

IN THE COURT OF APPEALS OF THE STATE OF OREGON  
JOSEPH ARNOLD; CLIFF ASMUSSEN; GUN OWNERS OF AMERICA,  
INC.; and GUN OWNERS FOUNDATION,

Plaintiffs-Respondents,

v.

TINA KOTEK, Governor of the State of Oregon, in her official capacity;  
ELLEN ROSENBLUM, Attorney General of the State of Oregon, in her official  
capacity; and CASEY CODDING, Superintendent of the Oregon State Police,  
in his official capacity,

Defendants-Appellants.

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Harney County Circuit Court  
No. 22CV41008

A183242

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Appeal from the Judgment of the Circuit Court  
for Harney County  
Honorable Robert S. Raschio

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**BRIEF OF *AMICI CURIAE* BRADY CENTER TO PREVENT GUN  
VIOLENCE, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE,  
MARCH FOR OUR LIVES, OREGON ALLIANCE FOR GUN SAFETY,  
ALLIANCE FOR GUN RESPONSIBILITY, AND GUN OWNERS FOR  
RESPONSIBLE OWNERSHIP IN OPPOSITION TO PLAINTIFFS-  
RESPONDENTS' REQUEST FOR A PERMANENT INJUNCTION**

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**BRIEF OF AMICI CURIAE****INTRODUCTION**

Measure 114, which prohibits the purchase and restricts the use of large capacity magazines (“LCMs”), is constitutional under Article I, section 27 of the Oregon Constitution because Plaintiffs-Respondents make no showing that it imposes any burden on the “people’s individual right to bear arms for purposes limited to self-defense” recognized in *State v. Christian*, 354 Or 22, 30, 307 P3d 429 (2013). Beyond that fundamental flaw in their position, Plaintiffs-Respondents’ claim should also be rejected because Measure 114 does not restrict firearms that were “commonly used for self-defense at the time [Article I, section 27] was drafted.” *See id.* Finally, Measure 114 “satisf[ies] the purpose of promoting public safety.” *See id.* at 33. For all those reasons, Measure 114 is constitutional under Article I, section 27 of the Oregon Constitution.<sup>1</sup>

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<sup>1</sup> This brief is addressed solely to the LCM ban in Measure 114, and does not address other provisions of Measure 114.

## ARGUMENT

### I. MEASURE 114 IS CONSTITUTIONAL UNDER *CHRISTIAN* BECAUSE IT IMPOSES NO BURDEN ON THE RIGHT TO SELF-DEFENSE.

#### A. *Christian* Establishes that Article I, Section 27 Protects the Right to Bear Arms Only for Purposes of Self-Defense.

Article I, section 27 of the Oregon Constitution protects the right to bear arms only for purposes limited to self-defense. The Oregon Supreme Court established the relevant standards in *Christian*, which Plaintiffs-Respondents and the trial court both acknowledged is the controlling precedent. *See* Opinion Letter Granting a Permanent Injunction Pursuant to ORS 28.020, at 2, *Arnold v. Kotek*, No 22CV41008 (Cir Ct Or Nov. 24, 2023) [hereinafter “Op Letter”] (citing *Christian*, 354 Or at 30). *Christian* construed the Oregon Constitution as establishing that “the right to bear arms is not an absolute right” and that “the legislature has wide latitude to enact specific regulations restricting the possession and use of weapons 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.*” *Christian*, 354 Or at 33 (emphasis added). In that case, the Court rejected a facial challenge to a Portland ordinance prohibiting the public possession of a firearm that the holder had recklessly failed to unload, because it did not

constitute a “total ban on possessing or carrying a firearm for self-defense.”

*Id.* at 40.

Consistent with *Christian*, an unbroken line of Oregon Supreme Court decisions establishes that the Oregon Constitution protects the right to bear arms *only* for self-defense. In *State v. Hirsch*, 338 Or 622, 632, 114 P3d 1104, 1110 (2005), the Court clarified that the word “defence” in Article I, section 27 “serves to limit the scope of the constitutionally protected conduct at issue in these cases.” The Court held that “Article I, section 27, precludes the legislature from infringing on the people’s right to bear arms for purposes of defense, but *not for purposes other than defense.*” *Id.*

(emphasis added). Similarly, *State v. Kessler*, 289 Or 359, 367, 369, 614 P2d 94, 98, 99 (1980), emphasized that the Oregon Constitution “does not mean that all individuals have an unrestricted right to carry or use personal weapons in all circumstances” and that instead the Constitution protects only “an individual’s right to bear arms to protect his person and home.”

Likewise, *State v. Delgado*, 298 Or 395, 399, 692 P2d 610, 611 (1984), holds that the Oregon Constitution protects the right to “possess certain arms for the defense of person” (internal quotations and citation omitted) and *State v. Blocker*, 291 Or 255, 259, 630 P2d 824, 825 (1981), recognized the

state constitutional “right to bear arms *for defense of self.*” (emphasis added).

In short, the Oregon Supreme Court has repeatedly and unambiguously held that the right guaranteed by Article I, section 27 is a right to bear arms for self-defense and does not establish a constitutional right to bear arms for other purposes.

**B. Measure 114 Does Not Burden the Right to Self-Defense.**

Numerous courts have thoroughly examined empirical research establishing that LCM restrictions do not burden the right to self-defense because the ability to fire more than 10 rounds without reloading is empirically unnecessary for self-defense.<sup>2</sup> The National Rifle Association’s

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<sup>2</sup> See *Oregon Firearms Fed’n, Inc. v. Kotek*, 682 F Supp 3d 874, 896 (D Or 2023); *Ocean State Tactical, LLC v. Rhode Island*, 646 F Supp 3d 368, 388-90 (DRI 2022), *aff’d*, 95 F4th 38 (1st Cir 2024); *Hanson v. District of Columbia*, 671 F Supp 3d 1, 12-16 (DDC 2023); *Duncan v. Bonta*, 19 F4th 1087, 1104-05 (9th Cir 2021) (en banc), *cert. granted, judgment vacated*, 142 S Ct 2895 (2022), *and vacated and remanded on other grounds*, 49 F4th 1228 (9th Cir 2022); *Worman v. Healey*, 922 F3d 26, 37 (1st Cir 2019), *abrogated on other grounds by New York State Rifle & Pistol Ass’n Inc. v. Bruen*, 597 US 1, 142 S Ct 2111, 213 L Ed 2d 387 (2022); *Ass’n of New Jersey Rifle & Pistol Clubs, Inc. (ANJRPC) v. Att’y Gen. New Jersey*, 910 F3d 106, 121 n 25 (3d Cir 2018), *abrogated on other grounds by Bruen*, 597 US at 1; *Kolbe v. Hogan*, 849 F3d 114, 127 (4th Cir 2017), *abrogated on other grounds by Bruen*, 597 US at 1; *State v. Misch*, 214 Vt 309, 356-57, 256 A3d 519 (2021), *reargument denied* (Mar 29, 2021); *Rocky Mountain Gun Owners v. Polis*, 467 P3d 314, 331 (Colo 2020).

(NRA) own database of “armed citizen” accounts shows that the use of more than 10 rounds of ammunition for self-defense is “extremely rare.”<sup>3</sup> Studies that have analyzed this database establish that the average number of shots fired by civilians in self-defense was about *two*.<sup>4</sup> Further, of the 736 self-defense incidents from January 2011 to May 2017 reflected in the NRA database, the defender was reported to have fired more than 10 bullets in only “*two* incidents (0.3% of all incidents).”<sup>5</sup> And about 18 percent of the instances of self-defense involved no shots fired at all. *Kotek*, 682 F Supp 3d at 896.

In *Kotek*, an expert in quantitative and analytic research confirmed these statistics. *Id.* at 897. Specifically, the expert studied a random sample of 200 incidents from the roughly 4,800 news stories describing defensive-gun-use situations over the same 6.5-year period covered by the NRA database. *See id.* The expert confirmed that in *no incident* were more than

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<sup>3</sup> Decl of Lucy P. Allen, *Oregon Firearms Fed’n, Inc. v. Brown*, No. 2:22-cv-01815 (D Or Feb. 6, 2023) (ECF No 116) [hereinafter “Allen Decl”]; *see also Armed Citizen Stories*, NRA-ILA, <https://perma.cc/H9BC-95HF>.

<sup>4</sup> *See* Claude Werner, *The Armed Citizen – A Five Year Analysis*, Guns Save Lives (Mar. 12, 2012), <https://perma.cc/QTL7-U8EM> (average of 2.2 defensive shots fired per incident from 1997–2001); Allen Decl, *supra* note 3, ¶ 10 (same, from January 2011 to May 2017).

<sup>5</sup> Allen Decl, *supra* note 3, ¶ 10 (emphasis added).

10 shots fired, and that 6 to 10 shots were fired in only 2.7 percent of incidents. *See id.*

Experts in other cases have similarly concluded and testified that the ability to fire more than 10 rounds without reloading is fundamentally unnecessary for self-defense. *See, e.g.,* Decl of Edward Troiano ¶¶ 9, 10, *Ocean State Tactical, LLC v. State of Rhode Island*, No 1:22-cv-00246 (DRI Oct 14, 2022) (ECF No 19-3) (“I am unaware of **any incident** in which a civilian has **ever** fired as many as 10 rounds in self-defense.”) (emphasis added); Decl of James W. Johnson ¶¶ 30, 31, *Kolbe v. O’Malley*, 42 F Supp 3d 768 (D Md 2014), No 1:13-cv-02841 (ECF No 44-3) (filed Feb 14, 2014) (then-Baltimore County Police Chief testifying that he was “**unaware of any self-defense incident**” in Baltimore County or “anywhere else in Maryland” for which “it was necessary to fire as many as 10 rounds in self-defense”) (emphasis added).

Statistician Jorge Baez testified to several of the foregoing facts in the trial court proceedings below. *See* Op Letter at 38. However, the trial court disregarded these findings, reasoning that “ten-round magazine bans are no panacea to prevent a mass shooter based upon the evidence in this case.” *Id.* That, of course, completely misses the point. The constitutional question is not whether LCM restrictions are a “panacea” that would prevent all mass

shootings. The Legislature has made a judgment—amply supported by empirical evidence, *see infra* Part III—that restricting LCMs promotes public safety by reducing the horrific toll of mass shootings. That legislative judgment is constitutional under *Christian* unless Measure 114 unduly burdens the right to self-defense. *See* 354 Or at 33. Mr. Baez’s testimony demonstrates that it does not impose any such burden.

**C. Measure 114 Was Upheld Against a Challenge in Federal Court Because, Among Other Reasons, the Law Does Not Burden Self-Defense.**

The US District Court for the District of Oregon has already considered whether Measure 114 burdens the right to self-defense, and held that it does not. *See Kotek*, 682 F Supp 3d at 874; *Oregon Firearms Fed’n, Inc. v. Brown*, 644 F Supp 3d 782 (D Or 2022). While those federal cases analyzed Measure 114 under the standards of the US Constitution, the factual question of the relevant burden on self-defense is similar, if not identical, under the federal standards of *New York State Rifle and Pistol Association, Inc. v. Bruen*, 597 US 1 (2022),<sup>6</sup> and the Oregon constitutional standards enunciated in *Christian*. *Compare Christian*, 354 Or at 33

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<sup>6</sup> To determine whether a challenged law is “consistent with the Nation’s historical tradition of firearm regulation,” the *Bruen* court instructed that the “central considerations” are “whether [the] modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.” 597 US at 24, 29.



(holding that a firearm regulation is consistent with Article I, section 27 so long as it “does not unduly frustrate the individual right to bear arms for the purpose of self-defense”), *with Kotek*, 682 F Supp 3d at 928 (concluding that Measure 114 “imposes a minimal burden on the right to armed self-defense”).

Citing the expert analysis of the NRA database discussed above, the federal district court in *Kotek* found: “According to objective evidence, an individual discharges more than ten rounds in just 0.3 percent of self-defense incidents. That means that in 99.7 percent of all self-defense incidents, [Measure] 114’s restrictions on LCMs would place no burden on the right to self-defense.” 682 F Supp 3d at 928.

Additionally, while the *Kotek* court acknowledged that millions of Americans currently *own* LCMs, it found that “Plaintiffs have not shown that LCMs are commonly *employed* for self-defense.” *Id.* at 921-22 (emphasis added). Conversely, the court found that “Defendants have produced credible evidence showing that they are not.” *Id.* The court explained that while “many Americans purchase LCMs with the intent to use them for self-defense . . . it is exceedingly rare (far less than 1 percent) for an individual to fire more than ten shots in self-defense.” *Id.* at 897.

In short, under both the federal constitutional standard set forth by the US Supreme Court in *Bruen* and the Oregon constitutional standard articulated by the Oregon Supreme Court in *Christian*, the operative question is not simply how many individuals possess or wish to possess LCMs, but whether a restriction on LCMs burdens individual self-defense. Empirical research and carefully reasoned decisions of the Oregon federal district court establish that Measure 114 does not burden individual self-defense. Under the standards of *Christian*, this precludes Plaintiffs-Respondents' challenge to Measure 114 under the Oregon Constitution.

**D. Many Other Courts Have Found That LCM Restrictions Do Not Burden Self-Defense.**

Beyond the decisions of the Oregon federal district court in *Kotek* and *Brown*, numerous other courts have held LCM restrictions to be constitutional because they have found no evidence that firing more than 10 bullets without reloading is necessary for self-defense. *See, e.g., Ocean State Tactical*, 646 F Supp 3d at 388-90 (“There is simply no credible evidence in the record to support the plaintiffs’ assertion that LCMs are weapons of self-defense and there is ample evidence put forth by the State that they are not.”); *Bevis v. City of Naperville*, 85 F4th 1175, 1195 (7th Cir 2023) (“[T]hese assault weapons and high-capacity magazines are much more like machineguns and military-grade weaponry than they are like the

many different types of firearms that are used for individual self-defense (or so the legislature was entitled to conclude.)”); *Hanson*, 671 F Supp 3d at 16 (“[T]he Court finds that the Second Amendment does not cover LCMs because they are not typically possessed for self-defense.”); *Nat’l Ass’n for Gun Rights v. Lamont*, 685 F Supp 3d 63, 98 (D Conn 2023) (finding an “absence of persuasive evidence that the assault weapons or LCMs listed in the statutes are commonly used or are particularly suitable for self-defense”); *Capen v. Campbell*, 2023 WL 8851005, at \*20 (D Mass Dec 21, 2023) (Plaintiffs did not “provid[e] any evidence at this stage that a magazine that can hold more than ten rounds is necessary, useful, or even desirable for self-defense purposes. . . . [T]he limit on magazine capacity imposes virtually no burden on self-defense, and is comparably justified to historical regulations.”).<sup>7</sup>

Notably, both federal and state courts in the State of Washington have rejected post-*Bruen* challenges seeking to enjoin Washington’s LCM restrictions under Washington’s constitution. Like Measure 114,

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<sup>7</sup> See also *Worman*, 922 F3d at 37 (“[N]ot one of the plaintiffs or their six experts could identify even a single example of . . . a self-defense episode in which ten or more shots were fired.”); *Duncan*, 19 F4th at 1104-05 (“The use of more than ten bullets in defense of the home is ‘*rare*,’ . . . or *non-existent*.” (emphasis added)); *Rocky Mountain Gun Owners*, 467 P3d at 331 (“In no case had a person fired even five shots in self-defense, let alone ten, fifteen, or more.” (internal quotations and citation omitted)).

Washington’s LCM provision restricts persons in Washington from manufacturing, importing, distributing, selling or offering to sell LCMs, with few exceptions. *See* Wash Rev Code §§ 9.41.370(1), .010(25); *Brumback v. Ferguson*, 2023 WL 6221425, at \*1 (ED Wash Sept 25, 2023). The federal court, for instance, declined to grant a preliminary injunction against Washington’s LCM ban, noting that plaintiffs had neither (i) met their burden of demonstrating that the regulation was not “reasonably necessary to protect public safety or welfare,” nor (ii) demonstrated an improper balance between “the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision.” *Brumback*, 2023 WL 6221425, at \*11-12 (internal quotations omitted).

Likewise, the Commissioner of the Washington Supreme Court quickly stayed a state trial court’s injunction of the LCM provision, allowing the law to remain in effect pending appeal. *See Washington v. Gator’s Custom Guns, Inc.*, No 102940-3, slip op at 3 (Wash Apr 25, 2024).<sup>8</sup> Relying on *City of Seattle v. Evans*, 184 Wash 2d 856, 869, 366 P3d 906, 913 (2015), a Washington Supreme Court case that in turn heavily relied on Oregon courts’ jurisprudence regarding Article I, section 27, the Commissioner observed that the Washington Constitution protected

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<sup>8</sup> Available at <https://perma.cc/PU79-PFFN>.

“instruments that are designed as weapons traditionally or commonly used by law-abiding citizens for the *lawful purpose of self-defense*.” *Gator’s Custom Guns*, slip op at 26 (citing *Evans*, 184 Wash 2d at 869) (emphasis added). In staying the injunction, the Commissioner examined the history of LCMs, their lack of utility in self-defense, and the public safety benefits gained in regulating them given their disproportionate use in mass shootings. *Id.* at 7-24. The Commissioner also repeatedly praised the thorough analysis of the Oregon federal district court in *Kotek*, calling it “supremely well-reasoned” and the “most persuasive on [the LCM] issue.” *Id.* at 6 n 4, 25.

These two cases from Washington State are particularly instructive because of the strong parallels between the relevant constitutional provisions of Oregon and Washington. Like Article I, section 27 of the Oregon Constitution, the relevant portion of the Washington Constitution, Article I, section 24, protects “[t]he right of the individual citizen to bear arms in defense of himself, or the state.” Wash Const, Art I § 24, 1889. Indeed, courts and legal scholars have repeatedly recognized that Washington’s right to bear arms was modeled after Article I, section 27 of the Oregon Constitution. *See, e.g., Evans*, 184 Wash 2d at 868 (also relying on

*Christian*, 354 Or at 30); *The Journal of the Washington State Constitutional Convention, 1889*, UW Law Digital Commons (1999) at 512 n 40.<sup>9</sup>

Further, Washington courts employ a similar test to those of Oregon courts when interpreting the scope of constitutional provisions. In Oregon, courts examine the “text of the constitutional provision, the case law surrounding it, and the historical circumstances that led to its creation,” *Hirsch*, 338 Or at 631 (citations omitted), while Washington courts similarly assess “the textual language of the state constitution,” “state constitutional and common law history,” and “preexisting state law.” *State v. Gunwall*, 106 Wash 2d 54, 65-66, 720 P2d 808, 814-15 (1986). Specifically, like Oregon courts, Washington courts have evaluated the constitutionality of firearms restrictions by evaluating whether the weapons at issue are “traditionally or commonly used by law abiding citizens *for the lawful purpose of self-defense.*” *Evans*, 184 Wash 2d at 869 (citing, *inter alia*, Or Const, Art I, § 27) (emphasis added). Finally, similar to Oregon courts, Washington courts engage in a balancing test that weighs “the public benefit from the regulation against the degree to which it frustrates the purpose of the constitutional provision.” *State v. Jorgenson*, 179 Wash 2d 145, 156,

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<sup>9</sup> Available at <https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1003&context=selbks>

312 P3d 960, 964 (2013) (citations omitted); *see also Christian*, 354 Or at 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.”).

Given these similarities, Washington courts have frequently looked to Oregon courts’ interpretations of Article I, section 27 when interpreting Washington’s parallel constitutional provision. *See, e.g., State v. Rupe*, 101 Wash 2d 664, 707, 683 P2d 571, 596 (1984) (“Our conclusion follows from the clear language of Washington’s constitution. In addition, it coincides with the interpretation placed on a similar provision contained in the Oregon constitution.”); *City of Seattle v. Montana*, 129 Wash 2d 583, 919 P2d 1218, 1221 n 1, 1223-24, 1227 n 2 (1996) (surveying Oregon’s case law interpreting Article I, section 27 in evaluating the meaning of “arms”), *overruled on other grounds by Yim v. City of Seattle*, 194 Wash 2d 682, 451 P3d 694 (2019); *Evans*, 184 Wash 2d at 856, 867 (citing *Christian*, 354 Or at 30; *Kessler*, 289 Or at 361-70; *Delgado*, 298 Or 395 at 400-01).

Beyond this extensive body of case law—from Washington and other federal and state courts across the country—rejecting challenges to LCM restrictions, a long line of older cases establishes the constitutionality of

restrictions on weapons deemed excessively dangerous, reasoning that such arms are not necessary for self-defense. *See, e.g., O’Neill v. State*, 16 Ala 65, 67 (1849); *Andrews v. State*, 50 Tenn 165, 171, 186 (1871); *English v. State* 35 Tex 473, 474, 477 (1871), *abrogated on other grounds by Bruen*, 597 US at 1. Similarly, states have regulated the manner of possession of weapons through laws relating to concealed carry, which courts have also held to impose no burden on self-defense. *See, e.g., State v. Mitchell*, 3 Blackf 229, 229 (Ind 1833); *Ex parte Thomas*, 21 Okla 770, 97 P 260, 265 (Okla 1908); *State v. Reid*, 1 Ala 612, 614, 621 (1840); *State v. Buzzard*, 4 Ark 18, 18 (1842); *State v. Chandler*, 5 La Ann 489, 489-90 (1850); *State v. Jumel*, 13 La Ann 399, 399-400 (1858).

In sum, courts have concluded that analogous laws restricting LCMs or restricting dangerous weapons do not burden the right to self-defense. Plaintiffs-Respondents do not and cannot demonstrate that LCMs are well-suited, or even used, for self-defense, and accordingly have failed to show that Measure 114 infringes upon their rights under Article I, section 27 of the Oregon Constitution.



**II. MEASURE 114 SATISFIES *CHRISTIAN* BECAUSE LCMs WERE NOT COMMONLY USED FOR SELF-DEFENSE AT THE TIME THE OREGON CONSTITUTION WAS DRAFTED.**

*Christian* holds that the right to bear arms, under the Oregon Constitution, may extend to “some firearms and certain hand-carried weapons commonly used for self-defense at the time [Article I, section 27] was drafted.” 354 Or at 30. Even accepting that standard, it does not apply to Measure 114—which does not restrict arms that were commonly used for self-defense at the time Article I, section 27 was drafted.

As noted by the court below, Oregon’s Constitutional Convention took place in 1857. Op Letter at 7. Article I, section 27 was taken verbatim from Sections 32 and 33 of the Indiana Constitution of 1851. *See Kessler*, 289 Or at 363. The drafters of Indiana’s bill of rights of 1816 borrowed freely from the wording of other state constitutions, including those of Kentucky, Ohio, Tennessee and Pennsylvania, all of which were drafted between 1776 and 1802. *Id.* Oregon’s constitutional provision on the right to bear arms therefore can be traced to state constitutional provisions drafted in the era between the Revolutionary War and the Civil War.

Weapons capable of firing more than 10 rounds without reloading were not broadly available in the United States until the late 19th century and were not commercially available to civilians until even later. *See Decl*

of Brian DeLay ¶ 8, *Arnold v. Kotek*, No 22CV41008 (Cir Ct Or Dec 12, 2022) (“[N]o large-capacity firearm design functioned well enough to become militarily and commercially viable before 1860 . . . the first handheld firearm that both (a) had a detachable magazine holding more than ten rounds and (b) was commercially available to civilians in the United States was the Thompson submachine gun, introduced to the market in the 1920s.”). The trial court itself acknowledged that, while examples of 10-round firearms magazines *existed* prior to 1857, the technological shortcomings of these magazines were not solved until later, well after statehood and Oregon’s enactment of Article I, section 27. *See* Op Letter at 7.

In particular, the Winchester Repeating Rifle, characterized by the trial court as a “breakthrough in firearms technology,” was first produced in 1867.<sup>10</sup> Winchester’s company produced the Henry Lever Action Rifle in the early 1860s, *see* Decl of Brian Delay ¶ 58, *Oregon Firearms Fed’n, Inc. v. Brown*, No 2:22-cv-01815 (D Or Feb. 6, 2023) (ECF No 118), but it was “underpowered for a military firearm”; the “open magazine bottom under the barrel could easily become fouled”; the rifle’s design could make it

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<sup>10</sup> *Winchester 1866 Prototype Musket*, The Armourer’s Bench, <https://perma.cc/PB83-TSM4>.

difficult to operate and aim; and the rifle was prone to becoming jammed and inoperable.<sup>11</sup> The 1866 Winchester rifle had similar flaws, and required the shooter to manipulate a lever between each shot (unlike modern semi-automatic firearms).<sup>12</sup>

The trial court also posited that Oregon’s Constitutional Delegates “must have been aware” of the Gatling gun. But the Gatling did not enter into general use until 1866—nearly a decade after Oregon’s Constitutional Convention.<sup>13</sup> The Union Army attempted to use the Gatling gun in 1863, but after buying just 13 of them, the Army deemed them ineffective and the gun was not used for the rest of the Civil War.<sup>14</sup> It was not until the late 1860s that the gun’s original paper cartridges were replaced with more reliable brass cartridges and the gun was adopted more widely.<sup>15</sup>

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<sup>11</sup> *1st DC Cavalry Martial Henry Rifle*, College Hill Arsenal, <https://perma.cc/LFP3-AVDY>.

<sup>12</sup> See Ryan Hodges, *The 1866 Rifle*, Taylor’s & Company (Aug 26, 2020), <https://perma.cc/7STW-8WMS>; *Why Britain Didn’t Adopt the Winchester 1866*, The Armourer’s Bench, <https://perma.cc/PRY3-YHSN>; see also Decl of Robert J. Spitzer ¶ 48, *Oregon Firearms Fed’n, Inc. v. Brown*, No 2:22-cv-01815 (D Or Feb. 6, 2023) (ECF No 123).

<sup>13</sup> See generally WILLIAM S. POWELL, *GATLING GUN*, University of North Carolina Press: Chapel Hill, NC 2006.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

The trial court further acknowledged that the black gunpowder used at the time of Oregon’s constitutional convention produced “significant smoke” that made “the rapid-fire technology impracticable in most utilizations.” Op Letter at 7. Smokeless powder was not successfully developed until 1889.<sup>16</sup> Earlier attempts to develop smokeless gunpowder led to disastrous consequences.<sup>17</sup> In 1846, Christian Friedrich Schönbein mixed nitrous and sulfuric acids to obtain a gun-cotton, which was rammed into cases and used with such poor results that it was soon abandoned.<sup>18</sup> In 1863, Austrian Wilhelm Freiherr Lenk von Wolfsberg created a smokeless explosive battery, which was used for one year until two large magazines blew up from unknown causes, and it also was abandoned.<sup>19</sup> Such experiments continued until 1889, when the US Navy began to successfully develop smokeless powder.<sup>20</sup>

Modern firearms capable of firing more than 10 rounds without reloading embody dramatic technological changes from the weaponry of the

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<sup>16</sup> Lieutenant RW Henderson, *The Evolution of Smokeless Powder*, 30 Proceedings of the United States Naval Institute 110 (Apr 1904), available at <https://perma.cc/DR6F-QQWP>.

<sup>17</sup> *See id.*

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

Founding and Reconstruction Eras. At the time of the Founding, the typical Revolutionary-era musket (i) could hold just one round at a time, (ii) could fire no more than three rounds per minute, (iii) had a maximum accurate range of 55 yards, and (iv) had a muzzle velocity of approximately 1,000 feet per second.<sup>21</sup> Further, these muskets had to be loaded before they could even be used.<sup>22</sup> By contrast, a typical modern AR-15 (i) can hold 30 rounds, (ii) can fire approximately 45 rounds per minute, (iii) can shoot accurately from approximately 600 yards, (iv) attains a muzzle velocity of over 3,000 feet per second, and (v) can be stored loaded and immediately fired.<sup>23</sup> Even the most advanced firearms of the Civil War era were a far cry from the modern AR-15. For example, the 1866 Winchester rifle, discussed above, had a maximum effective range of approximately 100 yards (about one-sixth

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<sup>21</sup> Christopher Ingraham, *What ‘Arms’ Looked Like When the 2nd Amendment Was Written*, Wash Post (June 13, 2016), <https://perma.cc/H6X5-C2NL>.

<sup>22</sup> See, e.g., *Firearms History and the Technology of Gun Violence*, UC Davis Library, <https://perma.cc/YHZ6-8QPG> (describing the “complicated process” of loading muskets used by soldiers during the Civil War).

<sup>23</sup> See Ingraham, *supra* note 21.

of an AR-15) and a muzzle velocity of 1,100 feet per second (roughly one-third of an AR-15).<sup>24</sup>

In short, repeating firearms, especially the lethally accurate technologies of today, were not commonly available or used at the time of the Oregon constitutional convention or the signing of the Oregon Constitution.

### **III. MEASURE 114 SATISFIES *CHRISTIAN* BY PROMOTING PUBLIC SAFETY.**

“The legislature has wide latitude to enact specific regulations restricting the possession and use of weapons 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.” *Christian*, 354 Or at 33. For the reasons addressed above in Part I, Measure 114 does not unduly burden self-defense. Further, Measure 114 unquestionably promotes public safety. Based on these two fundamental considerations, Measure 114 is constitutional under Article I, section 27 of the Oregon Constitution.

Mass shootings in the United States are on the rise, and have been since the turn of the 21st century.<sup>25</sup> The number of mass shootings more

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<sup>24</sup> Dan Alex, *Winchester Model 1866 Lever-Action Repeating Rifle*, Military Factory (Mar 12, 2019), <https://perma.cc/4ZJA-5V4M>.

<sup>25</sup> John Gramlich, *What the data says about gun deaths in the U.S.*, Pew Research Center (Apr 26, 2023), <https://perma.cc/CP2R-L397>.

than doubled between 2014 and 2020.<sup>26</sup> The years 2020, 2021 and 2022 were, in turn, each much deadlier than the year before.<sup>27</sup> Not only has the number of mass shootings increased in recent years, but research shows that the number of people shot in such attacks has also increased since 2015.<sup>28</sup> In 2022 alone, over 600 people were killed in mass shootings, with over 2,700 wounded.<sup>29</sup>

Shootings involving LCMs are deadlier than shootings that do not involve them. Since 2010, 86 percent of all high-fatality mass shootings (defined as a shooting where at least six or more people died, not including the perpetrator) have involved LCMs. *See Kotek*, 682 F Supp 3d at 897-98. Since 2020, every single high-fatality mass shooting has involved LCMs. *See id.* The average number of shots fired in a mass shooting where an LCM was not used was 16. *See id.* By contrast, the average number of shots fired in a mass shooting where an LCM was used was 99, over six

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<sup>26</sup> Juan Duchesne et al., *State Gun Law Grades and Impact on Mass Shooting Event Incidence: An 8-Year Analysis*, 234 J Am Coll Surg 645-651 (2022), available at <https://perma.cc/W3CX-D682>.

<sup>27</sup> Nadine Yousif, *Why Number of US Mass Shootings Has Risen Sharply*, BBC News (Mar 28, 2023), <https://perma.cc/U55P-QV9V>.

<sup>28</sup> *Mass Shootings in the United States*, Everytown Policy & Research (last updated Mar 2023), <https://perma.cc/YWU6-T4AD>.

<sup>29</sup> *Id.*

times greater. *See id.* More than 10 shots were fired in 94 percent of mass shootings where an LCM was used. *See id.* Every mass shooting since 2004 that resulted in 14 or more deaths has involved LCMs. *See Brown*, 644 F Supp 3d at 801.

In the deadliest mass shooting event in US history to date, which occurred in Las Vegas, Nevada in 2017, the shooter's LCM enabled him to fire 100 rounds "in between nine and eleven seconds." *Kotek*, 682 F Supp 3d at 898. In total, 60 people were killed and more than 400 people were wounded, all in the span of just 10 minutes.<sup>30</sup>

Bans on LCMs have been proven to promote public safety. State laws prohibiting LCMs reduce the incidents of mass shootings between 48 to 72 percent, and decrease the number of fatalities that occur in these mass shootings by 37 to 75 percent. *See Kotek*, 682 F Supp 3d at 898. In addition to aggregate data, firsthand accounts demonstrate why restricting LCMs can have an enormous impact on the toll from mass shootings—because the few seconds it takes to swap out a magazine or change firearms give victims the chance to run, hide or perhaps attack the shooter. When former US

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<sup>30</sup> *Las Vegas Attack: What Took Police So Long?*, BBC News (October 10, 2017), <https://perma.cc/PV8X-ANQG>; Katelyn Newberg, *Sisolak: We Will Never, Never Forget Those Killed in Oct 1 Shooting*, Las Vegas Review-Journal (Oct 1, 2020), <https://perma.cc/RF7G-GLEU>



Representative Gabby Giffords was shot in 2011, bystanders were able to disarm and tackle the shooter as he was replacing a spent magazine.<sup>31</sup>

During the mass shooting in 2012 at Sandy Hook Elementary School in Newtown, Connecticut, nine children were able to flee and two were able to hide when the shooter paused to exchange magazines. *Kotek*, 682 F Supp 3d at 898–99. During the mass shooting that occurred in 2019 at the Poway Synagogue in California, the shooter was confronted by congregants and chased out after he had fired all 10 rounds from his firearm and was forced to pause to reload. *See id.* These pauses necessarily occur less frequently when a mass shooter uses an LCM, thereby depriving victims of crucial moments in which to prevent or escape further harm.

The trial court correctly noted that mass shooting events create “extremely emotional” moments in our society. Op Letter at 37. Mass killings, especially of young people and children, rightfully cause an outpouring of concern and a desire to prevent such tragedies in the future. The trial court repeatedly described media coverage of mass shootings as “sensationalized,” making the remarkably callous—and constitutionally irrelevant—observation that the “number of people killed and injured is

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<sup>31</sup> *Woman Wrestled Fresh Ammo Clip from Tucson Shooter as He Tried to Reload*, ABC News (Jan 9, 2011), <https://perma.cc/CE4Y-4ZSY>.

statistically insignificant compared to the number of lawful gun owners.” *Id.* at 40, 41.

But the test set forth by *Christian* does not invite a comparison of the number of people injured in mass shootings to the number of lawful gun owners. Such comparisons ignore the relevant test: whether a regulation restricting the possession and use of weapons promotes public safety without frustrating the right to lawful self-defense. LCM bans do not burden the right to self-defense. And they have a demonstrated benefit for public safety. For these fundamental reasons, Measure 114 is constitutional.

### **CONCLUSION**

Measure 114 does not violate Article I, section 27 of the Oregon Constitution because, applying the standard of *Christian*, (1) Measure 114 does not burden the right to self-defense because LCMs are not used for lawful self-defense, (2) LCMs were not commonly used for self-defense at the time the provision was drafted, and (3) LCM restrictions promote public safety. Decisions of federal and state courts across the country, including from the State of Washington, confirm the constitutionality of LCM restrictions.

DATED this 14th day of June, 2024.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word-count limitation in ORAP 5.05(1)(b)(ii)(B) because the word count on this brief (as described in ORAP 5.05(1)(d)(i)) is 5,468.

I certify that the size of the type in this brief is not smaller than 14 points for both the text of the brief and footnotes, as required under ORAP 5.05(3)(b)(ii).

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## **CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on June 14, 2024, I directed the original BRIEF OF *AMICI CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, MARCH FOR OUR LIVES, OREGON ALLIANCE FOR GUN SAFETY, ALLIANCE FOR GUN RESPONSIBILITY, AND GUN OWNERS FOR RESPONSIBLE OWNERSHIP IN OPPOSITION TO PLAINTIFFS-RESPONDENTS' REQUEST FOR A PERMANENT INJUNCTION to be electronically filed with the Appellate Court Administrator and Appellate Records Section via the eFiling system and served on the following parties by electronic service via the eFiling system:

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