. The second part, Section 11, bans firearm magazines capable of holding more than 10-rounds of ammunition.

Broadly, Measure 114's permit to purchase program applies new requirements to firearm dealers, transferors, and transferees, as well as local law enforcement (called "permit agents") and the Oregon State Police with regard to firearm transfers. First, the permit to purchase program requires a law-abiding Oregonian to obtain a permit to purchase before acquiring any firearm. *See* BM114, § 4. To qualify, Oregonians must go through a multi-step process requiring involvement by both state and local law enforcement (fingerprinting, photographs, investigation, background check). The background check required by the permit to purchase program is in addition to the background check already required at the point of sale. *See e.g.*, ORS 166.412(2)(d). Oregonians must also complete a two-step firearm safety course. Because this program has not been created yet, and evidence has not been presented to the trial court on what these

courses entail, few specifics are known about the requirements of the course. Broadly, however, the first step of that course is an educational course covering federal and state laws concerning firearm ownership, purchase, transfer, use and transportation, storage, and the abuse and misuse of firearms. *Id.* at §§ 4 (8)(c)(A)–(C). The second course requires an "[i]n-person demonstration of the applicant's ability to lock, load, unload, fire and store a firearm before an instructor certified by a law enforcement agency." *Id.* at § 4(8)(c)(D). However, because the program is undeveloped, details on this part of the course are unknown and not on the record. The educational course is not required for permit renewals, but quinquennial background checks are required to maintain the permit to purchase. *Id.* § 4(7). The costs of these courses are either unknown or have not been presented to the circuit court and, therefore, are not on the record. However, Oregonians wishing to obtain a permit to purchase a firearm must also pay a fee (in addition to the cost of the two courses) of up to $65 for the original permit and up to $50 for each renewal. *Id.* § 4(3)(b), (7). The permits are issued by local law enforcement such as police chiefs and county sheriffs. *Id.* § 4(1)(a).

The permit to purchase program also places new restrictions on firearm dealers and other transferors, requiring confirmation that the transferee has a valid permit to purchase before completing the transfer of a firearm, as well as reporting information about that transfer to the Oregon State Police which will maintain a

registry of what firearms are obtained by transferees. *E.g.*, *Id.* §§ 6, 7, 8, and 9. The permit to purchase program also prohibits the transfer of a firearm before the second background check (a point of sale/transfer background check) is completed, irrespective of whether that takes weeks, months, or years. *See e.g.*, §§ 6(3)(c), (13)(b), (14), 7(3)(d)(B), and 8(3)(c). Measure 114 does not alter the current requirements on the Oregon State Police for processing background checks. Present requirements only require the Oregon State Police to determine whether the purchaser is immediately qualified or disqualified. *See* ORS 166.412(3)(a). However, "[i]f the department is unable to determine if the purchaser is qualified or disqualified from completing the transfer within 30 minutes" the Oregon State Police must merely "notify the gun dealer and provide the gun dealer with an estimate of the time when the department will provide the requested information." *Id.* at (3)(b). There is no requirement that the Oregon State Police perform any investigation whatsoever, nor any time limitation imposes within which the Oregon State Police must complete its investigation.

Measure 114 also bans what it calls "Large-capacity magazines". BM114, § 11. It defines large capacity magazines as "a fixed or detachable magazine, belt, drum, feed strip, helical feeding device, or similar device, including any such device joined or coupled with another in any manner, or a kit with such parts, that has an overall capacity of, or that can be readily restored, changed, or converted to

accept, more than 10 rounds of ammunition and allows a shooter to keep firing without having to pause to reload . . .” *Id.* § 11(1)(d). The “[u]nlawful manufacture, importation, possession, use, purchase, sale or otherwise transferring of a large-capacity magazine is a class A misdemeanor.” *Id.* § 11(6).

Measure 114 provides no exceptions for Oregonians, aside from law enforcement officers. *Id.* § 11(4)(c). Rather than providing exceptions, Measure 114 provides “an affirmative defense, as provided in ORS 166.055, to the unlawful possession, use and transfer of a large-capacity magazine . . .” *Id.* at § 11(5). To prove this affirmative defense, an Oregonian, standing as a criminal defendant, must show that they owned the banned magazine prior to the effective date of Measure 114 and have maintained it in their control or possession, *id.* at § 11(5)(a), or that they inherited the magazine “by operation of law upon the death of a former owner who was in legal possession of the large-capacity magazine” as defined under Section 11(5)(a), *id.* at § 11(5)(b). In addition to what the criminal defendant Oregonian must show under Section 11(5)(a) or (b), they also must show that they have:

> In addition to either (a) or (b) of this subsection the owner has not maintained the large-capacity magazine in a manner other than:
>
> (A) On property owned or immediately controlled by the registered owner;
> (B) On the premises of a gun dealer or gunsmith licensed under 18 U.S.C. 923 for the purpose of lawful service or repair;
> (C) While engaging in the legal use of the large-capacity magazine,

> at a public or private shooting range or shooting gallery or for recreational activities such as hunting, to the extent permitted under state law; or
>
> (D) While participating in firearms competition or exhibition, display or educational project about firearms sponsored, conducted by, approved or under the auspices of a law enforcement agency or a national or state-recognized entity that fosters proficiency in firearms use or promotes firearms education; and
>
> (E) While transporting any large-capacity magazines in a vehicle to one of the locations authorized in paragraphs (c)(A) to (D) of this subsection, the large-capacity magazine is not inserted into the firearm and is locked in a separate container.

Id. § 11(5)(c). To the best of Plaintiffs' knowledge, the statute that supposedly provides for this affirmative defense, ORS 166.055, is a non-existent statute.

B. Procedural History

Plaintiffs filed this case in Harney County Circuit Court on December 2, 2022 (a Friday) and immediately filed their ORCP 79 Motion for Temporary Restraining Order and Order to Show Cause why Preliminary Injunction Should not enter in Harney County on December 5, 2022 (a Monday) (ER-1–102). Despite Plaintiffs' motion being an *ex parte* motion that the circuit court could have heard immediately—and Defendants appearing remotely at the December 5 hearing—the circuit court allowed Defendants to file a written memorandum opposing Plaintiffs' motion and scheduled a hearing on Plaintiffs' motion for the following day. The record of the December 5, 2022 hearing was omitted from Defendants' excerpt of the record.

At the December 6, 2022 hearing on Plaintiff's motion, the circuit court began by framing Measure 114 as presenting two issues: (1) the permit to purchase program; and (2) the ban on magazines capable of holding more than 10-rounds. (ER-288–290, 326). The parties, including Defendants, agreed with the circuit court's framing of the issues. As conceded by Defendants in their Petition to this Court, "Plaintiffs sought a declaration that, on its face, Measure 114 in its entirety violates Article I, section 27, of the Oregon Constitution." *See* Defendant-Relator's Opening Brief, 15.

At the close of the December 6, 2022 hearing, the circuit court ruled from the bench in favor of Plaintiffs and granted a temporary restraining order on the whole of Measure 114. (ER-322–32).

On the permit to purchase issue, the circuit court ruled that a temporary restraining order should issue because, as Defendants noted, the federal court had already ruled against the plaintiffs in the federal case on the issue of the permit to purchase program, and the federal stay was solely based on the defendants' concessions in that case. As the circuit court noted, "the district court's decision is not dispositive on the Oregon Constitutional Right for the people to bear arms for the defense of themselves and the State . . . [and] [t]he question is whether Ballot Measure 114 causes an irreparable harm . . . to the State right, and that cannot be determined by the federal judiciary." (ER-323). The circuit court agreed that,

because Defendants had conceded that they would be unable to deploy the permit to purchase program by December 8, 2022, "no Oregonian would be able to purchase a firearm for that timeframe and the timeframe necessary to obtain a permit to purchase. Without a TRO, Ballot Measure 114, upon implementation, would impose an absolute restriction on the constitutionally protected activity of possessing a firearm, so the concession from Defendants is accepted and it does require a TRO until the State deploys a permit to purchase program that can then be subject to review by the judiciary for any facial challenges to its constitutionality." (ER-326–27).

Following the circuit court's ruling on the permit to purchase, the circuit court scheduled a preliminary injunction hearing, as to the magazine ban, to be held within 10-days as requested by Defendants and required by ORCP 79 B(2)(a), and further set what the circuit court characterized as a status hearing for the same date on the issue of imminent harm with regard to the permit to purchase program in light of the federal court's ruling as requested by Defendants. (ER-336–37).

The circuit court inquired whether Defendants desired to present evidence and argument on the permit to purchase issue at the December 13, 2022 hearing and Defendants declined, stating that they only wanted to be heard on the issue of irreparable injury with regard to the permit to purchase program. (ER-337–39). Defendants' counsel stated that Defendants "would like for the Court to hear

argument, perhaps briefing, on the question of whether the Court should extend its temporary restraining order past 10 days on the permit to purchase issue in light of the federal injunction. We are not seeking a hearing on the 13th to hear the broader question of the permit to purchase provision in total." (ER-338–39).

Before commencing the December 13, 2022 hearing on the preliminary injunction with regard to Measure 114's section 11 ban on magazines, the parties appeared on the record in the circuit court's chambers for a pre-hearing conference. Defendants omitted the record of that conference from the excerpt of the record. (ER-445–694). In the omitted pre-hearing conference, the circuit court instructed the parties on the scope of what that hearing would cover, limiting the parties to: (1) whether Plaintiffs had demonstrated irreparable harm regarding the permit to purchase, and (2) whether a preliminary injunction should be granted against the magazine ban.

At the start of the December 13, 2022 hearing on the magazine ban, the circuit court heard arguments from Plaintiffs and Defendants on the issue of continuing the permit to purchase temporary restraining order beyond 10-days in light of Defendants' inability to deploy the program. (ER-450–68). Defendants' sole objection to issuance of the temporary restraining order on the permit to purchase program was that Plaintiffs had failed to demonstrate imminent harm. *Id.* In fact, Defendants stated that they did not object to the circuit court extending its

order for good cause shown on two occasions during that hearing. (ER-465–66).

Despite the circuit court's framing of the issues at the December 6, 2022 hearing and the pre-hearing conference in chambers on December 13, 2022, during argument the permit to purchase at the December 13 hearing, Defendants indicated for the first time that they had a further objection to the scope of the temporary restraining order including certain subsections of Measure 114, specifically sections 6(3)(c), 6(13)(b), 6(14), 7(3)(d)(B), 8(3)(c), and 10 insofar as section 10 applied to the other subsections identified. Defendants now claimed that there were *three* portions of Ballot Measure 114, despite their earlier agreement to the circuit court's framing of two issues. (ER-288–290, 326). At that time, the circuit court re-iterated what the scope of the December 13, 2022 hearing as articulated in chambers. (ER-468–475). The circuit court also scheduled a subsequent hearing for December 23, 2022 to hear Defendants' objections regarding those subsections and, specifically, whether the temporary restraining order should not apply to those subsections under Defendants' new severability argument.

Following the December 13, 2022 evidentiary hearing, the circuit court issued its letter opinion on December 15, 2022. (ER-695–719). In that opinion, the circuit court segregated its injunctive relief in light of Defendants' new argument and instructed Plaintiffs to prepare three orders. *Id*. These were the Order Granting Preliminary Injunctive Relief – Ballot Measure 114, Section 11 (ER-720–24);

Order Extending Temporary Restraining Order – Ballot Measure 114, Sections 1–10 ("Permit to Purchase") (ER-725–29); and Order Extending Temporary Restraining Order – Ballot Measure 114, Sections 1–10 ("Background Check") (ER-730–34).

Thereafter, the circuit court held a third hearing on December 23, 2022 to decide whether the permit to purchase and background check provisions of Measure 114, sections 1–10 should be severed from preliminary relief. (ER-794–839). On January 3, 2023, the circuit court issued its letter opinion declining to sever the provisions as requested by Defendants (ER-840–41) and entered an order displacing the orders previously entered (ER-725–29 and ER-730–34). That order was subsequently amended to correct a typographical error. (ER-847–51).

The case and parties are now situated as follows: Measure 114's magazine ban is the only provision of Measure 114 that has been preliminarily enjoined. The permit to purchase program (including the background check amendment provisions that the circuit court declined to sever from the permit to purchase program) are temporarily restrained until Defendants have established a program capable of being reviewed by the circuit court. Defendants, at their sole discretion, may request a preliminary injunction hearing on the permit to purchase program, including the background check amendments within that program, on 10-days' notice to the circuit court at any time. Defendants have not done so.

III.

LEGAL STANDARDS

A. Injunctive Relief Standard

Traditionally, courts in equity have considered four factors to determine whether to grant or deny a preliminary injunction: (1) whether the plaintiff might suffer irreparable harm without an injunction; (2) the balance of equities, hardships, and conveniences between the parties; (3) whether the public interest weighs for or against an injunction; and (4) the plaintiff's likelihood of success on the merits. *See Winter v. NRDC, Inc.*, 555 US 7, 20, 129 S Ct 365 (2008) (describing traditional equity standards); *Injunctions*, 42 *Am Jur 2d* § 15 (same). The issuance of a preliminary injunction is a matter committed to the discretion of the circuit court *State ex rel. Keisling v. Norblad*, 317 Or 615, 623, 860 P2d 241, 245 (1993). A circuit court has the discretion to issue a temporary restraining order or a preliminary injunction. ORCP 79 A, C. The circuit court exercises its discretion when applying the traditional equitable standards for issuing a preliminary injunction. *Elkhorn Baptist Church v. Brown*, 366 Or 506, 543-45, 466 P3d 30, 52-53 (2020) (Garrett J. concurring).

A hearing on whether a preliminary injunction should issue is not a hearing on the merits, *see Fleming, Administrator, v. Woodward,* 180 Or 486, 488, 177 P2d 428 (1947), but determines whether the party seeking the injunction has made a

sufficient showing to warrant the preservation of the status quo until the later hearing on the merits. *See American Life Ins. Co. v. Ferguson,* 66 Or 417, 420, 134 P 1029 (1913). As explained in *Or. Educ. Ass'n v. Or. Taxpayers United PAC*, 227 Or App 37, 45, 204 P3d 855, 860 (2009), "[t]he office of a preliminary injunction is to preserve the status quo so that, upon the final hearing, full relief may be granted." *State ex rel. v. Mart,* 135 Or 603, 613, 295 P 459 (1931); *see also State ex rel McKinley Automotive v. Oldham,* 283 Or 511, 515 n 3, 584 P2d 741 (1978) (describing function of preliminary injunction as protection of status quo). Preliminary factual determinations are exclusively within the discretion of the circuit court. *State ex. Rel. Bethke v. Bain*, 193 Or 688, 703, 240 P2d 958 (1952).

B. Mandamus Standard

Mandamus is an extraordinary remedy serving a limited function in furtherance of two narrow purposes. *Lindell v. Kalugin*, 353 Or 338, 347, 297 P3d 1266 (2013) (quoting *Sexson v. Merten*, 291 Or 441, 445, 631 P2d 1367 (1981)). Such a writ is not a means of controlling judicial discretion or bringing about its appellate review. *State ex rel. Pac. Tel. & Tel. Co. v. Duncan*, 191 Or 475, 494-95, 230 P2d 773, 781-82 (1951). The allowable purposes for mandamus in this instance are to correct "fundamental legal error" or actions taken that are "outside the permissible range" of the circuit court's discretion. *Norblad*, 317 Or at 623.

Mandamus is not a means to compel a circuit court to decide facts in a particular way. *State ex rel Ware v. Hieber*, 267 Or 124, 128, 515 P2d 721 (1973) (citing Ferris, Extraordinary Legal Remedies, § 211, 243–45 (1926)).

This Court has stated, "[w]e know of no rule of law more firmly established both by statute and by decisions of this court than the rule that, so long as an inferior court or tribunal acts within the scope of its authority touching any matter about which it must exercise its discretion, its action cannot be revised by mandamus." *Duncan*, 191 Or at 494–95; *Lindell*, 353 Or at 347 ("Importantly, as this court has stated many times, '[i]t has become hornbook law in this state that the writ of mandamus cannot be used as a means of controlling judicial discretion.'") (brackets original).

Issuance of a temporary restraining order or a preliminary injunction is squarely within a circuit court's discretion under ORCP 79. *Norblad*, 317 Or at 623. When the facts are in dispute, the circuit court decides the facts. *Hieber*, 267 Or at 128. Further, "[a]s a general rule, mandamus lies to require inferior courts to act, but it will not compel them to decide disputed questions of fact in a particular way." *State ex rel Methodist Old People's Home v. Crawford*, 159 Or 377, 386, 80 P2d 873 (1938).

Mandamus is not appropriate where the relator complains of errors in the circuit court's conclusions of fact, let alone a circuit court's preliminary findings of

fact for purposes of preliminary injunctive relief. *Or. State Hosp. v. Butts*, 258 Or 49, 58–59, 359 P3d 1187 (2015) ("[M]andamus relief is not available . . . solely based on its disagreement with the circuit court's findings of fact."); *Hieber*, 267 Or at 128; *Bain*, 193 Or at 703 (where facts are in dispute, or where no strict rule of law is applicable, exercise of circuit court's sound discretion cannot be disturbed or controlled by mandamus); *see Gibson v. Morriz*, 270 Or App 608, 617, 348 P3d 1180 (2015) ("When a party challenges the findings of a circuit court sitting as a factfinder, our review is limited to the narrow issue of whether there is any evidence to support the circuit court's findings.") (citing *Hassan v. Guyer*, 271 Or 349, 352, 532 P2d 227 (1975)).

C. Standard for Declaratory Relief Claims under 28.020

Plaintiffs present their first claim for relief under the Declaratory Judgment Act as ORS 28.020. (ER-22–25). Under ORS 28.020, "[t]o determine whether plaintiff satisfied the statutory requirements in ORS 28.020 to bring the claim, and whether the claims are ripe for adjudication, we examine the underlying facts to determine if and how the challenged ordinance restrictions affect plaintiff's legal interests." *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 466, 228 P3d 650 (2010). ORS 28.020 gives Plaintiff a statutory right, and statutory basis to present this claim. ORS 28.020 states, "[a]ny person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status

or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder". In order to present a challenge under ORS 28.020, a party need not wait until a challenged law actually applies so long as the eventual application to the party is not a matter of speculation. *Savage v. Munn*, 317 Or 283, 292, 856 P2d 298 (1993).

IV.

SUMMARY OF ARGUMENT

This Court should deny Defendants' request for mandamus—which requires a showing of clear legal error or abuse of discretion—because Defendants' arguments primarily concern their disagreement with the circuit court's preliminary findings of fact, which are not appropriately addressed on mandamus. Even if there were any legal error in this case, it is far from *clear* or *fundamental* legal error and is therefore only properly addressed on appeal after the circuit court has made ultimate findings of fact and final conclusions of law. Moreover, though Defendants do not identify any specific discretionary acts by the circuit court that constitute abuse of that discretion, Plaintiffs assert that the circuit court's exercise of discretion, where it occurred, was proper and supported by the factual record. Defendants have

attempted to treat a mandamus petition as an appeal, asking this Court to disturb preliminary findings of fact that support preliminary injunctive relief and, instead, to make its own findings of fact based on unsupported allegations that were not presented below. For example, Defendants claim that every major manufacturer offers capacity-compliant magazines, but the factual record does not support this factual finding, nor was any such factual finding made. This Court should decline to disturb the circuit court's preliminary factual findings.

The threshold question in this case involves how lower courts are to interpret Article I, Section 27, including applying this Court's prior interpretational rulings. While Defendants' primary objections to the circuit court's rulings concern their disagreement with the circuit court on *findings of fact*, Defendants also assert that the circuit court should have applied a different test than this court has established in prior Supreme Court case law. Plaintiffs and Defendants assert two different interpretations of this Court's precedents regarding Article I, Section 27. Unsurprisingly, Defendants' interpretation is much narrower and ignores many portions of this Court's prior rulings that are inconvenient to Defendants' position. Broadly, Defendants assert that Article I, Section 27 only protects antique firearms. Plaintiffs' interpretation, on the other hand, is broader, based on this Court's Article I, Section 27 caselaw, in agreement with this Court's rulings regarding other

constitutional provisions, similar to federal law, and is the only way to read Article I, Section 27 without rendering it a nullity immediately upon its enactment in 1859.

This Court has interpreted Article I, Section 27 to protect all arms that, as modified by their modern design and function, are of the sort commonly used by individuals for personal defense in 1859 or before. Defendants, however, ask this Court to read out of its own precedents the "modern design and function" and "of the sort" qualifiers, and ask this Court to apply a new test that departs from this Court's rulings in cases such as *Kessler*, *Delgado*, *Hirsch*, and *Christian*. Defendants assert that this constitutional right only protects the possession of antique firearms that have not improved in design or function. Defendants assert that, for an arm to be protected, Plaintiffs must show that it possesses identical capabilities and functionality to arms from 1859—which is like saying that the Fourth Amendment does not apply to the search of a glovebox because automobiles did not exist in 1859, or that Article I, Section 8 of the Oregon constitution does not protect e-mail. Defendants also ignore the "of the sort" language from this Court's caselaw and argue that the numerous examples of pre-1859 multi-shot technology, including multi-shot technology where the firearm could fire more than 10-rounds without reloading, is insufficient for Article I, Section 27 purposes. Instead, Defendants assert that Plaintiffs must identify a single firearm in common use in 1859 or before that could fire more than 10-rounds without reloading.

In contrast, Plaintiffs' interpretation of Article I, Section 27 does not ignore this Court's use of the "modern design and function" and "of the sort" qualifiers. Plaintiffs assert that the firearm component (magazines) and firearms banned under Measure 114 are of the sort in common use for personal defense and defense of the state pre-1859, and have only improved through their modern design and function. The record was filled with uncontroverted testimony on these relevant historical facts. Before the circuit court, Plaintiffs have also shown numerous examples of firearms using multi-shot technology pre-1859. This includes firearms that possessed multi-shot technology but could not fire more than 10-rounds without reloading (*e.g.*, revolvers and double-barreled shotguns), as well as firearms (and other arms) that possessed multi-shot technology and could fire more than 10-rounds without reloading (*e.g.*, the Girandoni air rifle and other air rifles, pucklegun, Volcanic, Henry repeater, Jennings rifle, and some pepperbox revolvers). Plaintiffs also dispute Defendants' narrow interpretation of this Court's precedent which, if adopted, would freeze firearm technology in 1859, ignoring the Henry repeater which came only one year later and was never banned in Oregon. Defendants also completely ignore that Article I, Section 27 includes the private "defence of the state." Clearly Oregonians were not and are not expected to defend the state using antiques.

Plaintiffs and Defendants also disagree on the subsequent steps of the analysis that this Court has identified. This Court has stated that despite the broad protections of Article I, Section 27, it might still allow the government the limited ability to regulate the manner of possession and manner of use of arms for purposes limited to the promotion of public safety. However, this Court has also held that those manner of use and manner of possession regulations still must not infringe on the right to bear arms. Even if sociological studies and statistical analyses presented by Defendants were somehow relevant to determining the scope of an enumerated constitutional right (a concept foreign to constitutional law and foreclosed by this Court's holding in *Kessler*, which stated that Article I, Section 27 should be interpreted based on how it was understood and applied in 1859), Measure 114 does nothing to actually further its purported public safety goals while severely infringing on the right to bear arms. Defendants forward the absurd proposition that the constitutional rights contained in Article I, Section 27 can be infringed at will if the statute simply purports to be directed at public safety. This Court should not discard constitutional rights so easily. Similarly, Defendants seem to either read out the "manner of possession or use" language, or else baldly assert that any regulation of arms can be considered a manner of possession or manner of use regulation. Either interpretation is incorrect. Defendants also assert that the regulation does not have to actually advance public safety, and that this Court has required only a rational

basis analysis for an enumerated constitutional right under Oregon's constitution. Defendants also ignore the precedential requirement that no regulation of arms can infringe on the right to bear arms, even if it promotes public safety.

Defendants assert that the circuit court committed clear legal error, or else abused its discretion, in granting preliminary injunctive relief to Plaintiffs because they argue Plaintiffs failed to meet the four requirements recently rearticulated by this Court in *Elkhorn Baptist Church* (likelihood of success on the merits, imminent irreparable harm, balance of harms, and public interest). Plaintiffs disagree because the determination of those factors is reserved for the discretion of the circuit court. Plaintiffs have shown that Measure 114 severely infringes on the right to bear arms as enumerated in Oregon's constitution, demonstrating a substantial likelihood of success. Plaintiffs have also shown that even the temporary implementation of any provision of Measure 114 will deprive Oregonians of their constitutional rights, irreparably harming all Oregonians, and that that harm is imminent as only the circuit court's orders stand in the way of Defendants enforcing Measure 114. Plaintiffs have also shown that the balance of harms and public interest weighs in favor of maintaining the status quo and safeguarding the constitutional rights of Oregonians.

Beginning with the likelihood of success, since the parties advance different readings of the test this Court has required for analyzing regulations under Article I, Section 27; they also unsurprisingly reach different conclusions on how that test

should be applied to Measure 114. Regarding the Measure 114 ban on magazines capable of holding more than 10-rounds, Defendants assert that magazines are not "arms" within the meaning of Article I, Section 27 because they are not firearms. Defendants try to characterize the various parts necessary to make a firearm operable are not still parts of the firearm. Defendants provide no support for this assertion, nor do they explain how a detachable magazine is anything but a lineal descendant of a fixed or tubular magazine. Thus, even under Defendant's antiques-only theory, the magazines outlawed by Measure 114 would pass Defendant's test. The preliminary facts found by the circuit court demonstrated this. Plaintiffs, however, provided persuasive caselaw from federal cases interpreting the Second Amendment which reliably conclude that ammunition and magazines are a part of, and integral to, a firearm and, therefore, constitute arms. Plaintiffs thoroughly demonstrated that the factual record supports the circuit court's conclusion that magazines capable of holding more than 10-rounds of ammunition are protected arms under Article I, Section 27. As for the permit to purchase, including the background check amendments to the permit to purchase program, the parties agree that the arms regulated by Measure 114, Sections 1–10 are protected arms and, therefore, this portion of the analysis is satisfied and those arms are clearly protected.

The parties also disagree on how to apply the subsequent steps of the *Christian* analysis. First, because neither the magazine ban nor the permit to purchase regulate

the manner of possession or manner of use of firearms, the regulation is facially unpermitted and unconstitutional under this Court's precedents. Next, regarding the magazine ban, Plaintiffs dispute, as a threshold matter, whether Defendants have presented a public safety issue in Oregon at all. Even assuming that Defendants have provided evidence showing that there is a public safety issue, Plaintiffs assert that Defendants' chosen policies do not remediate that public safety issue. More importantly, however, Plaintiffs assert that Measure 114 infringes on the Plaintiffs' and all Oregonians' right to bear arms and, therefore, is unconstitutional.

The parties next disagree that Plaintiffs have demonstrated imminent and irreparable harm. However, Plaintiffs demonstrate that, absent injunctive relief by the circuit court, Plaintiffs and hundreds of thousands of Oregonians would have been deprived of their enumerated constitutional right to bear arms. Importantly, Defendants misapprehend the timeline in this case and assert that Plaintiffs were not facing imminent harm when the circuit court issued its order, despite the uncontroverted fact that the federal stay was set to expire within two weeks.

Finally, the parties disagree on how the balance of harms and public interests on both sides should be weighed. Here, Plaintiffs agree with the circuit court that the people and individual liberty must come first. Moreover, Plaintiffs assert that this tension should be resolved in favor of maintaining the status quo, rather than radical changes that will instantly criminalize hundreds of thousands of Oregonians.

Ultimately, this is a petition for mandamus, not an appeal. This Court should not grant mandamus because Defendants have failed to show clear legal error or abuse of discretion. Plaintiffs carried their burden during the preliminary hearings on these matters and the circuit court has issued its orders. Defendants have asked this Court to intervene because Defendants failed to persuade the circuit court. For the reasons articulated herein, this Court should decline to do so.

V.

ARGUMENT

A. Article I, Section 27 Protections for Oregonians

Article I, Section 27 of the Oregon State Constitution provides that, "[t]he people shall have the right to bear arms for the defence [sic] of themselves, and the State, but the Military shall be kept in strict subordination to the civil power." Or. Const. Art. I, § 27. As this Court has held, Article I, Section 27 is not limited to firearms but protects all arms which "as modified by [their] modern design and function, [are] 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) (brackets supplied). This Court has further interpreted "[d]efense of themselves" to achieve the purpose of deterring the "government from oppressing unarmed segments of the population" and to include an individual's

right to bear arms in defense of one's person and home. *State v. Kessler*, 289 Or 359, 366–67, 614 P2d 94 (1980). Regarding the defense of the state, this Court has interpreted that portion of Article I, Section 27 to "refer to the historical preference for a citizen militia rather than a standing army[.]" *Id.* at 366.

This Court has interpreted the term *arms* to "include those weapons used by settlers for both personal and military defense." *Id.* at 368. This clearly operates to eliminate the interpretation suggested by Defendants. As this Court noted, "[i]n the colonial and revolutionary war era, weapons used by militiamen and weapons used in defense of person and home were one and the same." *Id.* There is no indication from Oregon's founding that Article I, Section 27 *excludes* any sort of arm whatsoever.[1] (ER-327–28, 709) (SER-12, 17–18). Oregonians were, and are, at least permitted to arm themselves in furtherance of (i) maintaining a militia in lieu of a standing army, (ii) deterring governmental oppression, and (iii) exercising their right to self-defense. *Kessler* 289 Or at 366. In dicta in *Kessler* (which concerned a billy club), this Court intimated that certain arms which this Court characterized as "advanced weapons of modern warfare" such as "automatic weapons, explosives, and chemicals of modern warfare" that "have never been intended for personal possession and protection" might not be included in the *arms*

[1] Claudia Burton & Andrew Grade, Legislative History of the Oregon Constitution of 1857 - Part 1 (Articles I & II), 37 WILLAMETTE 4 L. REV. 469, 545–46 (2001).

contemplated by the drafters of Oregon's Constitution. *See Kessler*, 289 Or at 369. In other words, the only class of arms this Court has ever found unprotected by the Oregon Constitution are "[m]odern weapons **used exclusively by the military** . . ." *Id.* (emphasis added). However, this Court has never found any entire class of arms—let alone modern arms that are ubiquitous in Oregon and throughout the United States—are unprotected by Article I, Section 27.

To the contrary, when analyzing whether an arm falls outside of the constitutional protection, this Court has made clear that Oregon courts must not conflate *modernity* with a lack of constitutional protection.

In *Delgado*, this Court noted that the constitutional drafters "must have been aware that technological changes were occurring in weaponry as in tools generally. The format and efficiency of weaponry was proceeding apace. This was the period of development of the Gatling gun, breach loading rifles, metallic cartridges and repeating rifles." *Delgado*, 298 Or at 403. In line with this Court's other holdings when interpreting constitutional provisions, this Court has stated that its "purpose is not to freeze the meaning of the state constitution to the time of its adoption, but is instead to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform [the Court's] application of the constitutional text to modern circumstances." *Couey v. Atkins*, 357 Or 460, 490, 355 P3d 866 (2015) (internal citations omitted). Instead of freezing an Oregonian's

right to bear arms to antiques, as Defendants urge, when analyzing whether a class of weapons qualifies as *arms* under Oregon's Constitution, this Court considers whether the arms are "of the sort commonly used by individuals for personal defense" including modern modifications to their design and function. *Delgado*, 298 Or at 400–01.

In fact, this Court has never upheld the proscription of an entire class of arms to Oregonians; rather, this Court has for over 40-years consistently found that absolute proscriptions on arms violate Article I, Section 27 on every occasion in which this Court has examined such laws. *Kessler*, 289 Or at 372 ("The statute in this case . . . prohibits the mere possession of a club."); *State v. Blocker*, 291 Or 255, 260, 630 P2d 824 (1981) ("On the other hand, ORS 166.510 . . . is not, nor is it apparently intended to be, a restriction on the manner of possession or use of certain weapons. The statute is written as a total proscription of the mere possession of certain weapons, and that mere possession, insofar as a billy is concerned, is constitutionally protected."); *Delgado*, 298 Or at 403–04 ("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 P3d 429 (2013) ("We begin by observing that the ordinance expressly allows a person to knowingly possess or carry a loaded firearm in a public place if the 'person [is] licensed to carry a concealed handgun.' Thus, 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.") (internal citations omitted).

In its consistent decisions holding that absolute proscriptions on arms are unconstitutional, this Court has narrowed the permissible range of legislation the legislative branch may enact to only include regulations concerning the *manner* of possession and manner of use of protected weapons to promote public safety but has required that any such regulation not infringe on the right to bear arms. *See Christian*, 354 Or at 38; *see also Kessler*, 289 Or at 370; *Blocker*, 291 Or at 259; *Delgado*, 298 Or at 400, 403; *State v. Hirsch*, 338 Or 622, 643, 114 P3d 1104 (2005), *overruled on other grounds by*, *Christian*, 354 Or 22.

One example this Court has provided of a regulation of the *manner of possession* was "[t]he English Statute of Northampton in 1327 [which] forbade persons to ride at night carrying a firearm for the purpose of terrifying the people." *Kessler*, 289 Or 369–70 (brackets supplied).[2] An example this Court has provided of a regulation of the *manner of use* was "[a] 1678 Massachusetts law [that]

[2] *See also NYSRPA v. Bruen*, 142 S Ct 211, 2139–40, 213 L Ed 2d 387 (2022) (noting this statute likely dealt only with "the wearing of armor" or perhaps "lances" that were "worn or carried only when one intended to engage in lawful combat … to breach the peace," and "the Statute's prohibition on going or riding 'armed' obviously did not contemplate handguns"); at 2143–45 (explaining that later laws modeled on the Statute applied only to certain behaviors of "affray" and "riots" and "going armed 'to the terror of the people'").

forbade shooting near any house, barn, garden, or highway in any town where a person may be 'killed, wounded, or otherwise damaged.'" *Id.* (brackets supplied). Turning to a modern example, in *Christian*, this Court upheld a Portland ordinance which provided that "[i]t is unlawful for any person to knowingly possess or carry a firearm, in or upon a public place, including while in a vehicle in a public place, recklessly having failed to remove all the ammunition from the firearm." *Christian*, 354 Or at 26. In upholding the ordinance, this Court underscored its earlier rulings against total proscriptions on the mere possession of arms in *Kessler*, *Blocker*, and *Delgado*, finding that the ordinance was constitutional only because its recklessness standard showed that it was regulating the manner of possession (reckless possession) rather than the mere possession, and because the ordinance provided exceptions for those licensed to carry concealed firearms. *Id.* At 29.

In addition to this Court's recognition of the legislature's power to regulate the manner of possession and manner of use of arms, this Court has also recognized the legislature's authority to prohibit the possession of firearms certain criminals (namely felons). *State v. Cartwright*, 246 Or 120, 418 P2d 822 (1966); *Kessler* 289 Or at 370. As articulated in *Hirsch*, this Court held 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*." *Hirsch*, 338 Or 677 (emphasis added). This Court has never held that the legislature may treat all Oregonians as identifiable threats, as does Measure 114.

Even where the Court finds that a law regulates the manner of possession or manner of use of an arm, or where the regulation proscribes possession of an arm by a certain dangerous group of persons, the regulation must still meet two other requirements. First, the regulation must be found to actually satisfy the purpose for which it claims to be constitutionally enacted. *Hirsch*, 338 Or at 677–78 ("That is not to say, however, that the legislature's authority to restrict the bearing of arms is 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.") (emphasis added). Second, in actually satisfying the government's compelling end, the government must do so without infringing on the individual right to bear arms guaranteed by Article I, Section 27. *Christian*, 354 Or at 33; *Kessler*, 289 Or at 370.

Finally, when examining laws restricting the rights of Oregonians to bear arms as guaranteed by Article I, Section 27, and especially restrictions the state claims promote public safety, this Court has made clear that any controversy over the *wisdom* of the right to bear arms or the original *motivations* for the

constitutional right—as well as whether this Court or Oregonians generally would find either to be compelling if debated afresh—are immaterial to this Court's analysis. *Kessler*, 289 Or at 362. The task, as this Court identified, "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." *Id.* Here, Defendants invoke horrific tragedies as justification for depriving Oregonians of their enumerated and guaranteed rights under Article I, Section 27. However, for the Oregon constitution and the rights it enumerates and guarantees to mean anything, as the Court stated, those principles cannot continually change when doing so fits the needs of the moment.

B. Mandamus Relief Is Inappropriate When Defendant Has a Plain, Speedy and Adequate Remedy at Law.

Mandamus relief is not allowed in this case because Defendants are presenting their obvious disagreement with the circuit court's preliminary factual findings as *clear legal error* or *abuse of discretion* to prematurely initiate appellate review. Moreover, mandamus relief cannot be granted in this case as to the permit to purchase—which has only been temporarily restrained—when Defendants have a plain, speedy, and adequate remedy at law.

Mandamus relief is reserved for instances of clear legal error or abuse of discretion. *Lindell*, 353 Or at 347. Abuse of discretion requires the circuit court to have taken actions that are "outside the permissible range" of the circuit court's

discretion. *Norblad*, 317 Or at 623. Here, Defendants have not provided any example of *clear legal error* or abuse of discretion. Defendants merely disapprove of the circuit court's preliminary findings of fact. But mandamus is not a means to compel a circuit court to decide facts in a particular way. *Hieber*, 267 Or at 128 (citing Ferris, Extraordinary Legal Remedies, § 211, 243–45). This Court has stated that mandamus is inappropriate where the lower court acts within the scope of its authority, and Defendants have not articulated how or why preliminary factual findings or the issuance of preliminary injunctive relief are not within the circuit court's discretion. *Duncan*, 191 Or at 494–95; *State ex rel. Coast Holding Co. v. Ekwall*, 144 Or 672, 26 P2d 52 (1933); *Lindell*, 353 Or at 347. Issuance of a temporary restraining order or a preliminary injunction is squarely within a circuit court's discretion under ORCP 79. *Norblad*, 317 Or at 623. When the facts are in dispute, the circuit court decides the facts. *Hieber*, 267 Or at 128; *Crawford*, 159 Or at 386; *Butts*, 258 Or at 58–59; *Bain*, 193 Or at 703; *Morriz*, 270 Or App at 617.

Defendants further dispute how the circuit court has applied this Court's precedents and urge this Court to fashion a new test to avoid a result with which it disagrees. However, these assertions do not suggest clear or fundamental legal error. Rather, if anything, Defendants merely assert *legal error* which would be properly addressed, if it occurred, on appellate review, not mandamus. Essentially, Defendants ask this Court to circumvent all normal and required appellate

procedure and engage in appellate review now. However, as this Court has held, mandamus is not a means of controlling judicial discretion or bringing about its appellate review. *Duncan*, 191 Or at 494–95. If Defendants' relief is granted, doing so will deprive the circuit court of its jurisdiction and forgo the required appellate procedure, depriving the trial court of the opportunity to consider a full factual record developed through a trial on the merits and make a final a determination on the merits. It will also deprive the Court of Appeals the opportunity to review that record and decision and issue a final determination, pending a decision to review *that* decision by this Court. Appellate review, aside from being required, is the best way to fully develop the findings of fact and conclusions of law necessary for this Court to perform its role as the ultimate authority for the interpretation of the Oregon Constitution.

Moreover, and specifically regarding the temporary restraining order Defendants seek to reverse through this petition, mandamus is reserved for those applicable instances of clear legal error or abuse of discretion where "there is no other 'plain, speedy and adequate remedy in the ordinary course of the law.'" *Lindell*, 353 Or at 347 (quoting ORS 34.110). Where, as here, the law provides for a hearing within 10-days of the issuance of a temporary restraining order pursuant to ORCP 79, there exists such a remedy. *See* ORCP 79 B(2)(a). Moreover, as the circuit court has made clear to all parties, Defendants may request the preliminary

injunction hearing on 10-days' notice to the circuit court. Defendants have not done so because, in its present and non-existent form, the permit to purchase program would act as a total bar to the sale of any firearm in the state of Oregon, which would certainly violate Article I, Section 27.

Likewise, the same is true where, as here, "the party against whom the order is directed consents that it may be extended for a longer period." *Id.* In the present case, Defendant has stipulated to a stay, and extensions of the stay of the permit to purchase program contained in Measure 114. Defendant has a plain, speedy and adequate remedy when and if it ever has a viable, available permit to purchase program that Oregonians can use, then it has the remedy of asking the circuit court to hold a hearing within ten days on whether the permit to purchase program should convert into a preliminary injunction.

This Court should decline to disturb preliminary findings of fact that are squarely within the circuit court's discretion or perform premature appellate review on mandamus review as urged by Defendants. Defendants have thinly veiled their disagreement with the circuit court's preliminary findings of fact and application of those facts to this Court's precedents as *clear errors of law* or *abuses of discretion.* Those assertions are simply unsupported on the record. Moreover, this Court should, at a minimum, decline to issue a writ of mandamus with regard to the permit to purchase provisions of Measure 114 because Defendants may notice the

circuit court at any time that they are prepared for a hearing on whether a preliminary injunction should issue with regard to those provisions and a hearing will be scheduled within 10-days. Instead of doing so, Defendants have asked the circuit court to *not* schedule that hearing to allow them time to create the program that the circuit court will ultimately review. As such, Defendants' petition should be denied.

C. Plaintiffs' ORS 28.020 Claim Allows The Circuit Court To Rule On The Constitutionality of Measure 114 Facially and As-Applied.

Plaintiffs present their first claim for relief under the Declaratory Judgment Act as ORS 28.020. (ER-22–25). To determine whether plaintiff satisfied the statutory requirements in ORS 28.020 to bring the claim, and whether the claims are ripe for adjudication, Oregon courts examine the underlying facts to determine if and how the challenged ordinance restrictions affect a plaintiff's legal interests. *Thunderbird Mobile Club, LLC*, 234 Or App at 466. ORS 28.020 gives Plaintiff a statutory right, and statutory basis to present this claim. ORS 28.020 states, "[a]ny person interested under a deed, will, written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder". ORS 28.020.

Measure 114, if allowed to go into effect, would be a statute, while Article I, Section 27 is part of the Oregon Constitution. Accordingly, ORS 28.020 squarely applies here as Plaintiffs are entitled to see a declaration about their legal relations affected by a statute and the constitution because "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." ORS 28.010. Plaintiffs asked the circuit court to adjudicate their factual and legal issues pursuant to ORS 28.020 and 28.090 for issues of law and fact respectively. As ORS 28.010 provides, "[n]o action or proceeding shall be open to objection on the ground that a declaratory judgment is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a judgment." ORS 28.010.

To present a challenge under ORS 28.020, a party need not wait until a challenged law actually applies so long as the eventual application to the party is not a matter of speculation. *Savage v. Munn*, 317 Or 283, 292, 856 P2d 298 (1993). Plaintiffs' facial and as-applied challenges are properly before the circuit court under the Declaratory Judgment Act. There has been no contention that Plaintiffs' rights will not be affected, infringed, and burdened by Measure 114 if it goes into effect. In fact, the circuit court found, based on preliminary findings of

fact, just the opposite.[3]

Thus, an ORS 28.020 claim can challenge a statutes constitutionality facially and as-applied. Defendants erroneously and repeatedly attempt to cast Plaintiffs' legal challenge as something other than a facial and as-applied legal challenge to Ballot Measure 114 in a misguided attempt to find error. However, Plaintiffs note that Defendants appear to accept and admit the fact that this case properly includes a facial challenge to Measure 114. *See* Defendant-Relator's Opening Brief, p. 33.[4] However, Defendants neglect to realize that Plaintiffs' Complaint is expressly based upon a statutory claim, namely ORS 28.020, which gives the circuit court original jurisdiction over this matter. Thus, the circuit court is given authority to hear this challenge on both the facial aspects and the as-applied aspects that threaten Plaintiffs and other Oregonians constitutional rights as stated in the Complaint.

ORS 28.020 legal challenges do not require a plaintiff to have been arrested, charged, or prosecuted before they can ask the circuit court to make a declaratory

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[3] Order Granting Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue, Dec. 6, 2022, Harney County Circuit Court ("Plaintiffs will be deprived of their right to bear arms pursuant to Or. Const. Art. 1, Sec. 27 by being made unable to lawfully purchase a firearm or bear a magazine capable of holding more than 10 rounds of ammunition in the state of Oregon) and as found in the Circuit Court's Order Extending Temporary Restraining Order, Dec. 8, 2022, and the opinion letter attached to it as Exhibit 1.

[4] "Opening Brief" hereafter, full document title: Defendant-Relator's Memorandum of Law In Support of Petition for a Peremptory or Alternative Writ of Mandamus.

ruling with respect to their rights, "[d]eclaratory judgment is preventive justice, designed to relieve parties of uncertainty by adjudicating their rights and duties *before wrongs have actually been committed*." *Beason v. Harcleroad,* 105 Or App 376, 380, 805 P2d 700 (1991) (emphasis added); *see also Recall Bennett Committee v. Bennett,* 196 Or 299, 322, 249 P2d 479 (1952) ("[T]he action for declaratory judgment 'is an instrumentality to be wielded in the interest of preventative justice[.]'" (Quoting *Cobb v. Harrington,* 144 Tex 360, 190 SW 2d 709 (1945) (quoting Anderson, *Declaratory Judgments* § 3 at 12).)). The relevant part of ORS 28.020 states, "[a]ny person … whose rights, status or other legal relations are affected by a constitution, statute, … may have determined any question of construction or validity arising under any such instrument, constitution, statute, municipal charter, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." ORS 28.020. The statutory authority to issue declaratory judgments, however, is constrained by constitutional justiciability requirements. *Hale v. State*, 259 Or App 379, 383, 314 P3d 345 (2013). Thus, the Declaratory Judgment Act can be used to challenge the constitutionality of a statute and has been used in that way many times. *See Gaffey v. Babb*, 50 Or App 617, 621–22, 624 P2d 616, 619 (1981) (explaining, "[a] declaration of the validity or applicability of a substantive penal statute has never been denied on the grounds that the plaintiff had the *potential* alternative remedy

of just defending a prosecution. *Anthony v. Veach*,189 Or 462, 220 P2d 493, 221 P2d 575 (1950), *appeal dismissed*, 340 US 923, 71 S Ct 499 (1951); *Amer. F. of L. et al v. Bain et al*, 165 Or 183, 106 P2d 544 (1940); *McKee v. Foster*, 219 Or 322, 347 P2d 585 (1959); *Mult. Co. Fair Ass'n v. Langley*, 140 Or 172, 13 P2d 354 (1932). Instead, a declaration as to the applicability or validity of a criminal statute has only been denied when there is an *existing* alternative effective remedy, i.e., when a prosecution has already been initiated, as was the case in *Nelson v. Knight*, 254 Or 370, 460 P2d 355 (1969)." (Emphasis in original.)

This is also true of the criminal defendant in *Christian*, who did not assert an "as applied" challenge to the ordinance in that case and did not utilize ORS 28.020 at all. *See Christian*, 354 Or at 24 n 1. Thus, where, as here, Plaintiffs seek a declaration about the legality of a statute that clearly, and squarely will apply to them, prior to criminal prosecution, the circuit court can make a ruling about whether the statute is constitutional or not. Such ruling is not limited to just the firearms Plaintiffs own now, BM 114 also applies to firearms Plaintiffs want to acquire in the future and ORS 28.020 gives the court that authority.

The Declaratory Judgment Act expands the jurisdiction of courts to include those cases where the petitioner's "rights, status or other legal relations" are affected by the challenged enactment. ORS 28.010. The act is to be liberally construed. ORS 28.120; *Gaffey*, 50 Or App at 621. No actual wrong need be

committed, or loss incurred, to invoke declaratory relief. *Id*. The remedy of a declaratory judgment was designed to relieve litigants of uncertainty by adjudicating their rights before any wrong is committed or damage incurred. *Id.*

Again, Defendants concede that Plaintiffs bring a facial challenge. A review of the Complaint also makes it clear that Plaintiffs also bring an as-applied challenge because the Complaint alleges that Plaintiffs currently, and in the future, want to engage in activities which Measure 114 criminalizes. (*E.g.*, ER-2–5) (purchasing firearms like those they now own that hold more than 10 rounds, carrying firearms that are capable of being modified to hold more than 10 rounds, using magazines that hold more than 10 rounds or can be converted to hold more than 10 rounds). Defendants have not asserted—and certainly did not assert before the circuit court—that Plaintiffs lack standing or a justiciable controversy. Defendants ignore that this case is presented under the Declaratory Relief Act.

Oregon has expanded the availability of declaratory judgments in conjunction with the trend to make declaratory judgment available as a vehicle to challenge criminal statutes. *Gaffey*, 50 Or App at 622. Some case law, and factual circumstances exist where declaratory relief cannot be used to challenge criminal statutes, but those are merely justiciable controversy, standing, and ripeness questions that are not at issue here. *Id.* Accordingly, this court can review the legality of BM 114 and issue a declaratory judgment with respect to Plaintiff's

rights, status and legal relations between their Oregon Constitutional rights, and this new statute BM 114.

Defendants argue that the prohibition on overbreadth constitutional challenges taking place in criminal defense cases like *Christian* should be applied here to the facial challenge portion of a case under ORS 28.020. Defendants are wrong where it insists that if this Court can find even one constitutional application of Measure 114—with respect to any person, any firearm, or any other aspect—then this Court cannot make a ruling as to Plaintiffs' rights under the Declaratory Judgment Act. That argument directly conflicts with the controlling case law on ORS 28.020. To rule otherwise would mean that this case can only lead to legal determinations for Plaintiffs' specific makes, models, calibers, and capacities of firearms, and would establish an absurd standard whereby Oregonians would have to cited, arrested, charged, and prosecuted before they could challenge Measure 114, essentially nullifying ORS 28.020 as applied to regulations involving arms. Moreover, a separate claim would have to be made for each specific make, model, caliber, and capacity of firearm. There would be either an endless stream of thousands upon thousands of varieties of as-applied challenges to every specific make, model, caliber, and capacity of firearm, or many Oregonians would ignore the new law and technically be violating it with police unsure about its enforceability. Can Defendant or anyone rationally expect there to be an inventory

or list of which makes, models, serial numbers, date, type, brand, that has each uniquely been ruled constitutional or unconstitutional under BM 114? The combinations used in today's firearm market are countless because they are ever changing.

This Court can disregard Defendants' misguided arguments on this topic because it plainly conflicts with the Declaratory Judgment Act and because Plaintiffs have standing to raise the issue of Measure 114's validity in a declaratory judgment proceeding. A person has standing if his "rights, status or other legal relations" are affected by the ordinance. Standing requires an allegation of a direct, substantial interest in the controversy, ORS 28.020. *Gaffey*, 50 Or App at 623 (citing *Gortmaker v. Seaton*, 252 Or 440, 450 P2d 547 (1969)).That declaration of unconstitutionality will apply to Plaintiffs, Defendants, and Measure 114 generally, so after such a ruling it would not be enforceable on others either. *Id.* at 633 ("Because we determine the ordinance is unconstitutional, we are confident the defendants will not seek to enforce it, and it is therefore unnecessary to enjoin enforcement").

In sum, Plaintiffs have statutory authority to challenge both the permit to purchase requirement, and the magazine capacity ban, as both major sections of Measure 114 apply to Plaintiffs now and will apply to them in the future as specifically as alleged in the Complaint. There is a direct conflict between

Plaintiffs' Article I, Section 27 rights and Measure 114.

D. Measure 114 Bans the Vast Majority of Firearm Magazines

As a threshold issue, Defendants dispute Plaintiffs' and the circuit court's interpretation of Measure 114's definition of "large capacity magazine." BM114, § 11(1)(d). However, the interpretation of Section 11(1)(d) is not outcome determinative and, therefore, does not need to be addressed. To the extent this Court does address Defendants' interpretation, that interpretation not a reasonable interpretation, and there has been no determination of unconstitutionality. Therefore, there is no clear legal error or abuse of discretion in the circuit court's preliminary interpretation of Measure 114's magazine ban and the relief granted should not be disturbed on mandamus.

First, there is no evidence on the record that the circuit court would have changed its preliminary rulings in this case based on a different interpretation of Section 11(1)(d). The circuit court made factual findings that show that its rulings would not have changed, including finding that "large capacity magazines are in fact ubiquitous" and that "[i]n Oregon . . . 49.8% [of firearm owners] are estimated to own magazines that hold 11 plus rounds." (ER-704).

Defendants argue that the circuit court was required to accept Defendants' interpretation pursuant to *State v. Harmon*, 225 Or 571, 258 P2d 1048 (1961). However, the circuit court is only required to do so where "another construction is

reasonable which will uphold the constitutionality of the statute." *Id*. at 577. Defendants' argument fails on both counts. The circuit court did not determine that Defendants' interpretation was reasonable because it required the circuit court to *not* give effect to all provisions of the definition. (ER-674–80). Further, the circuit court did not determine that Measure 114 would be constitutional if Defendants' interpretation was upheld. This is a preliminary matter and ultimate questions of fact and conclusions of law were not before the circuit court; rather, what was before the circuit court was a determination of whether Plaintiffs had a likelihood of success. That decision relies upon and exercise of the court's discretion in applying the ORCP 79 standards. *Elkhorn Baptist Church*, 366 Or at 543. Therefore, even if this Court determines that this one interpretation was *clear legal error*, any such error would not be outcome determinative and, therefore, irrelevant for Defendants' purpose of reversing the preliminary injunctive relief.

Turning to the definition, Measure 114 defines "large capacity magazine" as follows:

> "Large-capacity magazine" means **a fixed or detachable magazine**, belt, drum, feed strip, helical feeding device, or similar device, including any such device joined or coupled with another in any manner, or a kit with such parts, **that has an overall capacity of, or that can be readily restored, changed, or converted to accept, more than 10 rounds of ammunition** and allows a shooter to keep firing without having to pause to reload[.]

BM114, § 11(1)(d) (emphasis added). Here, the definition lists several forms of devices (as well as the catch-all "similar devices") which feed ammunition to the chamber of a firearm and are, therefore, affected by this definition. The word "including" demonstrates that list *includes* the first examples provided, the catch-all "similar devices, and "any such device joined or coupled with another in any manner, or a kit with such parts." *Id.* That is the list of potentially affected devices.

The next part of the definition defines the subset of listed affected devices that are now banned. That subset includes devices that have an overall capacity of more than 10 rounds of ammunition, as well as devices that can be readily restored, changed, or converted to accept more than 10 rounds of ammunition. *Id.* Therefore, to determine whether a magazine or similar device is banned under Measure 114, courts will do a two-step analysis.

The first step will be determining whether the device falls under any of the listed categories of affected devices and, if not, whether it is similar to any of the listed categories. If a court agrees that the device meets that part of the definition, the next step of the analysis will be to determine whether the device is included in the subset of banned devices, which will require a court to determine whether the device has an overall capacity of more than 10 rounds, or whether it can be readily restored, changed, or converted to accept more than 10 rounds.

Defendants assert that the circuit court read out and ignored the language "including any such device joined or coupled with another in any manner, or a kit with such parts" from the definition. That is incorrect. The circuit court properly included devices that are joined or coupled with another and kits with such parts among the wide set of listed devices that may, or may not, be included in the narrower subset of devices that are banned under Measure 114 because they have an overall capacity of more than 10 rounds or can be readily restored, changed, or converted to accept more than 10 rounds. Moreover, since Measure 114 is a ballot measure, the parties have no legislative history to examine. However, the voter pamphlet Defendants cite (ER-782) shows that the "readily modifiable" language was intentional, and not surplusage as Defendants wish to interpret it.[5]

Defendants also ignore and omit the evidence presented that aided the circuit court in making its *preliminary* interpretation of Section 11(1)(d) and Plaintiffs' likelihood of success in light of that preliminary interpretation. For example, Plaintiffs' witness James Christensen provided five examples of magazines and firearms that a popular distributer, Midway USA, would not ship, as well as the reason Midway USA provided. (SER-4–11, 276–79). Among these were firearms marketed as so-called *California-compliant* firearms that cannot be shipped to

[5] State of Oregon, *Voters' Pamphlet, Oregon General Election November 8, 2022* https://oregonvotes.gov/voters-guide/pdf/book13.pdf#page=81 (accessed January 27, 2023).

Oregon. Plaintiffs also provided a copy of California Penal Code 16740 to highlight the differences between the two laws in light of Defendants' repeated assertions that California-compliant firearms and magazines would be legal in Oregon and that Measure 114 Section 11(1)(d) should be interpreted to do exactly what California's ban does. (SER-85).

The circuit court's preliminary injunctive relief should not be disturbed on mandamus. First, the circuit court's interpretation of Section 11(1)(d) was not outcome determinative and, therefore, if there was error, reversing that error would have no effect on the relief the circuit court granted. Further, Defendants' arguments regarding the canon of construction advanced in *Harmon* is inapplicable because the interpretation Defendants advance is unreasonable and requires the circuit court to ignore the effect of all provisions and deem crucial language as surplusage. Last, the circuit court's preliminary interpretation of Section 11(1)(d) may change upon a finding of unconstitutionality; however, what was determined at this phase of the litigation was a likelihood of success, and Plaintiffs' interpretation is, at a minimum, reasonable, if not the most reasonable, interpretation, therefore showing a likelihood of success. As such, the relief Defendants request should be denied.

E. Plaintiffs are Likely to Succeed

The circuit court has made numerous *preliminary* findings of fact which, when applied to Article I, Section 27 and this Court's precedential caselaw, entitle

Plaintiffs to the preliminary injunctive relief sought. (ER-322–32, 695–719). Defendants, through this writ of mandamus, attempt to have this Court prematurely engage in substantive appellate review of preliminary factual matters determined by the circuit court. In the evidentiary hearings below, Plaintiffs presented evidence on all of the relevant preliminary factual determinations necessary to support the preliminary relief. While these are preliminary findings of fact for the limited purpose of granting preliminary relief to Plaintiffs, they are findings of fact nonetheless and Defendants cannot attempt to circumvent the proper appellate procedure through mandamus by calling preliminary findings of fact fundamental legal error. *See Butts*, 258 Or at 58–59; *Bain*, 193 Or at 703; *Gibson*, 270 Or App at 617. As such, this Court should deny Defendants' petition.

1. Ballot Measure 114, Section 11, is Facially Unconstitutional

The magazines banned by Measure 114 constitute arms under Article I, Section 27; neither this Court, nor any other Oregon court, has reached the contrary conclusion. Therefore, the legislature (or, here, the people) is limited to regulating certain *manners* of possession, *manners* of use, or *possession* by *certain dangerous* groups. In so regulating, the regulation must actually satisfy its professed public safety goals and must not infringe on the rights of Oregonians as recognized and guaranteed by Article I, Section 27 while doing so. Here, Measure 114 fails on both accounts. Measure 114 bans not only the vast majority of magazines but, by

extension, nearly all firearms as a result because there are not compliant magazines available, and a magazine is an integral component of a firearm. In doing so, Defendants profess to advance a public safety goal based almost entirely on gun violence in other states, but not Oregon, and have chosen to advance a policy that its own evidence shows will not advance that goal. Defendants' policy infringes on Plaintiffs' and all Oregonians' rights to access modern firearms that are ubiquitous to Oregon by banning the vast majority of firearms and magazines and instantly presuming the guilt and criminality of hundreds of thousands of Oregonians. To justify their policy, Defendants rely on their own belief that the market may, someday, fill the chasm left by Measure 114, as well as the provision of an affirmative defense that would be virtually impossible to prove or disprove.

Defendants cite absolutely no caselaw in support of their argument that magazines do not constitute arms. While this question has not been squarely addressed by this Court, federal caselaw repudiates Defendants' bare and unsupported assertion. *See e.g.*, *Fyock v. City of Sunnyvale*, 779 F3d 991, 998, 2015 US App LEXIS 3471 (9th Cir 2015) ("our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable.") (citing *Jackson v. City & Cty of S.F.*, 746 F3d 953, 967, 2014 US App LEXIS 5498 (9th Cir 2014) (right to possess firearms implies corresponding right to possess ammunition necessary to

use them). The three purposes for which Article I, Section 27 was written, as this Court identified in *Kessler*, require that Oregonians have the right to maintain their arms in an operable condition for defense of themselves and the State. *See Kessler*, 289 Or at 366. In *Heller*, the United States' Supreme Court specifically upheld the right to keep a handgun in an operable state "for the purpose of immediate self-defense." *District of Columbia v. Heller*, 554 US 570, 635, 128 S Ct 2783 (2008); *see also Duncan v. Becerra*, 266 F Supp 3d 1131, 1142, 2019 US Dist LEXIS 54597 (SD Cal 2019) ("But without a right to keep and bear triggers, or barrels, or ammunition and the magazines that hold ammunition, the Second Amendment right would be meaningless."), *rev'd*, *Duncan v. Bonta*, 19 F4th 1087, 2021 US App LEXIS 35256 (9th Cir 2021), *rev'd*, *Duncan v. Bonta*, 142 S Ct 2895, 2022 US LEXIS 3233 (2022). In *Heller*, the United States Supreme Court examined two 18th century dictionaries from shortly prior to nation's founding and concluded that *arms* included "weapons of offence, or armour of defence" and "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." *Heller*, 554 US at 581–82.

Defendants misstate Plaintiffs' position, claiming that Plaintiffs have *conceded* that a magazine is a firearm accessory and not a firearm. First, the full quotation states that, "Article 1, Section 27 does not support an outright ban on any firearm, let alone a firearm accessory (critical to the operation of the firearm) that

comes standard with many of the most popular firearms and firearm platforms." (ER-51). Defendants fail to consider the difference between the broad category of *arms* and the narrower sub-category of arms called *firearms*. It would be inaccurate to say that ammunition is a firearm, but ammunition is certainly an *arm* within the meaning of Article I, Section 27. Likewise, a trigger (standing alone) is not a firearm, but it is a component that is critical to the operation of the firearm and, therefore, an arm. As this Court has repeatedly held, Article I, Section 27 does not only protect *firearms*, but protects *arms*. Moreover, just as the spring in a switchblade (which is necessary to operate the switchblade) was a modern change in design and function to its antecedent (the jackknife), so too is a detachable magazine a modern change in design and function to rifles, pistols, and shotguns, as well as multi-shot firearms more broadly, including those with tubular magazines. (ER-698, 696 (the circuit court adheres to its oral findings from December 6, 2022), 327–28, 707). A spring is not a knife, and a magazine is not a firearm, but both are arms.

Magazines capable of holding more than 10-rounds are protected by Article I, Section 27. This Court's holding in *Kessler* only intimates the potential that blanket bans on entire class upon a finding that the entire class of arms is unprotected. *Kessler*, 289 Or at 369. Defendants have put forth no evidence from which the circuit court could conclude as a preliminary finding of fact in favor of

Defendants on that issue. To the contrary, Defendants' own expert agreed with Plaintiffs' expert that civilian technology brought about advancements in multi-shot firearm technology, not the other way around, and that the arms banned by Measure 114 were not developed for exclusive use by the military, nor are they exclusively used by the military. (*e.g.*, ER-535). Plaintiffs have submitted evidence showing that firearms and magazines capable of holding more than 10-rounds are so common as to be ubiquitous and that magazines capable of holding more than 10-rounds are standard for most popular civilian firearms including 90% of standard size handguns and most rifles and shotguns. (ER-328–29, 483–92, 498–99, 702, 704 ("declarant Hanish states that large capacity magazines are in fact ubiquitous").

(a) The Circuit Court Applied the Correct Test

This Court's holding in *Delgado* further underscores its ruling in *Kessler* that "[t]he appropriate inquiry in the case at bar is whether a kind of weapon, as modified by its modern design and function, is of the sort commonly used by individuals for personal defense" prior to 1859. *Delgado*, 298 Or at 400–01. Plaintiffs have demonstrated, Defendants have not disputed, and the circuit court has agreed that the sorts of firearms available pre-1859 included rifles, revolvers, pistols, and shotguns, as well as multi-shot varieties of each with varying capacities. These firearms are the historical antecedents to every modern rifle,

revolver, pistol, and shotgun available on the market today, including multi-shot varieties of each, and have only been improved by their modern design and function to be safer, more accurate, and better suited to the user. These rifles, revolvers, pistols, and shotguns remain ubiquitous today in their descendants. They are also banned under Measure 114. The circuit court was correct to conclude that these are protected arms and was, therefore, required to perform the second and third steps of the analysis.

In addition to demonstrating that the same *sorts* or *kinds* of firearms existed pre-1859, Plaintiffs have also demonstrated that multi-shot technology has existed in common use in the United States and Oregon since before the founding of either. (*e.g.*, ER-597–98, 602–04). Plaintiffs have also shown several more advanced examples of multi-shot technology—*e.g.*, pepperbox revolvers (ER-540–41), Girandoni air rifle and other air rifles (ER-540), Volcanic (ER-539, 606), Spencer repeater (ER-607–08), Henry repeater (ER-607), Jennings rifle (ER-540, 551, 623–24)—that, taken together, demonstrates that firearms capable of firing more than 10-rounds were well-known to Americans, including Oregonians, and **are not** "advanced weapons of modern warfare [that] have never been intended for personal possession and protection." *Kessler*, 289 Or at 369; (ER-555 ("Q: Were the multi-shot firearms being developed intended for civilian use? A: I would say that they were, without exception, developed for civilian use unless you were

talking about field artillery, heavier weapons that are specifically for a more military use."). This technology, like all technology, has evolved and improved by its modern design and function to adapt, for instance, detachable magazines as the preferred tool over tubular magazines or single shot varieties. Multi-shot technology has also evolved and improved in modern design and function to allow for greater capacity. The circuit court was correct to conclude that arms with multi-shot technology are protected arms and was, therefore, required to perform the next steps of the analysis.

Turning to the next step of the analysis, the first issue for Defendants is that Measure 114's magazine ban is unlikely to advance its stated goal of public safety. This is because the mass shootings it intends to stop are so rare that the sample size is too small to determine whether a magazine ban will have any effect on mass shootings whatsoever. (*e.g.*, ER-697–701). The circuit court found, citing to Defendants' own evidence, that magazine bans cannot be said to actually accomplish the public safety goal of reducing mass shootings. *See e.g.*, *Id.* That conclusion had to be based on more statistically significant sample size using national data, not Oregon data. Further, Defendants have failed to show that there is even a mass shooting problem in Oregon capable of being solved. Indeed, of the mass shooting tragedies cited in Defendants' introductory paragraph, not one occurred in Oregon. Of those cited in Defendants' second paragraph, only two—

Thurston High School (1998) and Umpqua Community College (2015)—are actually classified as mass shooting events involving four or more fatalities (ER-700). Indeed, Defendants state that Oregon "has suffered mass gun violence" citing to (ER-157–59). Opening Brief, 45. The cited materials reference Thurston High School and Umpqua Community College, meaning that Oregon has had two mass shootings in 73 years since 1949.

This Court has required that the regulation must actually satisfy the purpose for which it claims to be constitutionally enacted. *Hirsch*, 338 Or at 677–78. Here, that purpose is public safety by reducing mass shootings. (ER-28). On the evidence before it, the circuit court preliminarily concluded that Oregon does not have a mass shooting problem and, if it did, the national data does not support the conclusion that banning standard size magazines will have any effect nationally, let alone in Oregon. (ER-711–13).

Nevertheless, even if the circuit court or this Court were to conclude that the two mass shootings Defendants cite in 73 years (since the first United States mass shooting in 1949 (ER-157–59, 698–99)) constitutes a public safety issue, and that a ban on magazines capable of holding more than 10 rounds would satisfy the goal of reducing mass shootings, Article I, Section 27 will still disallow a firearm law where the law infringes on the rights guaranteed by Article I, Section 27. *Hirsch*, 338 Or at 677–78; *see Christian*, 354 Or at 38; *Kessler*, 289 Or at 370; *Blocker*,

291 Or at 259; *Delgado*, 298 Or at 400, 403.

The circuit court correctly concluded, as preliminary findings of fact based on the evidence presented to it, that Measure 114 bans the vast majority of firearm magazines, including magazines that hold 10- or fewer rounds but that can be "readily restored, changed, or converted to accept" (ER-38) more than 10 rounds of ammunition due to the availability of extenders or the simple removal of rivets installed by the manufacturer. (ER-701–03). On this and other evidence before it, the circuit court preliminarily concluded that Plaintiffs have a likelihood of success in proving that Measure 114 infringes on Oregonians' right to bear arms. (ER-713–16). Indeed, the circuit court concluded that turning nearly half of Oregonians into presumed criminals overnight and requiring that they affirmatively prove their innocence runs afoul of the requirement that a firearm regulation not infringe on the rights of Oregonians.

As articulated above, Defendants disagree with the circuit court's preliminary conclusions of fact on this issue. Surely, the circuit court's ultimate factual findings and conclusions of law will be reviewed by the Oregon Court of Appeals, and potentially this Court. This is a matter of great importance for all involved on both sides. However, Defendants have not (and cannot) show that the circuit court applied the wrong test, thus presenting clear legal error, or that the circuit court otherwise lacked the discretion to, or abused its discretion in, granting

relief which the law and facts before it supported. The circuit court has concluded that Plaintiffs met their burden for the first of the four requirements for a preliminary injunction, and mandamus is not the proper procedure for reviewing the findings of fact that supported that determination.

(b) Defendants' Contrived Test

Defendants urge this Court to employ a new, narrower test with a still narrower method of interpreting which firearms meet that test, with the result that nearly all modern firearms commonly owned by Oregonians today would become *unprotected arms* and therefore ban-able under Article I, Section 27. Defendants' interpretation would render all three purposes for which this Court has recognized Article I, Section 27 was drafted useless because Oregonian access to firearms would be relegated to antiques possessing the precise designs and functions available to Oregon's pioneers. Indeed, by Defendants' logic, an arm can be banned even if it has adopted technology that makes the firearm safer (*i.e.*, adoption of safety measures which prevent accidental discharge of firearms that were adopted post-1859).

Defendants assert that Plaintiffs must show the common ownership and use of a specific firearm that accepted a detachable magazine capable of holding more than 10-rounds prior to 1859. This is far more than this Court has required under *Kessler*, *Delgado*, or any other Oregon Supreme Court case. Defendants

completely read out this Court's instruction to consider the *sort or kind*, as modified by its modern design and function, rather than the precise firearm design or function, when analyzing whether Article I, Section 27 protects an arm or class of arm. Further, Defendants substitute the requirement that the *kind* or *sort* was common, substituting a requirement of their own creation that Plaintiffs demonstrate that a specific firearm (*i.e.*, the Volcanic)–possessing identical design and function—was common prior to Oregon becoming a state on February 14, 1859. In fact, both Defendants' and Plaintiffs' proffered experts agreed that there can be no such showing for any firearms in the period *Kessler* instructs lower courts to consider due to there being no reliable purchase tracking records, as well as the fact that most firearm manufacturers at this time were artisans, greatly unlike the large manufacturers that would later dominate the 20th century. (*e.g.*, ER-544–45, 547, 551–53, 614–15).[6]

[6] Defendants further urge this Court to rely on an outlier Court of Appeals case and find that the circuit court failed to adhere to the case specific factual findings from *Oregon State Shooting Ass'n*, arguing that Plaintiffs citation to several firearms capable of firing multiple rounds, as well as more than 10-rounds without reloading was foreclosed by the factual findings in that case. However, that case sits in direct conflict with the rules of law and test for Article 1, Section 27 from *Kessler*, *Delgado*, and *Christian*. However, this new test was not used in *Christian*. Instead, this Court reiterated its *Kessler* test in *Christian*, and did not cite to *Oregon State Shooting Ass'n* at all, let alone in approval of the novel test it proposed. *Christian*, 354 Or at 30. Furthermore, that case concerned what was called at the time an "assault weapons" ban not multi-shot technology. *Oregon State Shootnig Ass'n*, 122 Or App 540, 543, 858 P2d 1315 (1993). Further, the circuit court was not required to adopt the factual findings of the Court of Appeals

Defendants next assert that a regulation on arms *need only* satisfy a permissible legislative purpose of public safety, asserting some sort of rational basis test. Indeed, before the circuit court, Defendants asserted that the circuit court must employ rational basis analysis on two occasions. (ER-663, 666). Contrary to Defendants' proposed watered-down legal standard, this Court has not required only that the government merely assert that its aim is public safety and provide some rational basis for why the regulation will meet that end. Rather, this Court has required that the restriction actually promote public safety "in the face of" Oregonians' rights under Article I, Section 27. This means that Defendants must make a showing, supported by evidence, that the law will actually promote public safety. Even then, that law must not deprive Oregonians of their rights to bear arms pursuant to Article I, Section 27. *Hirsch*, 338 Or at 677–78 ("That is not to say, however, that the legislature's authority to restrict the bearing of arms is 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."). But even if certain manners of possession or manners of use might be capable of regulation *in*

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on a different case and different factual record, especially when the questions in each case are completely different. This argument by Defendants should be rejected.

the face of the right to bear arms protected by Article I, Section 27, that is a wholly different concept from a statewide ban on an entire class of arms.

Moreover, this Court has explained that a regulation may not infringe on the rights of Oregonians, even if the regulation promotes public safety. *Christian*, 354 Or 30 ("We have held that Article I, section 27, prevents the legislature from infringing on the people's individual right to bear arms for purposes limited to self-defense."), 33 ("We have consistently acknowledged the legislature's authority to enact reasonable regulations to promote public safety as long as the enactment does not unduly frustrate the individual right to bear arms for the purpose of self-defense as guaranteed by Article I, section 27.").

Here, Defendants provide no analysis or explanation on why a total ban on the vast majority of firearms presently owned by Oregonians does not infringe on the rights of Oregonians. Rather, Defendants provide their bare assertion that magazines are not arms and assert that prohibiting the overwhelming majority of firearms to Oregonians who are overwhelmingly law-abiding is justified in the face of a .30 per million chance of being killed by a mass shooter. (ER-700). Further, the effect Measure 114's magazine ban could have on an Oregonian's .30 per million chance of being killed by a mass shooter is further reduced by the fact that Measure 114 has no effect whatsoever on rounds 1–10 in a magazine, or a potential shooter's ability to reload a firearm with a second, third, fourth, or fifth 10-round

magazine. The even more extremely remote chances of an Oregonian being injured or killed by a mass shooter are not reduced, let alone eliminated, by the elimination of that eleventh or twelfth round of ammunition. The effect is already infinitesimal, so the effect of not having an eleventh or twelfth round in the magazine is even less likely to have any effect on public safety. On the other hand, a law-abiding person having additional rounds in a gun carried for self-defense could make the difference between life and death, especially when facing multiple attackers, or one of the mass shooters against whom Defendants claim the statute is designed to protect (but whom, by definition, do not obey the law, and who certainly will not obey BM114).

2. Ballot Measure 114, Sections 1–10 are Facially Unconstitutional

Defendants do not dispute that the firearms affected by Ballot Measure 114's permit to purchase program are protected arms. Nor do Defendants dispute that, *even if* public safety is somehow promoted in some way that Measure 114 infringes on the right to bear arms guaranteed to Oregonians in Article I, Section 27. *See Christian* 354 Or at 33 (citing *Hirsch*, 338 Or at 677).

Here, even though Defendants have not shown that Measure 114 advances public safety,[7] Sections 1–10 fail for another reason. Specifically, they do not

[7] Indeed, Plaintiffs and Amici contend that a decrease in the availability of self-defense firearms increases crime.

merely regulate the manner in which Oregonians can possess firearms or the manner in which Oregonians can use firearms. Instead, they regulate whether a law-abiding Oregonian can acquire a firearm at all, a complete extinguishment of the right to keep and bear arms.

(a) The Permit to Purchase Program was Correctly Enjoined

Defendants contend that the circuit court committed clear legal error by not conducting the legal inquiry required by this Court's caselaw to determine constitutionality. However, Defendants waived this argument, and actually requested that the circuit court wait to take evidence on the permit to purchase issue until Defendants had a program capable of implementation and constitutional scrutiny. Defendants further and incorrectly assert that the circuit court has enjoined the program indefinitely. Moreover, Defendants also waived this argument and not only consented, but actually requested that the circuit court continue its order until Defendants have the permit to purchase process in place and ready to implement in lieu of repeated status checks.

In fact, at the December 6, 2022 hearing, Defendants even agreed with the circuit court that it was premature to hear argument on the constitutionality of a program that did not exist. (ER-337–39). Defendants waived their argument and requested that the circuit court not take evidence at the December 13, 2022 hearing, instead telling the circuit court that Defendants only wished to renew their

argument that harm was not imminent. *Id*. Now, Defendants somehow claim that irreparable injury will occur if the new ballot measure does not go into effect and the law stays as it has been prior to Measure 114.

Defendants are also incorrect that the circuit court did not engage in any constitutional analysis about the permit to purchase sections. To the contrary, the circuit court concluded that allowing enforcement of the permit to purchase program would act as a complete bar on the sale or transfer of any firearms in the state of Oregon due to the unavailability of the permit, which would violate Article I, Section 27. This was based on Defendants' concession that the permit to purchase program would not be capable of implementation or constitutional scrutiny by December 8, 2022. (ER-326–27). Defendants do not dispute that—absent the injunctive relief that has been granted in this case—no Oregonian would be able to purchase a firearm because Measure 114 requires a permit to purchase for any and all transfers of firearms. *See e.g.*, BM114, §§ 6(2)(a), (d), (3)(c), (7)(a), (13)(b), (14), 7(3)(a), (d)(B), 8(2), (3)(c), 9(1)(a)(A).

Defendants also fail to contend with the fact that the only barrier to the circuit court conducting further inquiry is the fact that Defendants do not have a program ready and have conceded that they will not have a program ready until at least March of 2023. This is, however, now the *third* asserted date by which

Defendants have asserted that the program will be ready,[8] so time will tell whether this third assertion to the judiciary and the people of Oregon will actually occur. Defendants' argument that this Court *must step in now* and allow a permit system Defendants cannot even implement take effect is wholly without merit.

Defendants also falsely assert that the circuit court has improperly enjoined to permit to purchase program indefinitely. To the contrary, the temporary restraining order has a definite end that is wholly within Defendants' control. The circuit court has issued a temporary restraining order temporarily restraining the enforcement of the permit to purchase program until the program *exists* and is capable of constitutional scrutiny, and will schedule a hearing on the preliminary injunction upon 10-days notice from Defendants. (ER-303–05, 310–11). Further, Defendants consented to the circuit court's decision regarding the timing component of the temporary restraining order on multiple occasions, only objecting to the entry of a temporary restraining order in the first place on the assumption that Plaintiffs had not presented imminent harm. (ER-465–66, 835–37). Indeed, the circuit court even asked Defendants whether they would prefer regular status checks or to notify the circuit court when the permit to purchase program was ready so a hearing on the preliminary injunction could be scheduled

[8] Defendants asserted to the federal court that the program would be ready by December 8, 2022 (ER-303–04), then February 8, 2023 (e.g., ER-451) and now March 8, 2023 (ER-835–36).

within 10-days, and Defendants requested to proceed with the latter. *Id.*

Any procedural irregularities in this case have been caused by Defendants' inability to implement the law they are so ardently defending. The circuit court has acted reasonably and well within the bounds of its discretion and the law, especially in light of the procedural irregularities Defendants have caused. Defendants consented to the circuit court's actions (though Defendants dispute the imminence of harm, which is addressed later) but now assert that it was legal error by the circuit court to act as Defendants requested. This Court should not disturb the circuit court's rulings on this issue and the temporary restraining order should remain in place until Defendants have a program that is capable of defense by Defendants and scrutiny by the circuit court.

The circuit court has made no conclusions (legal or factual) whatsoever as to the constitutionality of the permit to purchase program. The circuit court has only recognized the obvious—that letting Defendants require a permit to obtain a firearm, when no permits can actually be issued, will entirely shut down firearm commerce in Oregon and eliminate the right to purchase. This Court should reject Defendants' invitation to usurp the role of the circuit court and to decide both the facts and the law on this issue in the first instance.

(b) <u>The Permit to Purchase Program is Facially Unconstitutional</u>

Plaintiffs assert that Oregonians do have an unqualified right to purchase a

firearm without first being required to obtain a permit. This Court has identified the two permissible types of firearm regulations that can be enacted (manner of possession and manner of use), and a permit to purchase fits neither of those categories. Defendants assert that a permit to purchase program is facially constitutional, stating that *Hirsch* forecloses any argument to the contrary. Defendants' reading of *Hirsch* stretches the holding in that case to an absurdity. Furthermore, Defendants' failure to provide any explanation for how *Hirsch* (which concerned the conviction of a felon in possession of a firearm) applies to a permit to purchase that applies to every law-abiding Oregonian is glaring. *See Antonyuk v. Hochul*, 2022 U.S. Dist. LEXIS 182965 (N.D.N.Y. Oct. 6, 2022), ___ ("it seems overreactive (and a bit offensive) to literally analogize the need to regulate concealed-carry applicants to the need to regulate 'groups deemed dangerous.'"). However, even if the circuit court were to disagree with Plaintiffs and proceed to the next steps of the analysis, the next steps are highly fact-dependent and require a program that is capable of constitutional scrutiny before the circuit court can perform that analysis. As such, the circuit court was correct to exercise its discretion pursuant to ORCP 79 B(2)(a) to extend the temporary restraining order beyond 10-days for good cause shown.

Defendants assert that the permit to purchase program regulates the manner of possession or manner of use of firearms. This is simply incorrect. To the

contrary, as is plain from the face of Measure 114, the permit to purchase program regulates the mere acquisition and ownership of firearms, requiring that Oregonians prove their worthiness and obtain a permit before exercising a constitutionally protected right under Article I, Section 27. In support of their argument, Defendants first cite *Delgado*, which says that Oregonians do not have "an unfettered right to possess or use constitutionally protected arms **in any way they please.**" *Delgado*, 298 Or at 403 (emphasis added). There, *Delgado* is underscoring the legislature's ability to regulate the *manner* of possession or *manner* of use, and nothing in *Delgado* addresses acquisition of firearms whatsoever. As articulated above, regulating the manner of possession or manner of use encompasses legislation such as the 1678 Massachusetts law forbidding shooting (manner of use) a firearm in certain circumstances, the 1327 Northampton statute that forbade riding at night carrying a firearm for the purpose of terrifying the people (manner of possession). *Kessler*, 289 Or 369–70. Even looking to a modern example from *Christian*, this Court upheld a Portland ordinance prohibiting the carrying of a recklessly loaded firearm. *Christian*, 354 Or at 26. Again, that would be an example of a law regulating the manner of possession of a firearm, not the mere acquisition or ownership of a firearm. Defendants do not explain anywhere in their petition how requiring Oregonians to obtain a permit before purchasing a firearm regulates the manner in which Oregonians may

possess firearms or the manner in which Oregonians may use firearms.

Defendants next cite to *Hirsch*, which states that the legislature may "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 . . . restrict the exercise of the constitutional guarantee by members of those groups." *Hirsch*, 338 Or at 677.

First, Defendants have failed to identify which "certain group of persons" they have designated as posing identifiable threats to the safety of the community in BM 114. As the permit to purchase provisions apply to every Oregonian, it appears that Defendants are asserting that the State of Oregon has identified its entire population as an identifiable threat. Defendants imply as much, stating that the permit is intended to ensure that new purchasers of firearms are properly trained. However, that justification fails because Defendants are only entitled to identify a *certain group of persons* as posing an identifiable threat "by virtue of earlier commission of serious criminal conduct . . ." *Hirsch*, 338 Or at 677; *See also Kanter v. Barr*, 919 F3d 437, 454, 2019 US App LEXIS 7722 (7th Cir. 2019) (Barrett, J., dissenting) ("that power [to disarm people who are dangerous] extends only to people who are dangerous"); *Bruen*, 142 S Ct at 2123 (the "'suitable person' standard precludes permits only to those 'individuals whose conduct has shown them to be lacking…."). The label of *serious, dangerous criminal* cannot

possibly be applied to Oregon's entire population. Further, pursuant to *Hirsch*, once Defendants have identified that certain group, Defendants are entitled to restrict the exercise of the constitutionally guaranteed right under Article I, Section 27, **by that group.** *Id.* They are not entitled to require that every person in the state suffer the same restrictions as the identified group.

In addition to the training requirements, Defendants assert that a permit is necessary to ensure that Oregonians pass a criminal background check prior to purchasing a firearm. But this is disingenuous. As addressed more thoroughly in the next section, every Oregonian purchasing a firearm is already required to submit to a criminal background check when purchasing a firearm, and Defendants provide no explanation or justification for why one background check every five years for a permit will actually satisfy Defendants' professed goal of promoting public safety in a way that criminal background checks already performed every time at the point of transfer do not.

Plaintiffs assert that this argument, on its own, is sufficient for the circuit court to determine that the permit to purchase program is unconstitutional, prophylaxis upon prophylaxis. Nevertheless, because the next steps of the *Christian* analysis are fact-dependent (whether the regulation actually promotes public safety and whether the regulation infringes on the rights of Oregonians), it was reasonable and within the circuit court's discretion pursuant to ORCP 79

B(2)(a) to extend its temporary restraining order beyond 10-days for good cause shown until Defendants have a program in place that is capable of constitutional scrutiny.

Right now, not a single Oregonian can obtain a permit to purchase a firearm, so Measure 114 would operate as a complete ban if allowed to take effect. Until the circuit court has had the opportunity to take evidence on the specifics of the permit to purchase program, it would be improper for this Court to determine—without any findings of fact by the circuit court to review—that the circuit court committed clear legal error or abuse of discretion. As such, the temporary restraining order should remain in place until Defendants have a program that is capable of defense by Defendants and scrutiny by the circuit court.

(c) <u>The Permit to Purchase Program will be Unconstitutional</u>

Defendants assert that Plaintiffs have brought a premature as-applied challenge because Plaintiffs do not know how all of the specific provisions will be applied. Defendants fail to recognize that this case is presented under ORS 28.020 and can declare the rights of the parties with respect to a statute and the constitution before it is actually applied. What Defendants also omit when making that argument is that, when Plaintiffs filed their Complaint on December 2, 2022, as well as when Plaintiffs filed their motion for a temporary restraining order and preliminary injunction on December 5, 2022, Plaintiffs were still under the

impression that Defendants were prepared to enforce the permit to purchase provision by December 8, 2022 as asserted before the federal court by Mr. Marshall, Defendants' counsel in both the state and federal cases.[9] Plaintiffs' counsel, Mr. Smith, is local counsel for amici curiae in the federal case and heard first hand Defendants' counsel's assurances on that point. Defendants also ignore the fact that the lack of available facts regarding the permit to purchase program is due to Defendants' failure to finalize the program. (APP-11) (federal district court hearing on temporary restraining order held December 2, 2022).

In addition to regulating the manner of possession and manner of use of arms, this Court has held that a constitutional firearm regulation must actually satisfy the purpose for which it claims to be enacted. *Hirsch*, 338 Or at 677–78. In doing so, the regulation must not infringe on the individual right to bear arms guaranteed by Article I, Section 27. *Christian*, 354 Or at 33; *Kessler*, 289 Or at 370. Once Defendants produce a permit to purchase program capable of constitutional scrutiny, Plaintiffs assert that the program will be unconstitutional because it will not actually promote public safety and will certainly not do so

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[9] Bernstein, Maxine, *Oregon Measure 114 gun control challenge heard in court*, THE OREGONIAN https://www.oregonlive.com/crime/2022/12/oregon-measure-114-gun-control-challenge-heard-in-court.html ("If the measure is allowed to become state law, Oregon Senior Assistant Attorney General Brian Simmonds Marshall told the judge, Oregonians will be able to apply for a permit to purchase a gun on Dec. 8.") (published December 2, 2022 at 3:30 p.m., updated December 6, 2022 at 4:54 p.m.).

without infringing on the constitutional rights of Oregonians. As no factual evidence has been presented to the circuit court on that point, it is premature for Defendants to ask this Court to find the contrary. To the extent the circuit court finds that a permit to purchase program might promote public safety, the program will be so expensive, time consuming, and arduous—as well as duplicative and potentially impossible—that it will without any doubt infringe the rights of Oregonians to bear arms. However, until numerous fact determinations are made by the circuit court based on an existent program, it would be premature for the circuit court or this Court to determine that the permit to purchase promotes public safety without infringing the rights of Oregonians.

There are many unknown issues of fact concerning whether the permit to purchase program will have any effect on public safety. For instance, there is the threshold question of whether there is a public safety issue to solve. Defendants assert that the state-mandated training portion of the permit to purchase program will ensure that new firearm purchasers are *properly* trained, but the circuit court will need to determine whether supposedly untrained new firearm purchasers present a public safety concern and, if so, whether the state's chosen regulation infringes on their rights. The circuit court will also have to determine whether those who already own firearms, such as Plaintiffs Arnold and Asmussen, present a danger to public safety and, if so, whether the state's chosen regulation infringes

on their rights. The circuit court will also have to determine whether the quinquennial renewal requirements address public safety whatsoever since the educational component is not required to renew the permit, or whether unnecessarily duplicative renewals constitute infringement. BM114, § 4(7)(a), (b). The circuit court will also have to determine whether the duplicative background checks generally promote public safety, or whether they constitute infringement since Oregonians will still be required to undergo a second background check at the point of transfer.

There are many unknown issues of fact that will bear on the circuit court's determination of whether the permit to purchase program infringes on the rights of Oregonians under Article I, Section 27. For instance, the circuit court will have to determine how much each step of the program costs and whether the costs are so exorbitant, or the process so lengthy and arduous, as to deny an ordinary citizen their right to bear arms. *See Christian,* 354 Or at 30; *Hirsch*, 338 Or at 677–78 ("That is not to say, however, that the legislature's authority to restrict the bearing of arms is so broad as to be unlimited."); *see generally N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S Ct 2111, 2128–29 n 9, 2022 US LEXIS 3055 (2022). Measure 114 only states that "[t]he permit agent may charge a reasonable fee reflecting the actual cost of the process but shall not exceed $65, including the cost of fingerprinting, photographing and obtaining a criminal background check."

BM114, § 4(3)(b). Measure 114 provides no details on the cost for the two firearm safety courses required before an Oregonian can obtain a permit to purchase. *See* BM114, § 8. Will taking the course be sufficient, or will an applicant have to take a test before they will be *permitted* to exercise their constitutional right? *See* BM114, § 8(c)(A)–(C) (Measure 114 states that the course must *review* federal and state laws in (A) and (B) but no evidence has been presented to the circuit court thus far on the actual test). Will an applicant be able to bring their own firearm for the in-person demonstration pursuant to Section 8(c)(D)? If so, what kind of firearm must an applicant bring and how are they supposed to acquire it if they do not yet have a permit? Does Measure 114 require a legal impossibility? That subsection requires an applicant to demonstrate the applicant's ability to "lock, load, unload, fire and store a firearm . . ." so an applicant would presumably have to bring a firearm with a detachable magazine capable of being *locked* into the firearm before *loading* (chambering) a round. That is unless Measure 114 means *locking* the safety mechanism of the firearm before *loading* the magazine into the firearm, which would then require a firearm that has a safety mechanism *and* accepts a magazine. As for first time firearm purchasers, will a firearm be provided to them for this in-person demonstration? As ORS 166.435(2), (5)(a) makes it a crime to loan a firearm to another person unless the transferee is in the transferor's presence, an applicant will be unable to perform the in-person demonstration unless a family

member under ORS 166.435(4)(c) lends them the firearm or another person lends the applicant a firearm and remains in the applicant's presence at all times during the in-person demonstration. If a firearm will be provided, what kind of firearm? A pistol? Revolver? Rifle? Shotgun? Will that firearm or another similar firearm be made available to the applicant for practice before the in-person demonstration? Further, since the background check requirement for a permit to purchase or permit renewal is wholly duplicative, the circuit court may conclude upon examining the evidence, if any, on the public safety impacts of duplicate background checks that a second background check does not promote public safety. The circuit court may also determine that duplicative background checks constitute infringement.

Because determining whether a regulation on the manner of use or manner of possession of arms is constitutional still requires factual analysis of (1) whether the regulation actually advances public safety in the face of Article I, Section 27, and (2) whether the regulation infringes on the right to bear arms guaranteed by Article I, Section 27, the constitutionality of the permit to purchase program cannot be determined until it exists. Defendants have not (and cannot) circumvent the circuit court's jurisdiction and role as the factfinder through mandamus. This Court should allow the temporary restraining order to remain in place until Defendants have a program that is capable scrutiny by the circuit court.

3. The circuit court was correct to temporarily restrain Ballot Measure 114, Sections 1–10 "Background Check" Provisions

Defendants assert that the circuit court committed clear legal error by preliminarily concluding that the background check amendment provisions of Measure 114 were likely to be unconstitutional. However, no such analysis took place, and it would be improper for this Court to determine the likelihood of Plaintiffs' success on the merits through mandamus before the circuit court has received evidence or heard argument on that matter. Defendants also assert that the circuit court committed clear legal error by considering severability, asserting that their ORCP 79 D argument was what should have been considered. However, the circuit court considered both Defendants' ORCP 79 D argument and severability argument, both of which were made by Defendants. Last, Defendants assert that the circuit court committed clear legal error by not determining that the constitutionality of background check provision. However, the circuit court determined that the background check amendment provisions of the permit to purchase program were not severable, and because Defendants are not prepared to defend the permit to purchase program itself, this conclusion was proper.

(a) Ballot Measure 114, Sections 1–10 "Background Check" Provisions are inextricably intertwined with the "Permit to Purchase" Provisions

Defendants asked for Sections 1–10 to be removed from the restraining order. Yet at the same time they now assert that severability was the incorrect

analysis for the circuit court to consider. Defendants cited to Measure 114's severability section as their justification for asking the circuit court to narrow the temporary restraining order. Before the circuit court, Defendants simultaneously maintained that severability was the incorrect analysis but that the severability clause of Section 12 required severability. (*e.g.*, ER-780–82, 817). The circuit court properly exercised its discretion to deny this preliminary request.

Section 12 of Ballot Measure 114 reads:

> If any provision of this 2022 Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable. The people hereby declare that they would have adopted this Chapter, notwithstanding the unconstitutionality, invalidity and ineffectiveness of any one of its articles, sections, subsections, sentences or clauses.

(ER-39). Defendants also asserted that ORCP 79 D requires the circuit court to rewrite the law for Defendants, citing the language "shall describe in reasonable detail . . . the act or acts sought to be restrained" from ORCP 79 D as its support. However, as found by the circuit court:

> The language the defendants urge the court to use to sever is inexorably linked with the permit to purchase program. To find otherwise requires the court to ignore the operative language linking each provision on background checks to the permit-to-purchase program. The court would be separating sentences at commas and considering the phrase "permit holder" surplusage. It is not surplusage. The court declines the defendants' invitation to do so at this preliminary stage.

(ER-841). Moreover, Defendants provided no caselaw in support of its contention that ORCP 79 D requires the circuit court to preliminarily and temporarily rewrite the measure during the preliminary phases of a case concerning its constitutionality. To the contrary, ORCP 79 D merely requires that the circuit court be specific regarding the act or acts restrained. *See* ORCP 79 D. Here, the circuit court's December 6 and 13 orders challenged by Defendants specifically stated that Defendants were (and continue to be) restrained from enforcing Ballot Measure 114, Sections 1–10 as requested by Plaintiffs. That level of specificity is all that is required by ORCP 79.

The circuit court also considered Defendants' severability argument. Pursuant to Measure 114, Section 12, the circuit court concluded that there had been no determination of invalidity, unconstitutionality, or ineffectiveness of any article, section, subsection, sentence, or clause, making Section 12 inapplicable. (ER-841). This determination was supported by caselaw agreeing with the circuit court's determination as well. *Id.* (citing *Bernstein Bros., Inc. v. Department of Revenue*, 294 Or 614, 618, 661 P2d 537 (1983); *Standard Lbr. Co. v. Pierce et. al.*, 112 Or 314, 228 P 812 (1924)).

In their severability argument, Defendants contended that the circuit court could rewrite Ballot Measure 114, Sections 6(3)(c), 6(13)(b), (6)(14), 7(3)(d)(B), and 8(3)(c) to remove the requirement for a valid permit to purchase and substitute

other words instead—such as *purchaser* or *transferee*—for permit holder or qualified transferee. Neither ORCP 79 D nor the severability clause requires the circuit court to rewrite a law during the preliminary phase of a case due to a potential requirement to do so upon a later determination of unconstitutionality or invalidity at a later phase of the case. Defendants do not even cite any caselaw supporting that bare contention, yet they claim that it was clear legal error deserving of mandamus relief.

In light of the foregoing, it was neither abuse of discretion nor clear legal error for the circuit court to determine that the background check amendment provisions of the permit to purchase portions of Measure 114 are inextricably intertwined with the permit to purchase portions themselves, at least with respect to the preliminary relief. As such, the temporary restraining order restraining Defendants from enforcing Measure 114, Sections 1–10, should remain in place.

(b) Ballot Measure 114, Sections 1–10 "Background Check" Provisions Have Not Yet Been Ruled Facially Unconstitutional, but Likely Will Be

Defendants also assert that the circuit court committed clear legal error or abuse of discretion by not reaching any conclusion on whether the background check amendment portions of the permit to purchase program are facially constitutional—despite that question not being before the circuit court at the December 23, 2022 hearing. (ER-469–75, 735–36). Defendants further assert that

the background check amendment provisions of the permit to purchase program are constitutional. Defendants are incorrect in both regards.

First, the hearing on December 23, 2022 was focused solely on the issue of whether the background check amendment provisions of the permit to purchase program (Ballot Measure 114, Sections 6(3)(c), 6(13)(b), (6)(14), 7(3)(d)(B), and 8(3)(c)) were severable or capable of separate enforcement as asserted by Defendants. (ER-796–98). There was no determination on whether those provisions, if they are later determined to be severable and are actually severed, would be constitutional. Therefore, mandamus is an inappropriate mechanism for Defendants to assert the constitutionality of those provisions since the circuit court has not taken evidence or argument on that issue, or even asserted whether those provisions are unconstitutional.

Second, assuming that this Court considers Defendants' premature arguments regarding constitutionality, Defendants are incorrect that the background check amendment provisions of the permit to purchase program are constitutional, let alone that arguments against their constitutionality are foreclosed by this Court's precedent.

As addressed regarding other provisions, the legislature (or, here, the people) are limited to regulating the manner of possession or manner of use of firearms and may not regulate the mere acquisition of firearms. *See e.g.*, *Kessler*, 289 Or at 369–

70; *Christian*, 354 Or at 26. Defendants again cite to *Hirsch* as support. However, as articulated above, *Hirsch* allows the legislature 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 . . . restrict the exercise of the constitutional guarantee by members of those groups." *Hirsch*, 338 Or at 677. Defendants assert that, because *Hirsch* allows the legislature to prohibit certain dangerous criminals from accessing firearms, the legislature is similarly entitled to force each and every Oregonian to wait *indefinitely* for the background check to be processed (if it is ever processed) before exercising their rights under Article I, Section 27. Further, as with the permit to purchase program in general, Defendants fail to designate any certain group posing an identifiable threat due to their earlier commission of serious criminal conduct. Rather, Defendants designate <u>every</u> Oregonian as a member of that group unless or until the Oregon State Police determine that they are not. In doing so, Defendants restrict every Oregonian's right to purchase a firearm, not just those who actually belong to the group posing an identifiable threat. Therefore, the background check amendment provisions fail on that analysis alone.

The next steps of the analysis are highly fact-dependent and require the circuit court to make findings of fact based on the evidence presented at a hearing; there has been no such hearing and, though some evidence was presented by the

parties before the December 23, 2022 hearing, the evidence is incomplete and was not considered in the circuit court's analysis due to the threshold determination that the background check amendment provisions of the permit to purchase program could not be severed from the permit to purchase program itself.

Upon receiving evidence, the circuit court must next determine whether the restriction actually satisfies the public safety justification it provides *in the face of* Article I, Section 27. *Hirsch*, 338 Or at 677–78. The circuit court must also determine whether requiring a completed background check without requiring the Oregon State Police to complete that background check within any specified time period, or at all, infringes on Oregonians' Article I, Section 27 rights. This requires numerous factual findings.

For instance, Defendants cannot even show that there is a public safety issue to be solved. Here, Defendants cite to one horrific shooting in South Carolina as its justification for changing Oregon's firearm laws. While tragic, Defendants cite to no similar event in any other state, let alone Oregon. Defendants further cite to evidence that the background check process has prevented approximately 4,600 felons and 2,000 individuals on probation from illegally accessing firearms between 2018 and 2022. (ER-789). During that same time, however, by Defendants' own evidence that has not been presented to or considered by the circuit court on the merits, the Oregon State Police have processed approximately

1.2 million background checks in that same period (averaging 25,000 requests per month). (ER-788). This would mean that 0.0055% of the time a background check is processed, the Oregon State Police stop a felon or individual on probation from illegally accessing a firearm. Using Defendants' own data from that same period, the grand total of individuals whose background check was denied was 12,147 of the approximately 1.2 million requests, meaning that 0.01% of the time a background check is processed, the Oregon State Police stop someone who should not have a firearm from purchasing one.[10] The circuit court will need to determine, in the face of Article I, Section 27, whether Defendants present a public safety issue and, if so, whether the background check amendments from Measure 114 address that problem.

It is equally important what the circuit court does not know as the answers to these questions will help the circuit court determine whether the background check amendments are constitutional. For instance, of those whose background check is denied, how many denials are later appealed and reversed? How many lead to prosecution? How common is it for a firearm dealer to release a firearm without a completed background check? How many Oregonians who successfully purchase a firearm without a completed background check, and how many of those who do

[10] Of course, this assumes that every denied background check is correct, yet the FBI has admitted that it is wrong nearly 30 percent of the time. https://bit.ly/3R9omXe. Certainly Oregon's system errs as well, which must be added to that percentage.

are not allowed to own firearms?[11] If an Oregonian does successfully complete a transfer and is later discovered to not be allowed to own a firearm, do police seize the firearm?[12]

Even if the circuit court determines that the present requirements for background checks present a public safety issue and that Measure 114's background check amendments actually remediate that public safety issue, Plaintiffs maintain that allowing the Oregon State Police unlimited period of time within which to conduct a background check—as well as there being no statute or administrative rule requiring the Oregon State Police to investigate the reason why a background check is delayed at all—infringes on the rights of Oregonians. Indeed, ORS 166.436 only requires the Oregon State Police to perform an initial check to determine whether the transferee is instantly approved, instantly denied, or delayed; once a potential transferee is delayed, the Oregon State Police are only required to notify the transferor of the delay and "provide the transferor with an estimate of the time when the department will provide the requested information." ORS 166.436(3)(b). There is no requirement that the Oregon State Police adhere to their estimate or perform the investigation at all. There is no administrative rule

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[11] Grant Stringer, *Federal, state agencies don't track sales of guns to disqualified buyers in Oregon*, OREGON CAPITAL CHRONICLE https://oregoncapitalchronicle.com/2023/01/19/federal-state-agencies-dont-track-sales-of-guns-to-disqualified-buyers-in-oregon/ (January 19, 2023 at 5:45 a.m.).
[12] *Ibid.*

requiring the Oregon State Police to perform any further research to conclude the background check, or any prescribed timeline. *See generally* OAR 257-010-0055. There is also no process available for Oregonians to compel the Oregon State Police to do the research at all, let alone within a reasonable time.

While there is no Oregon caselaw that squarely addresses this issue, *Bruen* is persuasive that a background check process that allows the Oregon State Police an indefinite period of time to conduct further investigation to complete a background check would, at least, be violative of the Second Amendment. *Bruen*, 142 S Ct 2111, 2128–29 n 9. In the context of speech, Oregon courts, as well as the United States Supreme Court, have found that prior restraint laws violate individual speech rights where the law fails "to require the issuance or denial of a license within a specified brief period of time." *See e.g.*, *Outdoor Media Dimensions v. State*, 150 Or App 10, 121, 945 P2d 614 (1997), *rev'd on other grounds*, 340 Or 275, 132 P3d 5 (citing *Riley v. National Federation of Blind*, 487 US 781, 108 S Ct 2667 (1988)). Simply put, a right delayed is a right denied. Here, a right is being indefinitely delayed and is, therefore, indefinitely denied.

The circuit court was correct to determine that the background check amendment provisions of the permit to purchase program are not severable from the permit to purchase program itself during the preliminary phase of this case and, therefore, correct in waiting to consider that matter until Defendants produce a

permit to purchase program capable of constitutional scrutiny. Moreover, whether the background check amendment provisions are constitutional was not before the circuit court at the December 23, 2022 hearing and, therefore, not properly addressed on mandamus. Notwithstanding the circuit court's preliminary determinations on that matter, Defendants are incorrect that the background check amendment provisions are severable or constitutional. Determining whether the background check amendment provisions of the permit to purchase program are constitutional under this Court's precedent requires the circuit court to make many findings of fact and, therefore, mandamus is not appropriate. The circuit court's order should not be disturbed.

F. Plaintiffs Will Suffer Irreparable Harm

Defendants assert that the circuit court committed clear legal error by determining that Plaintiffs would suffer imminent and irreparable harm if Ballot Measure 114 was not enjoined. Defendants further assert that the circuit court's injunctive relief was unnecessary because the federal district court had placed a temporary stay of enforcement on a portion of Measure 114 at Defendants' request. However, Plaintiffs demonstrated that they would be irreparably harmed if Measure 114 was not enjoined.

Plaintiffs argued, and the circuit court agreed, that implementation of Ballot Measure 114 would deprive Plaintiffs of their enumerated constitutional right

pursuant to Article I, Section 27. The depravation of an enumerated constitutional right, even temporarily, constitutes irreparable injury. *See Elkhorn Baptist Church*, 366 Or 506; *id.* at 546 ("The inability of plaintiffs to worship in the manner that they prefer and the inability of intervenors to carry on their businesses in the manner that is usual (or at all) is irreparable harm for these purposes, even if temporary.) (Garrett, J., concurring); *see also Melandres v. Arpaio*, 695 F3d 990, 1002, 2012 US App LEXIS 20120 (2012) ("It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'"). Defendants do not dispute that the deprivation of an enumerated constitutional right constitutes irreparable injury, nor do Defendants dispute that the right to bear arms is an enumerated constitutional right. Rather, Defendants dispute that Measure 114 deprives Oregonians of their right to bear arms.

1. Ballot Measure 114, Section 11 Magazine Ban

Defendants assert that Plaintiffs would not be irreparably harmed because Measure 114 is not a complete ban on all firearms. Defendants assert that, because some magazines are unaffected by Measure 114, and because Plaintiffs can continue to keep magazines banned under Measure 114 on their own property or use them for certain limited purposes—subject to the threat of criminal prosecution and the necessity to prove an affirmative defense—the harm is not irreparable.

Defendants are incorrect that a showing of irreparable harm in the context of

Article I, Section 27 requires a showing that all firearms are banned. Defendants cite no supportive caselaw, or even persuasive caselaw, in support of that contention. Plaintiffs Arnold and Asmussen, as well as Plaintiffs Gun Owners of America and Gun Owners Foundation on behalf of their members and supporters, asserted in their Complaint that they own firearms and magazines that are banned under Measure 114, (ER-2–5), and incorporated those allegations into Plaintiffs' motion, (ER-42). Again, Defendants dispute a finding of fact by the circuit court under the guise of *clear legal error* without citing any precedential caselaw or even persuasive caselaw showing that the circuit court's factual findings or legal conclusions are erroneous, let alone *clearly* erroneous.

Defendants also assert that the circuit court has committed clear legal error or abuse of discretion in concluding that Plaintiffs have shown irreparable harm because Measure 114 allows Plaintiffs and all other Oregonians to continue to own their firearms and magazines and to use them on their own property or in certain limited circumstances (*i.e.* target shooting). Again, Defendants cite no supportive or persuasive case law to aid their bare assertion that a finding of fact against Defendants' interests constitutes clear legal error or abuse of discretion. Defendants' argument intimates that these narrow, allowable uses are *exceptions*, but they are not; Measure 114 provides no outright exceptions, except for law enforcement. BM114, § 11(4)(c). Defendants conveniently omit that Oregonians

who use their magazines in the ways Defendants indicate can still be charged with a class A misdemeanor, and have only an affirmative defense they will have to prove at their criminal trial. *Id.* § 11(5). Defendants also omit the many components to that affirmative defense, which will be impossible (or virtually impossible) to prove in light of the uncontroverted fact that magazines are not serialized and proving when one purchased a magazine will be impossible. *Id.* Plaintiffs and hundreds of thousands of Oregonians who own magazines capable of holding more than 10 rounds would have been presumed criminals, subject to an affirmative defense provided for in a non-existent statute (ORS 166.055) absent the circuit court's preliminary injunction.

More importantly, as articulated in *Kessler*, Article I, Section 27 is intended for three purposes, "(a) The preference for a militia over a standing army; (b) the deterrence of governmental oppression; and (c) the right of personal defense." *Kessler*, 289 Or at 366. Notably absent from that list is target shooting. Oregonians have the right to defend themselves inside of the home and outside of the home. *Kessler*, 289 Or 359 (inside of the home); *Blocker*, 291 Or 255 (outside of the home). Depriving Oregonians of the ability to bear arms outside of the home, even temporarily, constitutes irreparable harm, and Defendants provide no caselaw to the contrary. This is doubly true for Oregonians, such as Plaintiffs Arnold and Asmussen, who have their concealed handgun licenses and carry a firearm with a

magazine that is banned under Measure 114. (ER-2–3, 42).

Finally, as addressed above, Defendants rely on an erroneous interpretation of Measure 114's definition of a large capacity magazine. *See* BM114, § 11(1)(d). Measure 114 is arguably the most stringent ban on magazines in the country, banning even so-called California-compliant magazines. (SER-4–11, 276–79). Measure 114 bans upward of 90% of all handgun magazines available on the market today. (ER-296–97). Even if this Court were to conclude that the circuit court's interpretation of Section 11(1)(d) was *clearly* erroneous, 49.8% of magazines owned in Oregon hold 11 or more rounds, meaning that Measure 114 bans just short of half of all magazines. (ER-704).

While it is evident that Defendants resent the circuit court for finding Plaintiffs' arguments more persuasive than their own, resentment is not an appropriate justification for mandamus. Defendants have advanced no persuasive argument, let alone caselaw, in support of its contention that the circuit court's findings and conclusions were clear errors of law or abuse of the circuit court's discretion. Plaintiffs have demonstrated irreparable harm regarding the magazine ban. Mandamus is not appropriate.

2. Ballot Measure 114, Section 1–10 Permit to Purchase and Background Check Provisions

Defendants repeatedly assert throughout their petition that the circuit court committed clear legal error by issuing a temporary restraining order restraining

enforcement of the permit to purchase provisions of Measure 114. Having already persuaded the federal court that preliminary relief is inappropriate under the Second Amendment, Defendants have chosen to treat the federal district court as some sort of *higher* court than the Harney County Circuit Court, completely disregarding the fundamentals of federalism and the fact that the cases address distinct, albeit related, rights under separate constitutions.

Defendants assert that harm was not imminent when the circuit court gave its December 13 and 23, 2022 oral rulings, January 3, 2023 letter opinion (ER-840–41), and January 5, 2023 order (ER-842–50) temporarily restraining the permit to purchase program. Defendants assert that, because the federal court had already placed a temporary stay on enforcing the permit to purchase, harm was not imminent. However, on the date the circuit court gave its oral ruling on continuing the temporary restraining order (December 23, 2022), the federal district court judge had not extended its order, which was set to expire in 13-days on January 5, 2023. (APP-43). Of course, in light of the Holiday season, that was only 8-judicial days away. No Oregon circuit court is required to wait for a federal court to decide whether it will extend its stay of enforcement before finding that an Oregonian is facing imminent and irreparable harm. Still, the circuit court did not issue its official letter opinion until January 3, 2023. When that opinion letter was entered, the federal court had still not acted to extend its temporary stay of enforcement,

with its initial order set to expire on January 5, 2023, a mere two days after the circuit court entered its letter opinion. Indeed, federal court's order and the circuit court's order were actually signed on the same day, January 5, 2023, and no evidence has been presented showing that the federal court's order was entered first. (APP-49). Even still, the circuit court's January 3, 2023 letter opinion was undoubtedly entered first. Defendants' assertion that the circuit court committed clear legal error or abuse of discretion is patently untrue and unsupported by the record. If Defendants say that the harm was not imminent a mere two days before enforcement was set to begin, then Plaintiffs wonder what would be considered imminent?

Defendants also overlook the fact that the federal court's temporary stay is narrower than the circuit court's and, thus, it was reasonable for the circuit court to enter its broader order. The federal court's order does not temporarily restrain the background check amendment provisions of the permit to purchase program, only the requirement that transferees provide a permit before the transfer can be completed. (APP-49). The circuit court's order does both. (ER-840–41, 842–51). The circuit court's order also found in Plaintiffs' favor on the merits of issuing a temporary restraining order, while the federal district court had found in the defendants' favor.

Defendants have failed to show that the circuit court committed clear legal

error or abuse of discretion by finding irreparable harm. Defendants' complaints regarding the circuit court demonstrate Defendants' disagreement with the circuit court on certain findings of fact. As such, mandamus is inappropriate.

G. The Balance of Harms and Public Interest Favor Injunctive Relief

The circuit court has properly weighed the harms and public interests on both sides of this issue, which is soundly within the circuit court's discretion. In doing so, the circuit court properly resolved the balance of harms and public interests in favor of Plaintiffs. The circuit court weighed the guaranteed and concrete harm to the rights of Oregonians against the speculative harm advanced by Defendants and decided in Plaintiffs' favor. The circuit court considered the irreparable harm to Defendants (being restrained from enforcing Measure 114) and the irreparable harm to Oregonians (deprivation of Article I, Section 27 rights) and resolved that tension in favor of individual liberty rather than state authority. And the circuit court considered the radical change to Oregon's firearm laws from Measure 114 and favored maintaining the status quo that has existed in Oregon since its founding. In doing so, the circuit court did not abuse its discretion, nor did it commit clear legal error. As such, mandamus is inappropriate.

Defendants assert that they have incurred irreparable harm as a result of the circuit court's injunctive relief granted in this case because a state suffers a form of irreparable injury when it is restrained from enforcing its laws. Interestingly,

Defendants do not address this argument toward any specific provision of Measure 114. Plaintiffs presume that Defendants agree that they have not been harmed as a result of the temporary restraining order applying to the permit to purchase provision of Measure 114 since Defendants, by their own repeated admissions, are unable to enforce a permit to purchase. Though Defendants contend otherwise, the background check amendment provisions of the permit to purchase program are inextricably intertwined with the permit to purchase program and are, therefore, also incapable of separate enforcement. Therefore, Defendants cannot maintain that they have incurred irreparable harm by being restrained from enforcing a permit to purchase program that Defendants are incapable of implementing.

When an enumerated constitutional right is infringed, even temporarily, citizens suffer irreparable harm. *See Elkhorn Baptist Church*, 366 Or 506; *id.* at 546; *see also Melandres*, 695 F3d at 1002. Therefore, this Court may find that there is irreparable harm on both sides of this issue, just as there are public interests on both sides of this issue. However, Plaintiffs submit that, where a new law brings radical change, this Court should resolve any tension in favor of the status quo. (ER-701) ("The court finds that deliberate action from the court is warranted to not create a whipsaw effect so described."). Plaintiffs further submit that, where harm is irreparable on both sides, the judiciary should resolve that tension in favor of individual liberty rather than state authority. This is especially

true where, as here, Defendants advance a speculative harm that may or may not occur during the pendency of this case and Plaintiffs' harm will be immediate, concrete, and guaranteed. Oregonians who own or use standard capacity magazines capable of holding more than 10 rounds will be presumed to have committed a Class A misdemeanor and will have to affirmatively demonstrate that they purchased the magazine prior to the effective date of Measure 114, Section 11 even if they are possessing or using the magazine in one of the few limited ways authorized by Measure 114. BM114, § 11(2) (the crime), (5)(a)–(c) (the affirmative defense). The vast majority of magazines do not have serial numbers and proving when one purchased a magazine will be a virtual impossibility. It will also be virtually impossible to show that "the owner has not maintained the large-capacity magazine in a manner other than" the exceptions listed in Section 11(5)(c)(A)–(E). *Id.* § 11(5)(c). Plaintiffs and hundreds of thousands of Oregonians are guaranteed to be unable to possess their firearms outside of their homes for purposes of self-defense if the circuit court's orders are reversed. This includes concealed handgun license holders like Plaintiffs Arnold and Asmussen. *See Christian*, 354 Or at 30 ("Significantly, the ordinance does not prohibit a person from knowingly possessing or carrying a loaded firearm in a public place if the 'person [is] licensed to carry a concealed handgun.'") (brackets original).

On the other hand, the harm Defendants assert may occur is wholly

speculative, and disturbing the circuit court's orders will not remediate that potential harm. The facts in this case are distinct from those in a case like *Elkhorn*, which came to the Court during a pandemic that had "spread rapidly across the globe, killing hundreds of thousands of people" since it was first detected in late 2019 and this Court's decision in June of 2020. *Elkhorn Baptist Church*, 366 Or at 509. Here, Defendants rely almost exclusively on tragedies spanning decades and crossing state lines and even *time zones* to assert a present emergency in Oregon. The circuit court has correctly interpreted the potential harms to Defendants against the guaranteed harms to Plaintiffs, and properly resolved the tension between the two in favor of the individual's liberty interest. This consideration is aptly summarized in the circuit court's ruling from the bench, "First the people, then the State." (ER-331). In Justice Garrett's concurring opinion in *Elkhorn*, Justice Garrett identified weaknesses in the lower court's public interest analysis:

> In determining that the Governor's executive orders should be enjoined, the circuit court did not give sufficient attention to the Governor's role, in emergency situations such as the COVID-19 pandemic, in determining what is in the public interest, and it did not give the necessary weight to the harm to that public interest, as delineated by the state's elected executive, that would result if her orders were enjoined.

Id. at 547 (Garrett, J. concurring). No such criticism can be levied in this case, where the circuit court has carefully considered the interests and harms on both sides of this case and articulated how those considerations were weighed in

reaching its determinations.

Furthermore, the speculative harm Defendants fear may befall the state if Measure 114 is enjoined is not remediated by Measure 114 to any meaningful degree. As Defendants argue, Measure 114 does not impact magazines already owned by Oregonians who may decide to violate the proscription on possessing magazines capable of holding more than 10-rounds as part of their effort to commit the far more heinous crime of mass murder. Defendants also do not explain why rounds 1–10 are less dangerous or less likely to kill innocents than rounds 11+, and prevent no evidence (beyond anecdote) for how the seconds—not even tens of seconds—it takes for a shooter to change magazines will save lives.

As the circuit court noted, "the public interest, in this matter is real and significant" on both sides of this case. (ER-330). However, Plaintiffs have demonstrated, and the circuit court agreed, that the tension between the two sides is properly resolved in favor of the status quo and individual liberty rather than radical change and state authority. In reaching that conclusion, the circuit court did not act outside of its discretion, nor did it abuse its discretion. Nor did the circuit court commit clear legal error. As such, mandamus is inappropriate on this issue.

VI.

CONCLUSION

Mandamus is an extraordinary remedy that should rarely be granted, and

only upon a clear showing on all of the necessary prerequisites. Here, Defendants have a plain, speedy and adequate remedy wholly it is own control with respect to the non-existent permit to purchase program. Defendant has even requested stays and extensions of the stays on that subject. That precludes mandamus.

Defendants' main arguments relate to preliminary factual findings of the circuit court that Defendants dispute in argument, but not in contrary factual evidence. The circuit court was wholly within its discretion to weigh the facts and evidence put before it at the hearings, and mandamus is the wrong process to appeal those findings. Defendant disputes some facts but does not even approach a showing of "clear error" or abuse of discretion on any of the factual findings, much less any material factual findings. Likewise, the circuit court followed, and correctly applied, controlling legal precedent from this Court. To the extent Defendant seeks to have this court re-interpret or change the controlling case law, it is premature for such a request.

The standard on mandamus is a clear error, the circuit court simply applied and relied upon existing case Supreme Court case law, so there is no clear error. Defendants' exigency is embellished as Oregon has existed since 1859 without these type of restrictions on the right to bear arms. Mandamus should be denied.

DATED: January 27, 2023

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CERTIFICATE OF FILING AND SERVICE

I certify that on the 27th day of January 2023, I caused a true copy of the

PLAINTIFFS-ADVERSE PARTIES' MEMORANDUM IN OPPOSITION TO DEFENDANTS-RELATORS' PETITION FOR A PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS to be filed with the Appellate Court Administrator by electronic filing.

I further certify that on the 27th day of January 2023, I caused a true copy of the PLAINTIFFS-ADVERSE PARTIES' MEMORANDUM IN OPPOSITION TO DEFENDANTS-RELATORS' PETITION FOR A PEREMPTORY OR ALTERNATIVE WRIT OF MANDAMUS to be served on the following parties at the addresses set forth below:

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Service was made by eFiling and by first class mail.