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ENDORSED FILED
SUPERIOR COURT

AUG 21 2023

COWLITZ COUNTY
STACI MYKLEBUST, Clerk

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF COWLITZ

GATOR'S CUSTOM GUNS INC.

Petitioner,

v.

WASHINGTON STATE ATTORNEY
GENERAL'S OFFICE, a Washington state
agency; and STATE OF WASHINGTON;

Respondents.

No: **23 2 00826 08**

PETITION FOR DECLARATORY AND
INJUNCTIVE RELIEF AND TO SET
ASIDE CIVIL INVESTIGATIVE
DEMAND FOR INTERROGATORIES
AND PRODUCTION OF DOCUMENTS

Petitioner, Gator's Custom Guns Inc., a Washington for-profit corporation ("Gator's"),
by and through its attorneys, S. Peter Serrano and Austin F. Hatcher, of Silent Majority
Foundation, 5238 Outlet Dr., Pasco, WA 99301, petitions this Court (1) for an Order declaring
the Civil Investigative Demand for Answers and Interrogatory and Request for Production
("CID") issued by the Office of the Attorney General, State of Washington, Consumer
Protection Division ("Attorney General") on July 27, 2023 invalid and unenforceable; (2) for
prospective injunctive relief against the Attorney General to enjoin his office from seeking
information and documents from Gator's relative to its purported investigation; and (3) to set
aside the CID.

PETITION FOR DECLARATORY AND INJUNCTIVE
RELIEF AND TO SET ASIDE CIVIL INVESTIGATIVE
DEMAND FOR INTERROGATORIES AND
PRODUCTION OF DOCUMENTS - 1

Silent Majority Foundation
5238 Outlet Dr.
Pasco, WA 99301

1 This Petition is based on Ch. 7.24 RCW, *et seq.*, Ch. 7.40 RCW, *et seq.*, RCW
2 19.86.110(3) and (8), RCW 19.86.170, RCW 9.41.290, RCW 9.41.370(2), Article I, Section 8
3 and the Fourth Amendment of the U.S. Constitution, Article I, Section 7 of the Washington State
4 Constitution, and the records and files in this matter. Gator's alleges as follows:

5 **I. PARTIES AND VENUE**

6 1. Gator's is a Washington for-profit corporation with its principal office located at
7 109 Allen St., Kelso, WA 98626. Gator's is a federally licensed firearms dealer engaged in the
8 business of selling and distributing firearms and associated products to individuals including.
9 Gator's is a licensed special occupational taxpayer for the purpose of transferring and selling
10 items covered by the National Firearms Act and for items used by gunsmiths. Firearms sales
11 are contingent on the individual passing a background check, pursuant to federal law.

12 2. Gator's has always adopted a cooperative stance with law enforcement. Gator's
13 has successfully passed an audit performed by the Bureau of Alcohol, Tobacco, Firearms, and
14 Explosives ("ATF"), and received positive comments regarding Gator's excellent organization
15 and filing systems. Gator's regularly donates to the Cowlitz Chaplaincy program, which
16 provides emotional, relational, and spiritual services and support to local police, fire, and EMS
17 personnel and their families, and the Cowlitz County community generally. Gator's also
18 regularly supports Kelso Police Department and Cowlitz County Sheriff's Office by donating
19 resources to the K-9 programs and enhanced training classes for individual officers in the areas
20 of de-escalation and hostage negotiation.

21 3. The Attorney General is a Washington state agency that issued a CID to Gator's.
22

1 15. The plain language of RCW 9.41.375 requires the State to show that Defendants
2 engaged in online conduct. “[E]xpressio unius est exclusio alterius, [is] a canon of statutory
3 construction, [which means] to express one thing in a statute implies the exclusion of the other.
4 Omissions are deemed exclusions.” *Schnitzer W., LLC v. City of Puyallup*, 190 Wn.2d 568, 582,
5 416 P.3d 1172 (2018). The inclusion of the word ‘online’ means that in-person sales are not a
6 *per se* violation of the CPA. Defendant offers no basis for allegations of online sales, and
7 Plaintiffs have a limited internet footprint, exclusively limited to Facebook, where it conducts
8 no sales: <https://www.facebook.com/GatorsCustomGuns>.

9 16. The Attorney General has no authority to regulate Gator’s conduct outside the
10 State of Washington, and the Attorney General has no colorable claim that any wholesale sales
11 or transfers of LCMs to licensed firearms dealers located outside the State of Washington could
12 somehow be an “unfair or deceptive act or practice” under the CPA, especially when
13 considering the exceptions of RCW 9.41.370(2). Through the CID, the Attorney General seeks
14 such protected information, and compliance with the CID would require Gator’s to divulge such
15 information.

16 17. Furthermore, the constitutionality of Washington’s ban on LCM sales has been
17 challenged in several pending legal actions, including *Sullivan v. Ferguson*, No. 3:22-cv-05403
18 (W.D. Wash.), and *Brumback v. Ferguson*, No. 1:22-cv-03093-MKD (E.D. Wash.). Both
19 actions concern the constitutionality of ESSB 5078 under the U.S. Const. Amend. II. The right
20 to bear arms protects the ability to acquire ammunition, and by extension, ammunition feeding
21 devices.
22

1 Constitutional rights thus implicitly protect those closely related acts
2 necessary to their exercise... The right to keep and bear arms, for
3 example, “implies a corresponding right to obtain the bullets
4 necessary to use them,” *Jackson v. City and County of San Francisco*, 746 F.3d 953, 967 (C.A.9 2014), and “to acquire and
5 maintain proficiency in their use,” *Ezell v. Chicago*, 651 F.3d 684,
6 704 (C.A.7 2011)... Without protection for these closely related
7 rights, the Second Amendment would be toothless.

8 *Luis v. United States*, 578 U.S. 5, 26-27, 136 S. Ct. 1083 (2016) (Thomas, J., concurring); *see*
9 *also, Teixeira v. County of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (“As with purchasing
10 ammunition and maintaining proficiency in firearms use, the core Second Amendment right to
11 keep and bear arms for self-defense wouldn’t mean much without the ability to acquire arms.”)
12 (internal quotations omitted).

13 18. In addition to the protection of closely related acts necessary to the exercise of
14 the right to bear arms, the federal standard and analysis of the right has recently been further
15 clarified by the U.S. Supreme Court in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*,

16 When the Second Amendment’s plain text covers an individual’s
17 conduct, the Constitution presumptively protects that conduct. The
18 government must then justify its regulation by demonstrating that it
19 is consistent with the Nation’s historical tradition of firearm
20 regulation. Only then may a court conclude that the individual’s
21 conduct falls outside the Second Amendment’s unqualified
22 command.

597 U.S. ____, 142 S. Ct. 2111, 2129-30 (2022) (internal quotations omitted). Acquiring
ammunition feeding devices is unquestionably individual conduct.

19 19. Gator’s hereby challenges the constitutionality of ESSB 5078 under Wash.
20 Const. art. I § 24. Courts are to “consider constitutional questions first under our own state
21 constitution.” *City of Seattle v. Evans*, 184 Wn.2d 856, 862, 366 P.3d 906 (2015) (*accord State*
22

1 v. *Coe*, 101 Wn.2d 364, 373-74, 679 P.2d 353 (1984)). The Washington Constitution provides
2 that “[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall
3 not be impaired[.]” Wash. Const. art. I, § 24.

4 20. “Supreme Court application of the United States Constitution establishes a floor
5 below which the state courts cannot go to protect individual rights. But states of course can
6 raise the ceiling to afford greater protections under their own constitutions.” *State v. Sieyes*, 168
7 Wn.2d 276, 292, 225 P.3d 995 (2010).

8 21. The clearest postulation of this principle is that “Washington retains ‘the
9 sovereign right to adopt in its own Constitution individual liberties *more expansive* than those
10 conferred by the Federal Constitution.” *State v. Gunwall*, 106 Wn.2d 54, 59, 720 P.2d 808
11 (1986) (*quoting PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 100 S. Ct. 2035 (1980))
12 (emphasis added). The test set forth in *Gunwall* provides six nonexclusive neutral criteria
13 which are “relevant to determining whether, in a given situation, the constitution of the State of
14 Washington should be considered as extending *broader* rights to its citizens than does the
15 United States Constitution.” *Id.* at 61 (emphasis added).

16 22. Accordingly, the “floor” established by the federal Constitution was raised under
17 *Bruen*. Gone is the “‘two-step’ framework for analyzing Second Amendment challenges that
18 combines history with means-end scrutiny.” *Bruen*, 142 S. Ct. at 2125-26. Today, “when the
19 Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively
20 protects that conduct.” *Id.* at 2126. A state must “demonstrate that the regulation is consistent
21 with the Nation’s historical tradition of firearm regulation.” *Id.* This is not a radical departure
22 from the previous analytical framework, but rather a return and refocus to the standard set forth

1 in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008), and an explicit
2 rejection of means-end scrutiny of the right to bear arms.

3 23. As elucidated in *City of Seattle v. Evans*:

4 The right to bear arms protects instruments that are designed as
5 weapons traditionally or commonly used by law-abiding citizens for
6 the lawful purpose of self-defense. In considering whether a
7 weapon is an arm, we look to the historical origins and use of that
8 weapon, noting that a weapon does not need to be designed for
9 military use to be traditionally or commonly used for self-defense.
10 We will also consider the weapon’s purpose and intended function.

11 184 Wn.2d 856, 869, 366 P.3d 906 (2015). The right to bear arms is a fundamental right. “Gun
12 ownership is an inexorable birthright of American tradition.” *Sieyes*, 168 Wn.2d at 284. The
13 Washington Supreme Court determined that the federal Constitution applies to the States
14 independently of the U.S. Supreme Court’s analysis in *McDonald v. City of Chicago*, 561 U.S.
15 742, 130 S. Ct. 3020 (2010), and that the right is fundamental, explaining that “the Second
16 Amendment protects an individual right to bear arms from state interference through the due
17 process clause of the Fourteenth Amendment. This right is necessary to an Anglo-American
18 regime of ordered liberty and fundamental to the American scheme of justice.” *Id.* at 291; *see*
19 *also Zaitzeff v. City of Seattle*, 17 Wn. App. 2d 1, n.10, 484 P.3d 470 (2021) (*citing State v.*
20 *Sieyes*, “finding the Second Amendment right a fundamental right”); *State v. Ibrahim*, 164 Wn.
21 App. 503, 514, 269 P.3d 292 (2011) (*citing Sieyes*, “The right to bear arms is a fundamental
22 right guaranteed by the United States Constitution.”). “The violation of a fundamental
constitutional right, even if temporary, constitutes irreparable harm.” *Stevens Cty. v. Stevens*
Cty. Sheriff’s Dep’t, 20 Wn. App. 2d 34, 94, 499 P.3d 917 (2021) (Fearing, J., dissenting)
(*citing Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673 (1976)).

1 24. The Supreme Court in *Evans* examined analysis of the Oregon Supreme Court to
2 determine the outer bounds of Wash. Const. art. I § 24, because “Washington’s article I, section
3 24 was drawn from Oregon’s article I, section 27 and the constitution proposed by W. Lair
4 Hill.” *Id.* at 868 (*citing* Robert F. Utter & Hugh Spitzer, *The Washington State Constitution: A*
5 *Reference Guide* 39 (2002)).

6 25. Notably, Oregon’s Ballot Measure 114 (2022), which is analogous to ESSB 5078
7 in part as it prohibits LCMs, was preliminarily enjoined in Oregon state court. *See, Arnold v.*
8 *Brown*, Harney Cty. Cir. Ct. No. 22CV41008, attached as Exhibit B. The Supreme Court of
9 Oregon denied a request for a stay of the preliminary injunction. *See, Arnold v. Kotek*, Or. S. Ct.
10 No. S069998, attached as Exhibit C.

11 26. The CID violates Gator’s Fourth Amendment rights to be free from unreasonable
12 search and seizure because it is vastly overbroad, demands information and documents about
13 lawful conduct and which are beyond the Attorney General’s authority, is not reasonable related
14 to any legitimate investigative purpose, and is overly burdensome and expensive.

15 27. The CID violates Gator’s right to privacy under Article 1, Section 7 of the
16 Washington State Constitution.

17 28. Article 1, Section 7 applies to “persons,” including corporations. *See, State v.*
18 *Brelvis Consulting, LLC*, 7 Wn. App. 2d 207, 228-29, 436 P.3d 818, 830 (2018) holding that
19 corporations are encompassed in the definition of “persons” for the analysis of Article 1,
20 Section 7.

21 29. By issuing the CID and pursuing the purported investigation, the Attorney
22 General seeks to regulate and burden out-of-state commercial activity and lawful interstate

1 commerce, which improperly encroaches on Congress’s plenary authority to regulate interstate
2 commerce in violation of the Dormant Commerce Clause, Article I, Section 8 of the United
3 States Constitution.

4 **IV. GATOR’S IS ENTITLED TO DECLARATORY RELIEF**

5 30. Pursuant to Ch. 7.24 RCW, this Court has the authority to declare rights, status,
6 and other relations of parties. Gator’s seeks a declaration that the Attorney General lacks
7 authority to issue the CID and that the CID is invalid and unenforceable as the CID is issued
8 under a flawed, unconstitutional ESSB 5078.

9 31. Gator’s further seeks a declaration that ESSB 5078 is unconstitutional and
10 unenforceable, both as applied to Gator’s and facially.

11 32. The declaratory relief requested, if rendered or entered, will terminate the
12 controversy and remove uncertainty as to the Attorney General’s authority to issue the CID
13 and/or the validity of the CID itself.

14 33. The declaratory relief requested, if rendered or entered, will terminate the
15 controversy and remove uncertainty as to the constitutionality of ESSB 5078 and its burden on
16 the right to bear arms, which shall not be impaired, under Wash. Const. art. I § 24, and U.S.
17 Const. amend. II.

18 34. The public interest would be furthered by granting declaratory relief because
19 constitutional rights are at stake, and because the public has an interest in preserving the
20 principle of prosecutorial neutrality.

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V. GATOR’S IS ENTITLED TO INJUNCTIVE RELIEF

35. Pursuant to Ch. 7.40 RCW, this Court has the authority to provide injunctive relief in order to ensure that great injury does not befall a plaintiff if shown that the plaintiff is entitled to relief, and to ensure that public officers and officials act within the bounds of their lawful powers. Gator’s seeks an injunction to prevent the Attorney General from enforcing the CID.

36. The CID constitutes enforcement of ESSB 5078 as it is a direct enforcement of Section 4 of the Bill, implemented as RCW 9.41.375.

37. Gator’s has a substantial likelihood of success on the merits.

38. Gator’s will suffer irreparable injury if an injunction is not granted, and indeed is currently suffering an irreparable injury.

39. An injunction will not substantially injure other interested parties, in that there can be no injury to the Attorney General for not being able to prosecute or investigate Gator’s for lawful activity, nor is there any harm to the Attorney General arising from a delay to await a ruling on the merits of this matter.

40. The public interest would be furthered by the injunction because constitutional rights are at stake, and because the public has an interest in preserving the principle of prosecutorial neutrality.

VI. PRAYER FOR RELIEF

WHEREFORE, Gator’s prays as follows:

1. The Court declare the July 27, 2023 CID invalid and unenforceable;
2. The Court enjoin the Attorney General from enforcing the July 27, 2023 CID;

CERTIFICATE OF SERVICE

I certify that I filed with the Court and electronically served a copy of this document on all parties on the date below as follows:

Office of the Attorney General:	
Electronic Service Adress	serviceATG@atg.wa.gov
Ben Carr, Assistant Attorney General	ben.carr@atg.wa.gov
Bob Hyde, Assistant Attorney General	bob.hyde@atg.wa.gov
John Nelson, Assistant Attorney General	john.nelson@atg.wa.gov
Vick Walker, Paralegal	vick.walker@atg.wa.gov
Rosa Hernandez, Paralegal	rosa.hernandez@atg.wa.gov

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of August, 2023, at Pasco, WA.

S. Peter Serrano, WSBA #54769
Attorney for Petitioner

EXHIBIT A

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**OFFICE OF THE ATTORNEY GENERAL
STATE OF WASHINGTON**

IN RE THE MATTER OF:

SALES AND DISTRIBUTION OF LARGE
CAPACITY MAGAZINES TO ENTITIES
IN WASHINGTON

CIVIL INVESTIGATIVE DEMAND FOR
ANSWERS TO INTERROGATORY AND
REQUEST FOR PRODUCTION

THE STATE OF WASHINGTON TO

GATOR'S CUSTOM GUNS INC.
c/o Walter Wentz
109 Allen Street
Kelso, WA 98626-3401

DEMAND IS HEREBY MADE upon you by the Consumer Protection Division, Office of the Attorney General, State of Washington (Attorney General), to answer in writing and under oath, the Interrogatories contained in this Civil Investigative Demand (CID). This Civil Investigative Demand is made pursuant to RCW 19.86.110. The Attorney General believes you have knowledge relevant to the subject matter of an investigation now in progress. Said investigation involves possible past or current violations of RCW 19.86.020 (unfair or deceptive acts or practices, or unfair methods of competition, in the conduct of any trade or commerce) and RCW 9.41.375 (sales of large capacity magazines); specifically, unfair or deceptive acts and practices, and unfair methods of competition, with respect to the importation, distribution, sale, or offer for sale of large capacity magazines to persons or entities in Washington.

1 **I. TIME AND PLACE OF PRODUCTION**

2 The requested documents are to be produced to Ben Carr, Assistant Attorney General, at
3 the Office of the Attorney General, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104,
4 within thirty (30) days of being served with this Civil Investigative Demand, or at such other
5 time and place as is agreed to by the parties.

6 **II. COMMUNICATIONS**

7 All notices, questions, or communications concerning this Civil Investigative Demand
8 should be directed to Ben Carr, Assistant Attorney General, 800 Fifth Avenue, Suite 2000,
9 Seattle, WA 98104, by telephone at (206) 464-7662, or by email at Ben.Carr@atg.wa.gov.

10 **III. DEFINITIONS**

11 3.1 “Relating to” means constituting, containing, concerning, discussing, describing,
12 analyzing, identifying, referring to, or stating.

13 3.2 “You”, “your”, and “Gator” refer to Gator’s Custom Guns, Inc.; G.C.G. Inc., any
14 entity or person operating under the Federal Firearms License No. 9-91-015-07-3B-03764, and
15 any parent, affiliate, sister, subsidiary, predecessor, successor or assignee of them, and their
16 principals, operating divisions, present or former owners, employees, servants, officers,
17 directors, agents, representatives, attorneys, accountants, independent contractors, distributors,
18 and any other persons or entities acting on behalf of or under the direction, authorization, or
19 control of them, including any foreign or overseas affiliates.

20 3.3 “Large capacity magazine” and “LCM” means an ammunition feeding device
21 with the capacity to accept more than 10 rounds of ammunition, or any conversion kit, part, or
22 combination of parts, from which such a device can be assembled if those parts are in possession
23 of or under the control of the same person, but shall not be construed to include any of the
24 following: (a) An ammunition feeding device that has been permanently altered so that it cannot
25 accommodate more than 10 rounds of ammunition; (b) A 22 caliber tube ammunition feeding
26 device; or (c) A tubular magazine that is contained in a lever-action firearm. RCW 9.41.010(16).

1 3.4 “Communication” means every disclosure, transfer, exchange, or transmission of
2 information, whether oral, written, or electronic, by voice speech, telecommunications
3 (including messaging services, such as text messages), virtual meeting (e.g., FaceTime, Zoom,
4 or Webex), computer, electronic mail, facsimile, or otherwise.

5 3.5 “Distribute” means to give out, provide, make available, or deliver a Large
6 Capacity Magazine to any person in this state, with or without consideration, whether the
7 distributor is in-state or out-of-state. "Distribute" includes, but is not limited to, filling orders
8 placed in this state, online or otherwise. "Distribute" also includes causing a Large Capacity
9 Magazine to be delivered in this state. RCW 9.41.010(7).

10 3.6 “Sale,” “sell,” and “sold,” mean the actual approval of the delivery of a Large
11 Capacity Magazine in consideration of payment or promise of payment.

12 3.7 “Document” or “documents” means all computer files and written, recorded, and
13 graphic materials of every kind, including audio material, video material, and photographic
14 material regardless of whether in digital, analog or in another form, in the possession, custody
15 or control of the respondent. The terms “document” and “documents” includes material defined
16 as “writings” and “recordings” in ER 1001(a). The terms “document” and “documents” also
17 includes electronic correspondence and drafts of documents, copies of documents that are not
18 identical duplicates of the originals, and copies of documents the originals of which are not in
19 the possession, custody, or control of the respondent.

20 3.8 “Identify,” when used with respect to a document, means to state with respect to
21 each such document:

- 22 a. Title of the document;
- 23 b. Author;
- 24 c. Title or position of the addressee;
- 25 d. Type of document;
- 26 e. Date it was prepared;

1 f. Number of pages it comprises; and

2 g. Production number.

3 3.9 "Identify," when used with respect to an entity, means to state with respect to
4 each such entity:

5 a. Full legal name or title;

6 b. Form of business (i.e. corporation, partnership, limited liability co.);

7 c. Relationship to You;

8 d. Complete business location and mailing address;

9 e. Telephone and facsimile numbers;

10 f. State of incorporation or organization or, if organized outside the United
11 States, country and city of incorporation or organization; and

12 g. Address of headquarters and/or principal place of business.

13 3.10 "Identify," when used with respect to a Person, means to state with respect to
14 each such Person:

15 a. Name;

16 b. Title(s);

17 b. Residential or business mailing address;

18 c. Telephone number; and

19 d. Email address.

20 3.11 "Person" and "entity" mean natural persons, proprietorships, firms, general
21 partnerships, associations, joint ventures, for-profit corporations, non-profit corporations, trusts,
22 groups, agencies, institutions, other business or government organization, or any other legal
23 entity, and all present and former directors, officers, employees, agents, consultants, or other
24 persons acting in concert with or on behalf of any of them.

25 3.12 The singular includes the plural and vice versa. The masculine includes the feminine
26 and neuter genders. The past tense includes the present tense where the clear meaning is not

1 | distorted by change of tense. "And" as well as "or" shall be construed disjunctively or conjunctively
2 | as necessary to bring within the scope of the request all responses that otherwise might be construed
3 | to be outside its scope. "Include" and "including," and variations thereof, shall not be interpreted as
4 | terms of limitation but shall be deemed to be followed by the words "without limitation." "Any"
5 | shall be construed as synonymous with "every" and "all" and shall be all inclusive."

6 | IV. INSTRUCTIONS

7 | 4.1 Unless otherwise noted, the relevant time period for which documents and
8 | information are requested is **July 1, 2022** to the present.

9 | 4.2 This CID requests production of all described documents in your possession,
10 | custody, or control without regard to the person or persons by whom or for whom the documents
11 | were prepared (e.g., your employees, distributors, representatives, competitors, or others).

12 | 4.3 This CID includes documents and information in the possession of your
13 | employees, agents, representatives, and attorneys, unless privileged. If you contend that the
14 | information requested by any request is privileged in whole or in part, or if you otherwise object
15 | to any part of any request or contend that any identified document would be excluded from
16 | production to the Attorney General in discovery regardless of its relevance, identify the
17 | document and state the basis for the privilege, and provide a detailed privilege log that contains
18 | at least the following information for each document or piece of information that you have
19 | withheld:

- 20 | a. The name of each author, writer, sender, creator, or initiator of
21 | such document;
- 22 | b. The name of each recipient, addressee, or party for whom such document
23 | was intended or to whom the document was sent;
- 24 | c. The date of such document or an estimate thereof if no date appears on
25 | the document;
- 26 | d. The general subject matter of the document; and

1 e. The claimed grounds for withholding the document, including, but not
2 limited to, the nature of any claimed privilege and grounds in
3 support thereof.

4 4.4 This CID imposes a continuing duty to produce promptly any responsive
5 information or item that is not objected to, which comes into your knowledge, possession,
6 custody, or control after your initial production of responses to this CID.

7 4.5 In each instance in which a document is produced, produce the current edition,
8 along with all earlier editions or predecessor documents serving the same function, even though
9 the title of earlier documents may differ from current versions.

10 4.6 The following procedures shall apply to the production of documents and
11 information in response to this CID:

- 12 a. The recipient of this CID shall label each responsive document (i.e.,
13 Response to Request No. 1, Response to Request No. 2, and so forth),
14 group all documents responsive to a particular request together, and place
15 a label on each group of documents which identifies the
16 corresponding request;
- 17 b. All attachments to responsive documents or information shall be
18 produced with, and attached to, the responsive documents (or digitally in
19 corresponding order);
- 20 c. Each responsive document or information shall be produced in its entirety
21 and no portion of any document or information shall be edited, cut,
22 masked, redacted or otherwise altered, unless for applicable privilege
23 which shall be logged according to the procedures set forth above;
- 24 d. The recipient of this CID shall provide a key to all abbreviations used in
25 the documents or information and shall attach the key to the
26 corresponding documents or information.

1 4.7 Documents or information that may be responsive to more than one (1) numbered
2 request in this CID need not be submitted more than once. However, for each such document or
3 information, the recipient of this CID shall identify all of the numbered requests to which the
4 document or information is responsive. If any responsive document or information has been
5 previously supplied to the Washington Attorney General's Office, you shall identify the
6 document(s) or information previously provided and the date(s) of submission.

7 4.8 You shall consecutively number each page of all documents or information
8 produced with your response, and indicate the total number of pages produced with your
9 response. This page numbering must be separate from and must not alter any original page
10 numbering on the responsive documents or information.

11 4.9 Your responses to the requests in this CID should include all relevant
12 electronically stored information in your possession, custody, or control. Electronically stored
13 information is an irreplaceable source of evidence and therefore you must implement appropriate
14 safeguards against the destruction of evidence until the final resolution of this issue, as
15 noted below.

16 4.10 Production of electronically stored information and other documents in electronic
17 format shall conform to the standards set forth in **Exhibit A** (attached).

18 4.11 If you are unable to fully answer any particular interrogatory or request for
19 documents, supply all of whatever information is actually available. Designate such response as
20 incomplete, and accompany the information and documents produced with an explanation that
21 includes the reasons for the incomplete answer, a description of any and all of your efforts to
22 obtain the information, and the source from which the Attorney General may obtain information
23 to complete your response. If books, records, or other sources that provide accurate answers are
24 not available, provide your best estimates and describe how you derived the estimates, including
25 the sources or bases of such estimates. Designate estimated data as such by marking it with the
26 "est." notation. If there is no reasonable way for you to make an estimate, provide an explanation.

1 4.12 If particular documents responsive to this CID no longer exist for reasons other
2 than the ordinary course of business but you have reason to believe they have been in existence,
3 describe the documents, state the circumstances under which such documents were lost or
4 destroyed, and identify persons having knowledge of the content of the documents.

5 4.13 In order for your response to this demand to be complete, submit with your
6 response the attached certification form, as executed by the official supervising your compliance
7 with this CID.

8 4.14 **Duty to Preserve Documents: Do not destroy any documents, information,**
9 **or other data relating to any of the requests in this CID.** All documents, information, and
10 other data that relate to the subject matter or requests of this CID must be preserved. Any
11 destruction involving such documents, information, and other data must cease immediately, even
12 if it is your normal or routine course of business to delete or destroy such documents,
13 information, or data and, even if you believe such documents, information, or data are privileged
14 or otherwise need not be produced.

15 V. INTERROGATORY

16 **INTERROGATORY NO. 1:** Identify each Large Capacity Magazine that was shipped,
17 transferred, or otherwise distributed to You since July 1, 2022. In Your answer, please include:

- 18 a. The name, address, and phone number of the person or entity who shipped,
19 transferred, or otherwise distributed the Large Capacity Magazine to You;
- 20 b. Model number and brand of Large Capacity Magazine;
- 21 c. Quantity of Large Capacity Magazine;
- 22 d. Date You received the Large Capacity Magazine; and
- 23 e. The amount You paid for the Large Capacity Magazine.

24 **ANSWER:**

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CERTIFICATION

I, _____, having made the foregoing responses to the interrogatories and requests for production of documents in this Civil Investigative Demand, certify under penalty of perjury under the laws of the State of _____, that I am authorized to sign legal documents on respondent's behalf and know the responses herein to be true, correct, and complete.

Signature: _____
Title or Position: _____
Date: _____
City and State: _____

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PROOF OF SERVICE

I certify that I caused true and correct copies of this document to be served via Certified Mail on the following party at the following address:

GATOR'S CUSTOM GUNS INC
c/o Walter Wentz
109 Allen Street
Kelso, WA 98626-3401

I certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 27th day of July, 2023, at Seattle, Washington.

/s/ Ben Carr
BEN CARR, WSBA #40778
Assistant Attorney General

**Washington State Attorney General's Office
Consumer Protection Division
Everlaw Document Production Standards**

This document describes the technical requirements for electronic document productions to the Consumer Protection Division of the State of Washington Attorney General's Office (AGO). It is highly recommended that parties confer in advance of any large-scale document production.

Any proposed file formats other than those described below must be discussed with the legal and technical staff of the AGO Consumer Protection Division prior to submission.

1. Definitions and Scope

- a. **"Document(s)"** shall have the broadest meaning pursuant to Rule 34 of the Washington Superior Court Civil Rules (CR) and case law construing the same, and includes all electronic documents or electronically stored information (ESI) existing in any medium from which information can be obtained or translated into reasonably usable form.
- b. **"Native File(s)"** or **"Native Format"** means ESI that have an associated file structure defined by the creating or viewing application in the file type for (or of) the application in which such ESI is normally created, viewed, and/or modified in the regular course of the Producing Party's business.

At a minimum, all spreadsheets, presentation files (PowerPoint), and audio/video files must be produced in native format, unless there is an agreement to the contrary. (Note: An Adobe PDF file is **not** considered a Native File or Native Format unless the document was initially created as a PDF.)

- c. **"Metadata"** means: (i) information associated with or embedded in a Native File that does not constitute the primary content region of the file; and (ii) information generated automatically by the operation of a computer or other information technology system when a Native File is created, modified, transmitted, deleted, or otherwise manipulated by a user of such system.
- d. **"Load File"** means an electronic data file containing information about the Documents in a production, including an indication of which individual pages or files constitute each Document, and data relating to each individual Document, including extracted metadata.
- e. **"OCR"** means optical character recognition, i.e., using software to generate text from an image of text.
- f. **"Extracted Text"** means all text content extracted from a Native File.
- g. **"Receiving Party"** shall mean the party receiving production of Documents in response to any request for production of document(s).

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- h.** “**Producing Party**” shall mean the party producing Documents in response to any request for production of documents.
- i.** “**Bates Number**” means an identifier that consists of a short two to eight letter prefix, associated with the Producing Party’s name, followed by a six-digit number (e.g., ABCD000001). The prefix should include only letters, dashes, or underscores. The prefix and number should not be separated by a space. Each page in the production must be assigned a unique, incremental Bates number. The prefix must be the same for all pages produced from the same Producing Party.

2. General Production Requirements

- a.** Reference the specific portion of the request to which you are responding.
- b.** All submissions must be organized by **custodian**, unless otherwise instructed.
- c.** Electronic files must be produced in their **Native Format**, i.e., the format in which they are ordinarily used and maintained during the normal course of the Producing Party’s business. For example, an MS Excel file must be produced as an MS Excel file rather than a PDF or other image of a spreadsheet.
- d.** Emails and attachments to emails must be produced in their **Native Format**. If an email or an attachment requires either withholding or redaction, that file may be produced as an image file as long as the parent-child relationship is maintained and reflected in the Load File.
- e.** While the AGO accepts imaged productions **in addition** to native formats, imaged productions without native formats are deficient, unless the original document only exists in hard copy form or its Native Format is an image.
- f.** All Documents, whether originally stored in paper or electronic form, must be produced in the manner described herein. If the Producing Party has concerns or questions about these specifications and requirements, the Producing Party shall schedule a conference with the Requesting Party’s counsel, as soon as possible after receipt of the requests at issue, to discuss alternative production requirements, concerns, formats, or methods.

3. Production Format

Documents shall be produced according to the following specifications:

- a. Electronic Production of Paper Documents**
Documents that are maintained in paper format shall be scanned images at 300 DPI resolution, in text searchable PDF format that, to the maximum practicable extent, represents the full and complete information contained in the original

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Document. Documents must be produced with the associated OCR text, and Load File. Paper Documents that contain affixed notes shall be scanned with the notes affixed, if it can be done so in a manner so as not to obstruct other content on the document. If the content of the Document is obscured by the affixed notes, the Document and note shall be scanned separately, with a parent-child relationship indicated in the Load File.

b. Electronically Stored Information

Document images should be generated from electronic Documents in a set of color 300 DPI text searchable PDFs, one PDF file per document, that reflects the full and complete information contained on the original document to the maximum practicable extent. Electronic Documents must be produced together with a Load File containing all required metadata as set out in Section 13, below. The Producing Party may withhold the redacted text for redacted Documents.

c. File Structure

The Producing Party shall produce the following sets of files for all produced documents:

i. Load File

- (1) Each production must include a .dat metadata Load File, in a delimited text file format. The first row of the Load File should contain the metadata column/field names. Each subsequent row should contain the metadata for a single document. Each column of each row should contain one metadata value, with values encapsulated by a pre-designated "quote" character and columns separated by a pre-designated "separator" character throughout.
- (2) The Load File should use a thorn (þ, ASCII character 231) as the pre-designated "quote" character, and the special, non-printing character DC4 (ASCII character 20) as the pre-designated column separator.
- (3) The fields Begin Bates, End Bates, and NativePath must be present.
- (4) Every row must have the same number of columns/fields (empty values are acceptable).
- (5) Text must be encoded in either ASCII, UTF-8, or UTF-16.
- (6) The Load File should be placed in the Data folder of the production in the root directory.

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ii. Extracted Text and OCR Files (.txt files)

- (1) A single text file for each Document, containing the text of all the document's pages.
- (2) Pages separated by form feed character (decimal 12, hex 0x0C).
- (3) Filenames should be of the form: <Bates num>.txt, where <Bates num> is the Bates number of the first page of the Document.
- (4) Text and filenames must be encoded in UTF-8.
- (5) Files should be placed in the *text*/subdirectory.

iii. Image Files

- (1) A single 300 DPI, color, text searchable PDF file per Document.
- (2) Filenames should be of the form: <Bates num>.pdf, where <Bates num> is the BATES number of the first page of the document.
- (3) Files should be placed in the *images*/subdirectory.
- (4) PDFs shall include searchable text embedded in the Document.
- (5) No other information should be provided in image filenames, including confidentiality status.
- (6) Filenames must be encoded in UTF-8.

iv. Native Files

- (1) Filenames must be unique in the production, unless the content is identical. We recommend naming files by the Bates number of the first page of the associated Document.
- (2) The filename must retain the file extension corresponding to the original native format; for example, an Excel 2003 spreadsheet's extension must be .xls.
- (3) Each filename, including extension, must correspond to the NativePath metadata field in its corresponding document's row in the Load File.

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(4) Filenames must be encoded in UTF-8.

(5) Files should be placed in the *natives*/subdirectory.

4. Production Method

Production media shall always be encrypted and sent via FTP or SFTP link provided via email at the time a production letter is emailed, unless the parties agree otherwise. If a production is too large to practicably FTP, it may be sent via encrypted physical media such as a Hard Drive or USB, along with a cover letter noting the name of the matter in which it was produced, the production date, the Bates number range of the material contained in the production, and a short description of its contents. Passwords for encrypted media should be sent separately from the media itself.

5. Document Unitization

Imaged Documents shall be unitized in a manner that maintains the Document(s) and any attachments as they existed in their original state.

6. Attachment Families

For electronic Documents, the relationship of documents in a document collection (e.g., cover letter and enclosures, e-mail and attachments, binder containing multiple documents, or other documents where a parent-child relationship exists between the documents) shall be maintained using the Begin Family and End Family fields of the Load File, provided however that the Producing Party must present only one level of parent-child relationship. Document Images generated from attachments to emails stored in Native Format shall be produced contemporaneously and sequentially immediately after the parent email in their Bates numbering.

7. Duplicates

A Producing Party who has more than one identical copy of an electronic document (i.e., the documents are actual and contextual duplicates) need only produce a single copy of that document. A Producing Party need not produce the same electronically stored information in more than one form. Deduplication should be based on the MD5 or SHA1 hash values of native version of documents, respecting differences in families (i.e., two duplicates attached to different emails will both be provided). The hash value will take into account the document's text and intrinsic metadata (e.g., author, date created, etc.), but not extrinsic metadata values (e.g., custodian, file path). Emails should be systematically and consistently de-duplicated.

8. Bates Numbering

Each Producing Party shall Bates number its production(s) as follows:

a. Document Images

Each page of a produced Document shall have a legible, unique page identifier ("Bates Number") electronically "burned" onto the image at a location that does

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not unreasonably obliterate, conceal, or interfere with any information from the source document. The Bates Numbers shall be formatted as described in Section 1.i., above. The Producing Party will use a consistent prefix throughout the matter. Thus, once a party chooses a prefix, *e.g.*, ABCD, it should not later produce a Document using a different prefix, *e.g.*, EFGH. No other legend or stamp should be placed on the Document Image other than a confidentiality legend (where applicable), redactions, and the Bates Number.

b. Native Format Documents

To preserve the integrity of Native Format Documents, no Bates Number, confidentiality legend or internal tracking number should be added to the content of the Native Document.

c. Sort Order

For Bates numbering, documents will be sorted by their original file path in ascending order, preserving family ordering.

9. Confidentiality Designations

Confidentiality designations must be made on an individual document basis – productions where all documents are designated “Confidential” are unacceptable. Documents designated as confidential pursuant to a protective order or other agreement should be clearly labeled as such to avoid inadvertent disclosure of confidential information. Provide the confidentiality designations in a field provided with the load file and emblazon the confidentiality designation on the imaged document with the Bates stamp. The confidentiality legend shall be placed onto each document’s image at a location that does not unreasonably obliterate or obscure any information from the source document.

10. Search Terms

The Producing Party must meet and confer with the Receiving Party before finalizing any search terms to identify electronic documents to be collected for review for possible production, or any subsequent modification of such search terms.

11. Databases

To the extent discovery requires production of discoverable electronic information contained in a large database, the Producing Party should meet and confer with the Receiving Party’s counsel to discuss the format of the production, with an understanding of which fields are relevant, and what set of queries is to be made for discoverable information. Prior to the conference, the Producing Party should produce relevant data dictionaries, white papers, and exemplar reports from the database in a reasonably usable and exportable electronic file (spreadsheet if possible).

12. Privilege Logs

The Producing Party must produce privilege logs in spreadsheet or .csv format. A Producing Party will produce a separate privilege log for each production within 20 days after the production of documents for which a privilege is asserted. The production of a

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privilege log for a custodian or his/her department must be made not less than 20 days prior to that custodian's deposition.

13. Metadata

The Producing Party shall produce the metadata information described below with each production and in the format described above. For each Document, the Producing Party shall produce a line in the corresponding Load File with the following fields, where available. The field naming conventions shall be as set forth in this Section. Datetime metadata will be provided in UTC in a consistent, reasonable, and clearly delimited format (e.g., M/d/y H:m). To the extent timezone information is provided for context, it will be provided in a separate Load File field.

Field Name	Description	Data Type	Example
Begin Bates	Beginning Bates number of first page of a document	Text	ABCD000001
End Bates	Ending Bates number of last page of a document	Text	ABCD000003
Begin Family	Begin Bates of parent document of family of attachments	Text	ABCD000001
End Family	End Bates of last attachment of family	Text	ABCD000004
Pages	Number of Bates stamped pages for the PDF image each document.	Number	3
NativePath	Relative file path of native record within production, including filename and extension of native file within the production. Only for documents produced in native format.	Text	.\VOL001\natives\001\ABCD000001.xlsx
TextPath	Relative file path of text record within production, including filename and extension of the text file within the production.	Text	.\VOL001\text\001\ABCD000001.txt
Placeholder	If Bates stamped document is produced with a placeholder image (values: Y or N)	Text	Y
Redacted	If this document has redactions (values: Y or N)	Text	Y

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ConfDesig or Endorsement	If this document has been designated confidential and emblazoned with a confidentiality stamp.	Text	Confidential
PrivDesig	If this document has been designated privileged.	Text	Privileged Documents
ResponseID	Identification of request to which document is responsive. If your document is responsive to more than one request list each item separated by semi-colons.	Text	RFP 2; RFP 3
All Custodians	For de-duplicated documents, list of all custodians the duplicate copy was collected from.	Text	
All Paths	For de-duplicated documents, list of all file paths for duplicate copies.	Text	
Author	Creator of document	Text	Jones
Bcc	Additional blind recipients of an email (Blind Carbon Copy)	Text	bob@acme.com
Cc	Additional recipients of email (Carbon Copy)	Text	sue@acme.com
Custodian	Name of person from whom documents were collected	Text	Jones
Date Created	Datetime document was created	Datetime	07/21/1969 02:56:00
Date Modified	Datetime document was last modified	Datetime	07/21/1969 02:56:00
Date Received	Datetime document was received	Datetime	07/21/1969 02:56:00
Date Sent	Datetime an email was sent	Datetime	07/21/1969 02:56:00
File Extension	The suffix at the end of the native filename indicating file type	Text	.docx .pdf .xlsx
Filename	Original filename of native document, including extension	Text	interesting_spreadsheet.xlsx

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File Path	Original source file path, including location, folder name, filename, and extension	Text	media.zip//jones.pst//sentmail/444.eml//interesting_spreadsheet.xlsx
From	Sender	Text	jones@acme.com
In Reply To	Message id of email this email is in reply to	Text	
Message Id	Unique message id from internet headers	Text	
MD5 Hash	MD5 Hash value of Document	MD5 Hash	
SHA1 Hash	SHA1 Hash value of document	SHA1 Hash	
Subject	Subject line	Text	Check this out!
To	Recipient	Text	mary@acme.com

EXHIBIT B



Oregon Judicial Department

TWENTY-FOURTH JUDICIAL DISTRICT

Robert S. Raschio, Presiding Judge

December 15, 2022

Tyler Smith & Associates, P.C.
Attn: Tyler Smith & Tony L Aiello, Jr
181 N. Grant Street, Suite 212
Canby, OR 97013

Oregon Department of Justice
Attn: Sr. A.G. Brian Marshall
1162 Court St. NE
Salem, OR 97301

Markwitz Herbold PC
Attn: Harry Wilson
Special Assistant Attorneys General
145 SW Broadway, Suite 1900
Portland, OR 97201

Re: Preliminary Injunction on Ballot Measure 114's Magazine Capacity component: Joseph Arnold, Cliff Asmussen, et al, Plaintiffs v. Kate Brown, Governor of the State of Oregon, et al, Defendants, Harney County Circuit Court case #22CV41008

Parties:

The court will issue a Preliminary Injunction under Oregon Rule of Civil Procedure (ORCP) 79(A) on Ballot Measure 114 (BM 114) section eleven known as the large capacity magazine prohibition until a full trial can be held on the Complaint for Declaratory and Injunctive Relief.

The court will maintain the Temporary Restraining Order under Oregon Rule of Civil Procedure (ORCP) 79(A) on BM 114 sections one through ten until the state provides notice that it is prepared to deploy a "Permit to

Purchase” program. Upon receipt of notice, the court will hold a preliminary injunction hearing within 10 days to determine if the program can constitutionally be deployed.

The court cannot rely on a federal stay. There is a separate analysis and identified right under Oregon law. The court adheres to its oral findings from December 6 and 13, 2022.

Defendants are granted a hearing on December 23, 2022, regarding the “Charleston” loophole portion of BM114. Defendants will identify in a written notice the operative language at issue for that hearing by Friday, December 16 at noon.

The court is segregating each matter because of BM 114, section 12 requiring severability in case of a finding of unconstitutionality of a provision.

Turning to BM 114, section 11, the prohibition on large capacity magazines, the findings in this opinion letter are not binding on the final legal and factual determinations after a final trial on the complaint. The analysis is limited to findings on the motion for a preliminary injunction.

The court must find that the facts as applied to the law show to a clear conclusion under the factors of ORCP 79. See Wilson v. Parent, 228 Or 354, 369 (1961). The clear conclusion must find that the Plaintiffs have established a likelihood of success on the merits which is weighed against the other factors under ORCP 79.

Factual Findings

Findings one through 23 are from the pleadings and attached exhibits for the temporary restraining hearing held December 6, 2022. Findings 23 through 37 are from the preliminary injunction hearing and associated exhibits held on December 13, 2022:

All these findings are considered by the court:

- 1) At the Temporary Restraining Order hearing, Plaintiffs called a credible factual witness, Ben Callaway, a Harney County firearms dealer with a Federal Firearms License. Mr. Callaway testified

most firearms currently sold can be modified to hold more than 10 bullets by readily accessible kits and extenders meaning most commonly owned firearms including shotguns and handguns may not be legal for sale under BM 114 pursuant to the language in section 11(1)(d)(A)(Exceptions to the restrictions on large magazines include an “ammunition feeding device that has been permanently altered so that it is not capable, now or in the future, of accepting more than 10 rounds of ammunition.”), because the firearms will have no available operable magazines under the prohibition.

- 2) In Oregon, 593 people died from firearms in 2020. Defendant’s brief for Mandamus, pg. 4 see ex. 4 of said declaration. According to the Oregon Health Authority, there were 40,239 deaths that year. Aggregated, there were 158 deaths by homicide and 835 deaths by suicide, obviously not all be firearms. Website link: [Oregon Health Authority: Oregon Death Data: Death Data: State of Oregon](#). Death by suicide would not require a large magazine. In 2020, 122 of the homicides where with a weapon. See [Over Half of All Homicides in Oregon Are Committed With a Gun \(msn.com\)](#). 70.5% of those weapons were firearms meaning there were 86 homicides with a firearm. Id.
- 3) The number of rounds commonly needed by individuals to defend themselves has not been systematically tracked, nor has the number of rounds fired by individuals in self-defense. Marshall Dec., ex. 1 (Declaration of Lucy P. Allen), pg. 3. Allen found from the literature that .3% of 736 incidents of self-defense used more than 10 rounds in the encounter since more than ten shots were fired during the event. Id. at 5. 56% of all acts of self-defense occurred in the home. Id. at 6. Large Capacity Magazines are estimated to be used in 3 out of 10,000 acts of self-defense. None of these statistics are Oregon specific, except for some information in Exhibit B of the Allen declaration. Id. at 36-42.
- 4) Exhibit 1(B) determined that there were 179 recorded mass shootings in the country from 1982 until October 13, 2022. Two of those mass shootings occurred within Oregon causing the tragic loss of 13 lives along with 24 others injured. (Thurston High

School, May 21, 1998, and Umpqua Community College, October 1, 2015). *Id.* at 38, 40.

- 5) The Declaration was prepared for California litigation. California has no state constitutional right to bear arms.
- 6) The court finds the Colt multi-shot revolver was developed in the 1830s and appeared in the pre-Civil War West. *Marshall Dec., ex. 2* (Declaration of Robert Spitzer), pg. 25.
- 7) Oregon first restricted machine guns in 1933. See *Id.* at 15 see also 1933 Or Law 488. The limitation was on fully automated weapons described as a weapon of any description by whatever name known, loaded or unloaded, which is designed or modified to allow two or more shots to be fired by a single pressure on the trigger device. The definition is still operable in Oregon. ORS 166.201(6).¹ ORS 166.272 does not allow for possession of such weapons.²
- 8) The court finds the Spitzer Declaration conflates magazine capacity with the firearm actions, to wit: automatic versus semi-automatic, severely limiting its value to these proceedings. *Marshall Dec., ex. 3* (Declaration of Louis Klarevas) at 63(describing the definitions).
- 9) Since 1949, when the first mass shooting occurred, there have been 30 mass shootings resulting in 10 or more deaths. *Id.* at 6. None occurred in Oregon. *Id.* Of the mass shooting with fatalities

¹ ORS 166.201(6): "Machine gun" means a weapon of any description by whatever name known, loaded or unloaded, which is designed or modified to allow two or more shots to be fired by a single pressure on the trigger

² ORS 166.273: Unlawful possession of machine guns, certain short-barreled firearms and firearms silencers. (1) A person commits the crime of unlawful possession of a machine gun, short-barreled rifle, short-barreled shotgun or firearms silencer if the person knowingly possesses any machine gun, short-barreled rifle, short-barreled shotgun or firearms silencer. (2) Unlawful possession of a machine gun, short-barreled rifle, short-barreled shotgun or firearms silencer is a Class B felony (3) A peace officer may not arrest or charge a person for violating subsection (1) of this section if the person has in the person's immediate possession documentation showing that the machine gun, short-barreled rifle, short-barreled shotgun or firearms silencer is registered as required under federal law. (4) It is an affirmative defense to a charge of violating subsection (1) of this section that the machine gun, short-barreled rifle, short-barreled shotgun or firearms silencer was registered as required under federal law. [1989 c.839 §13a; 1997 c.749 §8; 1997 c.798 §1].

of 14 or over, the assailants used large capacity magazines. There have been 13 mass shootings with 14 or more fatalities since 1966. *Id.* at pg. 6.

- 10) There have been 69 mass shooting events involving the death of 6 or more people from 1990 to 2017. 64% of those events involved large capacity magazines, or 44 over that 27-year period. *Id.* at 44-49. The exhibit states, “[a]lthough 69 is a horrific number of incidents, for statistical purposes, it is a relatively small number and limited the power to detect significant associations... Moreover, because of suboptimal statistical power, there is also the possibility that the magnitude of the effects detected was overstated” regarding the use of large capacity magazines in mass shootings. *Id.* at 49-50
- 11) Further, the “impact of individual state firearm laws is reduced by the fact that guns often move across state lines—occasionally purchased in locales with more permissive law and taken to states with more restrictive laws.” *Id.* at 50.
- 12) “In total, 1,460 people were injured or killed over the 37-year period” in mass shootings from 1981-2017. *Id.* at 54. Harney County has a population of 7495 people.
- 13) “Mass shooting fatalities, as a particular type of gun injury event, account for <1% of all gun deaths...” *Id.* at 63.
- 14) Other types of gun violence, e.g. suicide, domestic violence homicides and red flag order violations are not responsive to large capacity magazine bans. *Id.* at 63.
- 15) The remainder of the study only looks at Full Automated Weapon bans and cites by the author of the Declaration as making claims of public policy benefits from large capacity magazine bans. *Id.* at 66. The study stated it could not create a distinct statistical evaluation of whether such bans have an independent impact on mass shootings from restrictions of the action of the firearms. *Id.* at 66-67.

- 16) Marshall Dec., ex. 4 has no description of the effects of large capacity magazines in the 593 firearm deaths in Oregon in 2020, though notes 455 of the deaths were from suicide.
- 17) Marshall Dec., ex. 5 is a study heavily relied upon by the defendants entitled “Evidence concerning the regulation of firearms design, sale, and carrying on fatal mass shootings in the United States”. The study indicates there were 604 mass shooting events involving four or more fatalities from 1984 until 2017 equaling 2,976 homicides. Marshall Dec., ex. 5 at 11. “Nationally, the annual rate of mass shooting fatalities per 1 million population nationwide was .36 per 100,000 population...” Id. The results were the researchers “found no evidence that concealed carry laws, assault weapons bans, prohibitions for domestic abusers and violent misdemeanants, or point-of-sale [criminal background checks] were associated with the incidents of fatal mass shootings.” Id. Further, inferences cannot be made that large capacity magazine bans have an effect on casualties, only that there may such an inference. Even though there is evidence that large capacity magazine bans and firearm licensing has an effect on mass shooting incidents, “there are large confidence intervals.” Id. at 17. The final conclusion of the article on large capacity magazines is striking to the court: “LCM bans also *seem* to reduce the incident of fatal mass shootings”. The court finds the article states there no scientific certainty large capacity magazine bans have an impact on fatalities and casualties. See also Marshall Dec, ex. 5 at 28-42 (statistical significance of the large capacity magazine ban on mass shootings is variable).
- 18) The mean annual rate of mass shootings in Oregon per 1 million population is .06 and of fatalities is .30 per million of population. Id. at 24. The data is not linked large capacity magazines usage.
- 19) Of importance in other parts of this litigation: “The findings of this study suggest that the most common policy prescriptions offered by advocates on each side of the debate over gun control— comprehensive background checks and assault weapon bans on one side and so-called “Right to Carry” laws reducing restrictions on civilian concealed carry of firearms on the other side—do not

seem to be associated with the incidence of fatal mass shootings.” Id. at 17.

- 20) Marshall Dec., ex. 6 does not apply to large capacity magazines.
- 21) Marshall Dec., ex. 7 (Declaration of Ryan Busse) states that “many widely available guns are designed with universal magazine acceptance. Many handguns can accept a magazine within 15 to 20 plus rounds... Firearms manufactures... can easily modify a ‘high capacity’ magazine into one that will accept only 10 rounds...” Marshall Dec., ex. 7 at 4. The most popular self-defense firearms “in history” (1911 style pistol) come with standard magazines of seven to eight rounds. Id. The model can be adapted by interchangeable magazines to hold more than 10 rounds. Id. Additional magazines can be purchased at a minimal cost. Id. at 5.
- 22) Further, “buying multiple magazines and maintaining a large supply of magazines is and has been encouraged by firearms manufacturers and firearm retailers.” Id. at 7. “Additionally, there is a well-known sales spike for magazines whenever regulations are implemented as consumers anticipate laws or ‘grandfathering’ with purchases meant to ensure legal supply for a long period of time.” Id. “[M]ost gun owners purchase several magazines for each gun... they can easily modify...” Id. at 8.
- 23) Of note for the preliminary injunction question, a “recent example of this well-known reality includes ‘freedom week’ in California in which a court allowed the sale and purchase of large-capacity magazines during one week in Spring 2019 resulting in massive sales spikes...” Id. at 7. The court finds that deliberate action from the court is warranted to not create a whipsaw effect so described.
- 24) BM 114 is impacting the ability for firearms dealers to stock their stores. Midway USA, a national distributor of firearms, is issuing the following: “Order Contains Restricted Products. These products cannot be included in your order due to the following: Oregon has restricted the sale of magazines that have a capacity

of more than ten rounds, or those that can be adapted to hold more than ten rounds—e.g., those with floor plate or end plate.” Plaintiffs Preliminary Injunction Hearing (PIH) ex. 1. Plaintiffs PIH ex. 11 shows the same result with other manufacturers.

- 25) California’s restriction on large capacity magazines is much narrower than BM 114. See Plaintiffs PIH ex. 5.
- 26) Defendants offer an exhibit showing firearm manufacturers do offer magazines of 10 rounds or less that are California compliant. Defendants PIH Declaration of Greg Scott and ex. 1-10, pg. 1-112. Most appear through the testimony and exhibits to be capable of ready modification to increase capacity.
- 27) Mr. Callaway creditably testified at the preliminary injunction hearing that most, if not all, current magazines are readily adaptable or easily modifiable within a period of seconds with a hand drill or pocketknife to be able to hold more than ten rounds with all popular gun brands. The defense expert, James Yurgealitis, did not dispute that testimony. In fact, he stated “anything is possible” for modifying magazines with a technical skill range of little to some. The adaptability of magazines includes just taping two magazines together to create one with a twenty-round capacity.
- 28) Mr. Callaway also testified that fix plates on magazines diminish the life of the magazines since they cannot be maintained. The defendants raised the length of magazine life as part of their analysis of why BM 114 has no impact on current large capacity magazine owners. Mr. Callaway described that the normal approach of cleaning magazines for safety and functionality is to remove the end plate after every second use to clean out the grime and oil the spring mechanism. He testified it was not possible to do the same cleaning process with fixed end plates thus significantly diminishing the product’s use potential. Mr. Yurgealitis described using air compression, cleaning fluid baths and ultrasound technology to clean those mechanisms, a process which is time consuming, requires special equipment and is expensive in comparison to detachable face plate cleaning

techniques and is not as effective as the detachable end plate design.

- 29) Replacing magazines, according to Mr. Callway, generally costs \$40 to \$50. The process creates a cost prohibition to owning firearms, particularly for indigent.
- 30) Mr. Yurgealitis noted that there are magazines for the commercial market with magazine restrictions. The other jurisdictions do not have adaptability restrictions. As he testified, in direct testimony, there is “no magazine on the market that cannot be modified” because of the floorplate.
- 31) Dr. Brian DeLay testified that the development of firearms was significant between 1860 and 1872. He, also, submitted a separately filed declaration on December 12, 2022. The testimony was crafted to eliminate the time and effort made in that development. He testified that during Polk’s War of 1846 to 1848, multi-capacity revolvers and rifles were in use and for sale to the private market. Emigrants on the Oregon trail had the same types of firearms. Large capacity magazines prototypes were in development since 1580, though not generally in the marketplace largely due to a lack of functional stability for use by the public. But, “almost certainly” the framers and adopters of the Oregon Constitution would have been aware of those developments and the ongoing developments in firearm technology. The Kopple Law Review article comes to the same conclusion about the multi-round technology development and public knowledge around statehood. Plaintiffs PIH ex. 4. As does the Hlebrinsky Declaration on the technology of that timeframe. Plaintiffs PIH, ex. 7. All these experts agree that there was no clear distinction between private and military use at the time of statehood. Dr. DeLay did testify that most private gun manufacturers were angling for military contracts but would sell any firearm to private citizens in they could afford one. Private citizen purchases supported their own self-defense and defense of the state in the form of militia activities. Meriwether Lewis bought his large capacity magazine weapon for the expedition. The Hornback exhibit bolsters this factual finding regarding the broad scope of

firearms used by early leaders and settlers in Oregon. Plaintiffs PIH ex. 10.

- 32) Dr. DeLay testified there were no historical antecedents in the law banning any type of firearm in 1857 to 1859. Hlebrinsky, also, finds that there were no historical antecedents. Plaintiffs' PIH ex. 9. DeLay and Hlebrinsky agreed laws banning particular possession of types of firearms did not begin generally until the 20th century, post-dating statehood.
- 33) Magazines are an integral part of firearms. See Plaintiffs PIH ex. 6, at 12-25. Limiting magazine sizes has a direct impact on who can use a firearm in self-defense. Weaker individuals cannot use larger caliber firearms due to the recoil impact for self-defense. Weaker individuals compensate for the inability to use larger caliber ammunition with by large magazines. *Id.* at 15-16.
- 34) Unlikely declarant Busse, declarant Hanish states that large capacity magazines are in fact ubiquitous. *Id.* at 18.
- 35) The article by William English, Ph.D., at Georgetown University, "2021 National Firearm Survey: Updated Analysis Including Types of Firearms Owned, Expanded Report May 13, 2022". is of note to the court's findings on the question of "ubiquitous". Plaintiffs PIH ex. 6, 26-82.
- 36) In Vermont, 30% of the state's residents own firearms. Of those 30%, 29.3% have used a firearm in self-defense in which 45.9% of the incidents were against multiple assailants. *Id.* at 65.
- 37) The current rate of gun ownership in the country is 31.9%. Plaintiffs PIH ex. 6, 27. Of that group, 31.1% have used their guns in self-defense. *Id.* at 34.
- 38) In Oregon, 38.3% of citizens are estimated to own firearms. *Id.* at 35. Of those, 49.8% are estimated to own magazines that hold 11 plus rounds. *Id.* at 52.

With those facts, the role of the judiciary is to determine whether Ballot Measure 114, section 11 exceeds the legal limits of the people's authority under the Oregon Constitution. See Elkhorn Baptist Church v. Brown, 366 Or 506, 510 (2020).

Article I, Section 27 Analysis:

Oregon Constitution provides the right for the people "to bear arms for the defense of themselves, and the state". Oregon Constitution Article I, section 27.

As pointed out by the Defendants, the Oregon Constitution "has content independent of that of the federal constitution." State v. Soriano, 68 Or App 642, 645 (1984).³ Therefore, any irreparable harm of BM 114 must be considered separately under Oregon law and is not dependent on a federal determination. The pleading before this court focused solely on the Oregon Constitution.

The Oregon Constitution must be at least as protective as the Federal Constitution on any matter of a constitutional right.⁴ If it is not, the question becomes, does the United State Constitution have a more protective right thus making the Oregon provision unenforceable pursuant to Supremacy Clause.

According to Hon. Jack L. Landau, retired Oregon Supreme Court Justice:

In some cases, the court adopted a historical or originalist approach, as in State v. Kessler. That case involved the meaning of Article I, § 27, which guarantees the right to bear arms. The court observed that federal court decisions construing the Second Amendment guarantee of a right to bear arms "are not particularly helpful." Turning to the meaning of the state

³ While this court disagrees with some of the factual conclusions of U S. District Court Judge Karin Immergut, which are not binding on Oregon state courts, she is analyzing the measure under the Second Amendment jurisprudence. This court does not reach that analysis since there is a clear preliminary showing that the measure is unconstitutional under Oregon Constitution Article I, section 27 by reading the provision and Oregon jurisprudence related to the constitutional protection provided to the citizens of Oregon to "bear arms for the defense of themselves, and the state".

⁴ The Second Amendment to the U.S. Constitution reads: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Plainly read, the Second Amendment right to bear arms is captured in the "and the state" language of Article I, section 27.

constitutional guarantee, the court declared that its task was “to respect the principles given the status of constitutional guarantees and limitations by the drafters” The court set out a history of the provision, from its roots in the English Bill of Rights of 1689 to colonial American fears of standing armies and concerns for personal safety to the state constitution of Indiana, from which the Oregon guarantee was borrowed. In the end, the court concluded that the “arms” that the state constitution guarantees a right to possess consist of those that would have been used by nineteenth-century settlers for personal defense and military purposes.

Jack Landau, “An Introduction to Oregon Constitutional Interpretation”, 55 Willamette L. Rev. 261, 265-66, Spring 2019.

The judicial review concept of precision in the drafting the Constitution of Oregon started in 1863: “If the framers of the Constitution had intended to limit them to one hundred dollars, they could and certainly would have used different and more appropriate language to embody their intention.” Noland v. Costello, 2 Or. 57, 58 (1863). State v. Hirsch similarly cited a range of modern treatises and articles on the historical origins of the constitutional right to bear arms, as well as more contemporaneous sources, including writings of the framers of the Second Amendment, on which Article I, Section 27, of the Oregon Constitution is a decedent. See, e.g., State v. Hirsch, 114 P.3d 1104, 1109 (Or. 2005) (“[W]e must discern the intent of the drafters of Article I, Section 27, and the people who adopted it.”).

“A constitution is dependent upon ratification by the people. Its language should therefore be considered in the sense most obvious to the common understanding of the people at the time of its adoption.” Landau at 266.

This court is bound by the interpretation of the Oregon Constitution by the Supreme Court and Courts of Appeals of Oregon.

The current constitutional interpretation under Article I, section 27 is found in State v. Christian, 354 Or. 22 (2013). First, the Oregon Constitution allows for reasonable restriction on ownership of weapons that promote public safety. Id. at 33-34. Second, the reasonable restrictions cannot

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unduly frustrate the right to bear arms. Id. at 38. (“...the legislature may specifically regulate the manner of possession and the use of protected weapons to promote public safety as long as the exercise of that authority does not unduly frustrate the right to bear arms guaranteed by Article I, section 27.”).⁵

The holding limits the inquiry to a facial challenge of the constitutionality of a statute. Christian at 40.

The Supreme Court indicated that total bans on types of weapons and firearms used for self and state defense violates Article I, section 27. Id. at 40-41 quoting State v. Delgado, 298 Or 395 at 403-404 (“The problem here is that ORS 166.510(1) absolutely proscribes the mere possession or carrying of such arms [switchblades]. This the constitution does not permit.”).

The evidence shows the distinction the defendants are trying to draw between firearms and magazines is a fiction. Firearms do not function without magazines. An analogy would be making a distinction between a car and its engine.

ORCP 79 Analysis:

With this constitutional analytical framework in mind, the court will turn to the requirement of ORCP 79(A)(1)(a) for a preliminary injunction.

“When determining whether to issue a preliminary injunction, courts consider, among other things, the likelihood that the party requesting the injunction will ultimately prevail on the merits of its claim and whether, if the injunction is not issued, the party will be irreparably harmed during the litigation of the claim. Courts also balance the harm to the movant against harm to the opposing party and the public if the injunction is issued.” Elkhorn Baptist Church v. Brown, 366 Or 506, 518-519 (Internal citations removed).

⁵ The Oregon Supreme Court, in its early interpretations of the Oregon Constitution ask the lower courts to consider “what did those conservative pioneer citizens have in mind.” Jones v. Hoss, 132 Or 175, 178-179 (1930).

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Application of the law to BM114 must lead the court to a clear conclusion that those factors are met preliminarily. See Wilson v. Parent, 228 Or 354, 369 (1961).

The preliminary injunction requires the plaintiff to meet the burden of production or persuasion by the providing evidence. See Arlington Sch. Dist. No. 3 v. Arlington Educ. Ass'n, 184 Or App 97, 102 (2002).

The plaintiffs have produced such clear and persuasive evidence. The defendants evidence bolsters the clarity of the court's determination.

(1) Likelihood of success.

BM 114, section 11 will dramatically change the rules on law abiding citizens who currently own weapons or wish to purchase weapons with large capacity magazines. The vast majority of gun owners are responsible, careful citizens with a great deal of respect and care for their firearms and only use them for law purposes including self-defense.

The large capacity magazines provisions will go into effect unless the court issues a preliminary injunction immediately impacting their constitutional right to bear arms.

a) Construction of BM 114, section 11

BM 114, section 11 is titled "Prohibitions/Exceptions to Large-Capacity Magazines." ⁶ The court will focus on specific language but has considered the section as a whole.

Section 11 prohibits any fixed (built into the gun) or detachable (external clips) magazines that hold over ten rounds of ammunition. "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..." BM 114 section 11(d).

⁶ Section 11 is attached as Exhibit 1 of the Defendants' response to Plaintiffs' motion for a temporary restraining order.

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The prohibition has an exception for “ammunition feeding device that has been permanently altered so that it is not capable, now or in the future, of accepting more than 10 rounds of ammunition.” BM 114 section 11(d)(A).

A new Class A misdemeanor is created for anyone who manufactures, imports, possesses, uses, purchases, sells or otherwise transfers any large capacity magazine upon effective date. BM 114 section 11(2), (6). The ban does not apply to sales to the military or law enforcement. BM 114 section 11 (4).

BM 114 section 11(5) creates an affirmative defense to the crime. The accused would need to prove they possessed the large capacity magazine prior to adoption of the measure. Then the accused would need to prove that their possession the item was in use in specific ways and/or kept in specific places. If they chose, owners could relinquish their property prior to “commencement of prosecution by arrest, citation, or a formal charge.” Id. at (5)(d). The court assumes that the investigative agency would have broad discretion as to when to arrest the individual eliminating the option of just giving up the item.

The section requires licensed gun dealers cease sales immediately and within 180 days to alter or divest from all banned items. BM 114, section 11(3).

b) Existence of Large Capacity Magazines at Statehood.

The Plaintiffs demonstrate that firearms with magazine capacity over 10 rounds of ammunition were in existence at the adoption of the Oregon Constitution in 1857. Plaintiffs’ Motion for Order to Show Cause, pg. 15-17. Article I, section 27 was adopted without any noted debate by the delegates. Claudia Brown and Andrew Grade, “A Legislative History of Oregon”, 37 Willamette L. Rev. 469 (2001). The court infers from that silent record that no concerns were raised over the types of firearms allowed for self or state defense. The defendant does not point to any co-occurring Oregon statute proscribing large magazine firearms for citizens or any other types of weapons.

The Oregon Supreme Court has held modern equivalents to the weapon today is “substantially different from its historical antecedent” and that the drafters were “aware that technological changes were occurring in

weaponry as in tools generally.” Delgado, 298 or at 403. The Court could not “freeze the meaning of the state constitution to the time of adoption, but is instead to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform...the constitutional text to modern circumstances.” Couey v. Atkins, 257 Or 460, 490 (2015) (internal citations omitted). The analysis of this court is that the framers and the population were aware of, and even anticipating, more powerful firearms including with larger magazine capacities.

The caselaw does not suggest that the firearms development is frozen in time at founding as is argued by the defendants. In fact, the courts have assumed development over time. As such, the court finds that the firearms today are the direct decedents of the firearms from the timeframe of statehood: multi-shot handguns and rifles. The type of magazine is essential to the protective power of the firearm as was testified to by one of the defendants’ witnesses.

The precedent in Oregon shows no historical statutory bans on the size of magazines or on the types of firearms until 1933. All preceding restrictions were on use, e.g. prohibitions on riding horses through town terrifying neighbors with firearms.

The right to bear arms included military firearms used for state and self-defense at the time the provision was drafted. ⁷ As noted, large capacity magazines predated the automation and mass production of metals. Large capacity magazines existed in the 1830s, nearly two hundred years ago. The type of firearm with a large capacity magazine was known and used for self-defense at statehood and would have been understood to be firearm

⁷ “In State v. Kessler, 289 Or. at 369, 614 P.2d 94, the court held: ‘Firearms and other hand-carried weapons remained the weapons of personal defense, but the arrival of steam power, mechanization, and chemical discoveries completely changed the weapons of military warfare. The development of powerful explosives in the mid-nineteenth century, combined with the development of mass-produced metal parts, made possible the automatic weapons, explosive, and chemicals of modern warfare P Cleator, *Weapons of War* 153–177 (1967) ’ Oregon State Shooting Ass'n v. Multnomah Cnty., 122 Or. App. 540, 545–46, 858 P.2d 1315, 1319–20 (1993). Automatic weapons are banned in Oregon as are other military grade weapons.

Kessler subject matter was billy clubs and not firearms. All discussions regarding firearms is dicta.

being developed for militia usage and self-defense. See Christian, 354 at 30 quoting State v. Kessler, 289 Or 359, 368 (1980).^{8,9}

The court finds that magazines indistinguishable from the firearms they power and are protected weapons and Ballot Measure 114, section 11 acts on a prohibition on firearms and their protected uses under Article I, section 27.

c) Public safety

President Barack Obama eulogized to the Sandy Hook Families in Newton, Connecticut a decade ago, the court echoes, "I am very mindful that mere words cannot match the depths of your sorrow, nor can they heal your wounded hearts."

The court is incapable improving on that important, profound sentiment.

The Defendants concede the ballot measure's intention is to reduce mass shootings.

Mr. Marshall, for the Defendants, is right that mass shootings deliver a special type of terror in our heart and minds and that the majority of voters in Oregon believed that banning large capacity magazines would help to relieve a "grave and immediate risk to the health, safety and well-being of the citizens of this state." BM 114, Preamble.

The facts do not support their conclusion.

"[J]udges must...not be intimidated into upholding majority rule." Edward Trompke, "A Natural Tension", Or. St. B. Bull., Feb/March 2002, at 9, 14. "Judicial independence and judicial accountability are both shields and swords, but both are intended to protect judges, to allow them to fairly decide all cases, and ultimately to protect the rights of every person." Id. at 15.

⁸ Kessler found that the term "arms" in Article I, sec 27 are weapons used by militia and for self-defense maintained by the individual. 289 at 370 Kessler also announced that "regulation is valid if the aim of public safety does not frustrate the guarantees of the state constitution " Id.

⁹ See Plaintiffs Motion Pg. 16 on firearm development. The Defendants have not shown that large capacity magazines are "advanced weapons of modern warfare", see Defendants' Response, pg. 10 quoting Kessler at 369. The court weighs that assertion against the ubiquitous nature of large capacity magazine in distribution to the public.

Oregon Constitution allows for reasonable restrictions to promote public safety. Christian at 33-34. The promotion of public safety cannot be based upon a merely speculative harm.

BM 114, section 11 does not restrain dangerous practices or regulate the carrying or use of firearms, only the possession of a ubiquitous weapon design. *Id.* at 32. “[A]ny restriction must satisfy the purpose of the authority in the face of Article I, section 27: the protection of public safety.” *Id.* at 33 quoting State v. Hirsch/Friend at 677.

While the preamble of the ballot measure states it promotes public safety, the court finds from both sides’ pleadings and exhibits, it does not do so in any measurable way. Their primary article states the restrictions on large capacity magazines seems to have an effect on the outcome of mass shooting events, but the sample size is too small to say definitively. Factual finding 17. Correlation does not equal causation.

Further, the court finds that there is less than a 1 in 1,000,000 chance of a person being a fatality in a mass shooting in Oregon, and even less with an offender who is using large capacity magazines.¹⁰

That the large capacity magazine bans promote public safety is mere speculation.¹¹ The court cannot sustain a restraint on a constitutional right on mere speculation that the restriction could promote public safety. Certainly, a court cannot use a mere speculation in determining guilt in a criminal case, damages in a negligence case, future harm in a parole matter, or the many other legal matters where disallowing that outcome. See State v. Hedgpeth, 365 Or 724, 733 (2019); Smith v. Providence Health & Servs – Oregon, 361 Or 456, 475-76 (2017); Smith v. Bd. of Parole & Post-Prison Supervision, 343 Or 410, 419 (2007); Lea v. Gino’s

¹⁰ Large Capacity Magazines are used in 3 out of every 10,000 incidents of self-defense outside of the home, a constitutionally protected activity. There is no analysis of such use when defending the home. See Defendant’s Response, pg. 12. BM 114, section 11 makes it illegal to possess large capacity magazines in the home unless the accused provides affirmative proof of ownership prior to passage and that the possession met one of the exceptions under the law.

¹¹ Defendants argue that every mass shooting since 2004 with 14 or more deaths used large capacity magazines. See Defendants’ Response, pg. 14. They fail to note that there have been ten such events in last eighteen years as is borne out in their exhibits. See Marshall Dec, Ex. 1, pg. 36-40. There have been 110 mass shootings of four or more victims in the same timeframe, many of which did not involve large capacity magazines. *Id.*

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Pizza Inn, Inc., 271 Or 682, 688 (1975) (“Prosser on Torts (2nd ed), s 42, p. 200 expresses ... What is required is evidence from which reasonable men may conclude that, upon the whole, it is more likely that there was negligence than that there was not. Where the conclusion is a matter of mere speculation or conjecture, or where the probabilities are at best evenly balanced between negligence and its absence, it becomes the duty of the court to direct the jury that the burden of proof has not been sustained.”)

Firearms owners deploy more than ten rounds in three out of 10,000 legal acts of self-defense which is frequency of 100 times higher than any chance of fatality from a mass shooting. The right to bear arms in self-defense is constitutionally protected and is presumed to protect public safety using the current technology of the day.

BM 114, section 11 does not reasonably promote public safety, meaning it not a permissible legislative regulation, therefore it is facially unconstitutional prior to analyzing how unduly burdensome the measure is on firearm ownership.¹² Magazine size is a regulation on a firearm. That regulation must reasonably promote public safety. Large capacity magazine prohibition has not been shown to promote public safety in a calculatable way beyond the protection already achieved by the status quo.

The court cannot read BM 114, section 11 in any way that creates a constitutional act.

d) Unduly Burdensome.

Even if BM 114, section 11 is a reasonable restriction, it cannot unduly frustrate the right to bear arms. Christian at 38. BM 114, section 11 restrictions on current gun ownership and future purchases unduly frustrates the right to bear arms under Article I, sec. 27.

Considering the testimony of Callaway, Yurgealitis and Declarant Busse: most commonly sold firearms can be adapted by interchangeable

¹² Defendants’ analysis on page 11 regarding regression analysis overstates their own literature significantly. Their own literature states that there seems to be a correlation as hypothesis due to the very small statistical size and the incompleteness of the literature. See factual finding 17.

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magazines to hold more than 10 rounds. Most, if not all, magazines are readily modifiable to hold more than 10 rounds.

Magazines are necessary to make firearm operable. Fyock v. City of Sunnydale, 779 F3d 991, 998 (9th Cir 2015).

A plain reading of BM 114, section 11(d) makes the sale, possession or transfer, except upon death, of those firearms punishable by crime. Those firearms with magazines are capable, now or in the future, of readily restored, changed, or being converted to accept more than ten rounds. Based upon the preliminary evidence, the result of BM 114 would be a near absolute prohibition on handguns and many other firearms with their magazines. See Delgado at 403-4.

Further, the Court of Appeals rejected the notion of modification to make a firearm legal, after the fact, under Oregon State Shooting Ass'n v. Multnomah Cnty., 122 Or. App. 540, 548–49, 858 P.2d 1315, 1321 (1993):

While it is argued by the defendants the firearms can be modified to meet the requirements of BM 114, the law does not support the proposition. The dissent concludes that, because the “semi-automatic firearms may be illegally modified to become automatic weapons * * * is not a reason to deprive them of section 27 protection under the tests adopted by the Supreme Court.” 122 Or. App. at 556, 858 P.2d at 1325. That is backwards. The weapons have been modified, ostensibly so that they will not be classified as military weapons, which, under the Supreme Court's tests are not entitled to the constitutional protection. Those “modifications” cannot be used to bootstrap these weapons into personal defense weapons so that they come within the constitutional protection. The weapons are not the “sort” of weapons for defense of self intended by the drafters to come within Article I, section 27.

BM 114, sec 11 provides no definition on how such a modification would be permanent in the eyes of the law.

There is restraint on purchase, transfer, and possession of firearms with large capacity magazines fixed or detachable. Any firearm that can be modified to hold a large capacity magazine is also prohibited to be sold in

the State of Oregon. If a future kit is developed to modify a current model of magazine or firearm, that model would then become immediately prohibited under BM 114, sec 11. Kits can be used to expand fixed magazines.

Most, if not all, firearms requiring detachable magazines will be unusable and unpurchasable under BM 114, section. Since most, if not all, detachable magazines can be “readily restored, changed or converted to accept” more than ten rounds, those cannot be sold under this law. BM 114, section 11, (1)(d). See factual findings 24-29. There is no other way to read the provision that would make it facial constitutional. The “or” component language restrains the number of firearms that could be sold to less than 10% of what is currently on the market.

Current owners of large capacity magazines are criminalized under the law. As is pointed out by the plaintiffs, “BM 114 provides no general exception even for continuing to possess magazines already owned prior to the effective date. Rather, BM 114 provides a mere ‘affirmative defense’.”

If found with a large capacity magazine, the owner has a choice of relinquishing the large capacity magazine without further process or face arrest at an officer’s discretion. BM 114, sec 11(5)(d) see also Defendants’ response, pg. 4.

Once arrested and criminally charged with a Class A misdemeanor, with a maximum penalty of 364 days in jail and a fine up to \$6,250, the accused can exercise an affirmative defense proving the possession of the large capacity magazine prior to passage of BM 114, section 11.

An affirmative defense places the burden on the accused to prove their right to possess the large capacity magazine by a preponderance of the evidence. See Oregon State Bar Bar Books, Criminal Law in Oregon, section 19.1-2. Proof may be testimony subject to creditability determination by the fact finder but is, generally, better bolstered by documentation. All of the exceptions to the crime in section 11(c) are also part of an affirmative defense. The accused must establish proper storage, on the private property of the owner or while engaging in public or private shooting range or hunting and that if they were transporting the magazine, it was in a vehicle lock box. In other words, the possession is presumed illegal until the accused owner of the large capacity magazine proves

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otherwise in a court of law after the state had established a prima facia case of guilty by surviving a motion for judgment of acquittal.

Defending against a criminal charge is expensive, time consuming and extremely stressful with private legalcounsel. All indigent defendants would face the same challenges, except would be entitled to court-appointed counsel. ¹³

e) Preliminary Conclusion on Likelihood of Success.

Under these findings and legal analysis, “there can be no reasonably likely circumstance in which application of [section 11] would pass constitutional muster.” Christian at 41.

The statutory scheme is very burdensome on lawful firearm owners who possess large capacity magazines legally now. Clear from the preliminary record, magazines capable of holding more than ten rounds come standard with many popular firearms and firearm platforms on the market today and are possessed by law-abiding citizens for lawful purposes. The measure criminalizing currently lawful conduct creating presumed criminals out of 1 in every 5 Oregonians. In other words, under Christian, the regulations are unduly burdensome on currently lawful conduct and are without a public safety promotion.

The court is clearly persuaded the plaintiffs have a likelihood of success of showing BM 114, section 11 is unconstitutional under Article I, section 27. The court will not turn to the federal constitution.

(2) Imminent and Irreparable Harm.

Plaintiffs show implementation of BM 114 would, if their challenge is successful, cause an irreparable harm to gun owners and those seeking to purchase firearms for self-defense. Any deprivation of a constitutional right, even temporarily, constitutes an irreparable injury. See Elkhorn Baptist Church v. Brown, 366 Or 506, 519, see also 366 Or at 546 (2020) (Garrett, J., concurring).

¹³ “The public defense crisis is playing out throughout the state...this too is exponentially worse in rural areas for a wide variety of reason.” Oregon State Bar President Kamron Graham, “Rural Oregon Needs Our Engagement”, Oregon State Bar Bulletin, December 2022, pg 30. Rural Oregon is a place with a rich culture of firearm ownership and pride in their capacity to handle their use without interference.

The Plaintiffs have shown there is a likelihood that the court will find the section facially unconstitutional. Christian at 40.

There are no circumstances where section could be constitutional. The Defendants state as a “practical matter, Plaintiffs can continue to ‘keep and bear arms’”. Defendant’s response, pg. 12.¹⁴ On its face, that statement may seem persuasive, but that is borne by the facts. The state can only fetter the right to bear arms with a clear showing that the regulation promotes public safety and is not unduly burdensome. BM 114, section 11 fails to meet either legal standard.

Defendants have not shown how delaying implementation would cause imminent and irreparable harm. This is particularly emphasized by the delay in implementation of the “permit-to-purchase” program. The status quo is not improved by implementation of the BM 114, section 11.

(3)Balancing Harms.

There is little to no harm in delaying implementation of BM 114 while the parties prepare and present evidence at an injunction hearing.

Based upon the court findings, there is a clear preliminary showing of an irreparable harm to the right to bear arms under Article I, section 27 under BM 114, sec 11 preventing a mere speculative harm of allowing the ongoing possession and purchase of large capacity magazines.

The numbers are starkly in support of this preliminary determination. If allowed to go into effect, 1 in 19 of all Oregonians are presumed guilty of a class A misdemeanor unless they can prove otherwise. See Factual Finding 38. More than ten rounds are needed in three out of every 10,000 acts of legal, justifiable self-defense acts. The chance of being a fatality in a mass shooting in Oregon is .3 in a million. There have been 13 mass shootings with 14 or more fatalities since 1966, a very low number with naturally high emotionally responses.

¹⁴ Defendants even argue that both “firearms and magazines are durable goods with a long useful life. Plaintiffs can continue to keep and bear the arms they currently possess. .” There is no analysis for the Defendants on how many mass shootings used large capacity magazine and how many of those were newly purchased. The evidence is also that the fixed plate magazines do not have a long and useful life. The long and useful life relies on the ability to remove the base/floor plate for regular cleaning.

Finally, the defendants' own literature "seems" to show that the ban will help with fatalities. No definitive scientific evidence has been provided that large capacity magazine bans have any impact on the number of fatalities or casualties now or in future events.

The implementation of BM 114, section 11 would have an immediate impact on the liberty interests of 1 in 5 Oregonians and make it harder for the weaker individuals in our society to defend themselves against attackers.

(4)Public Interest.

The legal standard is "there are situations where the public interest would be so seriously affected by the issuance of an injunction that the court will deny an application therefor". Elkhorn Baptist Church v. Brown, 366 Or 544 quoting Bennett v. City of Salem, et al, 192 Or 531, 546 (1951).

As described above, the public interest in this matter is real and significant. The people of Oregon voted for the measure by a margin of 975,553 (50.65%) for the measure, and 950,589 (49.35%) against. Oregon Secretary of State website, State of Oregon: Voting & Elections - Voting & Elections. The court acknowledges the proponents demonstrated that our society has become exacerbated by the relentless news about mass shootings in the country and the slaughter of innocents. BM114, Preamble.

However, there is strong evidence presented by the proponents of BM114 that public safety is not promoted by the exercise of the authority contained in BM114 and the measure unduly frustrates the right to bear arms making it unconstitutional. There is a nearly equal public interest in issuing a preliminary injunction.

There is a serious harm to the public interest, as well, when individuals are arrested, prosecuted and convicted of a Class A misdemeanor under an unconstitutional statutory regime, a potential if BM114 is allowed to go in effect at this time.

A delay for judicial review of the constitutionality of the measure outweighs immediate implementation subject to potentially overturning the measure after the review. The public interest demands judicial scrutiny and

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deliberation to avoid a see-sawing back and forth on this issue. A final determination needs to be made on the constitutionality of the measure prior to lifting any injunction.

On balance, the public interest in implementation of BM114 weighs in favor of the Preliminary.

CONCLUSION

The court ORDERS the temporary restraining order remains on Ballot Measure 114, sections one through ten. Upon receipt of notice from the Defendants the “permit to purchase” process is administratively ready, the court will hold a preliminary injunction hearing within 10 days, unless fixed by the court on a different date, to determine if the program can constitutionally be implemented.

The next hearing related to background checks will be on December 23, 2022, at 10:00 AM as noted above. The identified statutory provisions of the law subject to that review will be filed by Defendants in writing by December 16, 2022 at noon.

The court ORDERS a preliminary injunction is GRANTED as to Ballot Measure 114, section 11 until a full hearing on the complaint can be heard where the court can determine by clear and convincing evidence whether BM 114, sec. 11 is constitutional under Article I, sec 27.

Plaintiffs shall prepare each order separately and submit them by December 16, 2022, at noon.

So Ordered,

A handwritten signature in black ink, appearing to read 'Raschio', with a long horizontal line extending to the right.

Robert S. Raschio
24th Judicial District
Presiding Circuit Court Judge

EXHIBIT C

IN THE SUPREME COURT OF THE
STATE OF OREGON

Joseph ARNOLD,
Cliff Asmussen,
Gun Owners of America, Inc.,
and Gun Owners Foundation,
Plaintiffs-Adverse Parties,

v.

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
Terri Davie,
Superintendent of the Oregon State Police,
in her official capacity,
Defendants-Relators.

(CC 22CV41008) (SC S069998)

En Banc

Original proceeding in mandamus.*

On petition for a writ of mandamus filed January 13, 2023; considered and under advisement on January 31, 2023.

Robert A. Koch, Assistant Attorney General, Salem, filed the petition and memorandum of law for defendants-relators. Also on the petition and memorandum were Benjamin Gutman, Solicitor General, and Ellen F. Rosenblum, Attorney General.

Tyler D. Smith, Tyler Smith & Associates PC, Canby, filed the memorandum in opposition for plaintiffs-adverse parties. Also on the memorandum was Tony L. Aiello, Jr., Canby.

* On petition for a peremptory or alternative writ of mandamus from two orders of the Harney County Circuit Court, Robert Raschio, Judge.

PER CURIAM

The petition for a writ of mandamus is denied without prejudice. The motion for stay is dismissed as moot without prejudice.

PER CURIAM

In this proceeding, the state asks that we issue a writ of mandamus directing the trial court to vacate two preliminary orders entered in a declaratory judgment action. Collectively, those orders temporarily restrained and enjoined the state from enforcing—while the trial court action is ongoing—Ballot Measure 114 (2022), which voters approved at the November 2022 General Election. We deny the state’s petition for a writ.

Measure 114 makes several statutory changes pertaining to firearms. Simply summarized, it requires a permit to purchase a firearm (“permit-to-purchase requirement”); requires completion of a criminal background check before a firearm may be purchased, acquired, delivered, or transferred (“background-check requirement”); and imposes restrictions regarding “large-capacity” magazines (“large-capacity magazine restrictions”).¹ After the election, plaintiffs filed the underlying declaratory judgment action against three state defendants (“the state”), asserting that Measure 114 is unconstitutional under Article I, section 27, of the Oregon Constitution.² Plaintiffs also sought preliminary relief, which the trial court granted in two orders. The first was a temporary restraining order that restrained the state from enforcing the permit-to-purchase requirement, together with the background-check requirement; by its terms, that order will remain in place until the state notifies the court that the permit-to-purchase requirement is ready to implement, at which point the court will hold a hearing (within 10 days) on plaintiffs’ motion for preliminary injunctive relief. The second was an order granting preliminary injunctive relief as to the large-capacity magazine restrictions, enjoining the state from enforcing those restrictions until a full hearing is held on plaintiffs’ complaint.

¹ Measure 114 defines a “[l]arge-capacity magazine” as an ammunition feeding device (fixed or detachable), with a capacity of more than 10 rounds of ammunition (with other requirements and conditions). The measure generally prohibits the manufacture, importation, possession, use, purchase, sale, or transfer of such large-capacity magazines.

² Article I, section 27, provides that “[t]he people shall have the right to bear arms for the defen[s]e of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.”

The state now asks that we issue a writ of mandamus directing the trial court to vacate those two temporary and preliminary orders. After considering the current procedural posture of the underlying action, we decline to issue a writ. We emphasize that our decision has no bearing on the parties' respective positions as to any aspect of the underlying proceeding, including the merits of plaintiffs' complaint. *See North Pacific v. Guarisco*, 293 Or 341, 346 n 3, 647 P2d 920 (1982) (so explaining).

Our decision today does not serve as a bar to any future challenge in this court or otherwise on appeal. Rather, at this juncture, and given our understanding that the trial court is proceeding as expeditiously as possible to resolve the issues that the parties have presented, we have determined that we should decline to exercise our mandamus discretion at this time. *See State ex rel Fidanque v. Paulus*, 297 Or 711, 717, 688 P2d 1303 (1984) (mandamus is an "extraordinary remedial process which is awarded not as a matter of right, but in the exercise of a sound judicial discretion" (internal quotation marks omitted)).³

We recognize that the legal status of Measure 114 is of significant concern to many Oregonians. Of course, it is the role of the judicial branch of government to resolve disputes such as challenges to laws enacted by the legislative branch, which includes the people exercising their initiative power. *State ex rel. Carson v. Kozer*, 126 Or 641, 644, 270 P 513 (1928). That resolution is underway in the trial court; our only determination today is that now is not an appropriate time to exercise our authority in mandamus in connection with the trial court's temporary and preliminary rulings.⁴

The petition for a writ of mandamus is denied without prejudice. The motion for stay is dismissed as moot without prejudice.

³ We deny the state's petition for a writ of mandamus without prejudice as to the filing of any future petition for a writ filed in this court by any party, in relation to either (1) preliminary injunctive relief as to the large-capacity magazine restrictions; or (2) any other future ruling in the underlying proceeding.

⁴ The state also filed a motion requesting that this court stay the trial court proceedings pending resolution of its mandamus petition. Because we deny the petition for mandamus, we dismiss the motion to stay as moot, but again without prejudice, in the manner described in the preceding footnote.