IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF COLUMBIA

IN THE MATTER OF THE PETITION of the Board of County Commissioners of COLUMBIA COUNTY, a political subdivision of the State of Oregon, Petitioner, For a Judicial Examination and Judgment of the Court as to the Regularity, Legality, Validity and Effect of the Columbia County Second Amendment Sanctuary Ordinance	Case No. 21CV12796 THE ATTORNEY GENERAL'S RESPONSE TO INTERVENORS' OPENING BRIEF **ORS 20.140 - State fees deferred at filing** **Hearing Date: July 21, 2021 – 10:30am**

MEMORANDUM OF LAW

I. INTRODUCTION

The parties agree that the county is powerless to nullify state and federal law. To avoid the consequence of that concession, Intervenors interpret the Second Amendment Sanctuary Ordinance ("Ordinance" or "SASO") only to constrain Columbia County's *enforcement* of most state and federal firearms laws. But that reading flouts the SASO's text, which provides that those laws "shall be treated as if they are null, void and of no effect in Columbia County, Oregon." And the Intervenor who filed the only voters' pamphlet argument in favor of the initiative that became the SASO argued that it would shield Columbia County residents from state laws, not only county enforcement of those laws. *See* § II.B, below.

But even if Intervenors' narrow reading of the SASO is correct, the SASO is still invalid: it violates the state statute barring local governments from adopting their own regimes of firearm regulation (ORS 166.170) (§ II.C); it conflicts with the constitutional status and statutory duties of the district attorney (§ II.D); it conflicts with the sheriff's duty to enforce state law (§ II.E);

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and its penalty and civil provisions are preempted by state statutes including the Oregon Tort Claims Act (§ II.F).

Intervenors may reply that these unconstitutional provisions may be severed from the SASO. But Columbia County Ordinance 2021-1, which enacted the SASO, provides that if the underlying initiatives are invalid, the ordinance is deemed repealed. In addition, given that the SASO's central provisions are invalid, the Court has no basis to conclude that the county intended to enact as standalone legislation whatever valid remnants of the SASO might remain. For those reasons, this Court should hold the SASO is invalid as a whole. *See* § II.F.

II. ARGUMENT[1]

A. This Court Has Jurisdiction to Determine the Ordinance's Validity.

1. The only operative law is the Second Amendment Sanctuary Ordinance Adopted by the County Board in March 2021.

The voters of Columbia County enacted Initiative 5-270 in 2018 and Initiative 5-278 in 2020. But, in March 2021, the Columbia County Board of County Commissioners ("County Board") repealed the 2018 initiative and amended the 2020 initiative. *See* Columbia County Ordinance 2021-1 § 4. It is blackletter law that a legislative body may amend or repeal a statute enacted by initiative. *See Straw v. Harris*, 54 Or 424, 431 (1909) ("[E]ither branch of the legislative department, whether the people, or their representatives, may enact any law, and may even repeal any act passed by the other."). Thus, the County Board has authority to amend or repeal an ordinance adopted by initiative. *See* ORS 203.111 (providing, along with ORS 203.230 and 203.240, that the County Board is the county's "governing body and shall exercise general legislative authority over all matters of county concern").

As a result, the initiatives as originally adopted are no longer in force. The only county ordinance that remains operative is the Columbia County Second Amendment Sanctuary

[1] The Attorney General also incorporates by reference the arguments for the invalidity of the Second Amendment Sanctuary Ordinance made in her motion for summary judgment.

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Ordinance, which was adopted by Ordinance 2021-1 ("SASO or "Ordinance"), as reproduced on pages 5–10 of Exhibit 1 to the Petition.[2] The validity of that Ordinance is the subject of this proceeding.

2. This proceeding is proper.

The County Board commenced this proceeding to determine the validity of the SASO it enacted. The statutory authority for this proceeding is clear: the County Board "may commence a proceeding … for the purpose of having a judicial examination and judgment of the court as to the regularity and legality" of "[a]ny ordinance … enacted by the governing body, including the constitutionality of the ordinance…." ORS 33.710(2), (2)(g). Because the SASO is such an ordinance, this Court has jurisdiction. The Oregon Supreme Court's most recent consideration of a validation proceeding concerned the validity of ordinances implementing a charter amendment adopted by the voters' referral, a close analogue to this action. *See Multnomah Cty. v. Mehrwein*, 366 Or 295, 298 (2020) (noting the county petitioned for review under ORS 33.710 of ordinances implementing voter-adopted charter amendments). There was no suggestion that the courts lacked jurisdiction to adjudicate that dispute. *Id.*

In addition, contrary to Intervenors' premise, an ordinance enacted by initiative can be subject to a validation proceeding. The statute allows the County Board to initiate a proceeding to determine whether to implement an initiative when doing so requires a significant public expenditure or significantly affects its constituents:

[2] At the parties' request, this Court stayed the Ordinance to allow it to decide this case before it becomes effective and enforceable.

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> "Any decision of the governing body that raises novel or important legal issues that would be efficiently and effectively resolved by a proceeding before the decision becomes effective, when the decision will:
>
> (A) Require a significant expenditure of public funds;
>
> (B) Significantly affect the lives or businesses of a significant number of persons within the boundaries of the governing body …."

ORS 33.710(1)(e)(A)-(B).

Whether or not to implement this Ordinance meets these criteria. It could "[r]equire a significant expenditure of funds," including defense of indemnification actions under the Oregon Tort Claims Act. *See* ORS 30.285(1), 30.287(1); *see also* § II.F, below. It also "[s]ignificantly affect[s] the lives" of Columbia County residents by determining whether state and federal firearms laws will be enforced by and within Columbia County.

The subjective intent of the county officials who enacted the SASO or initiated this proceeding is irrelevant. *Contra* Intervenors' Opening Brief ("Intervenors' Br.") at 7–8. The validation procedure's purpose is to allow county officials to resolve legal uncertainty. So it is neither surprising nor suspect that the governing body enacted the Ordinance despite questioning its constitutionality. It is entirely appropriate for the county to seek a judicial determination to resolve its doubt.

Intervenors' speculations about the political motivation or consequences of this proceeding are irrelevant to the legal questions that are properly before this Court. *Contra* Intervenors' Br. at 7–8. And contrary to Intervenors' suggestion, there is concrete, genuine adversity among the parties:

- Between Columbia County and the State regarding whether the county may lawfully instruct its officers to ignore state law and create a cause of action for damages should they abide by their state law duties.
- Between the Citizen Opponents and Columbia County regarding the lawfulness of the Ordinance.

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- Between the State and the Citizen Opponents, on the one hand, and the Intervenors, on the other, regarding the lawfulness of the Ordinance.

Each of those parties has a stake in this controversy. Oregon courts can issue a declaratory judgment to clarify these parties' legal obligations under these circumstances. *See* ORS 33.710(4); ORS 28.010.

B. The Ordinance's Nullification Provision is Invalid.

1. The Ordinance purports to nullify federal and state law.

Intervenors' claim (at 15) that the SASO "only applies to how the county views" federal and state gun laws contradicts the text, context, and history of the Ordinance. The Ordinance provides that "Extraterritorial laws … shall be treated as if they are null and void *in* Columbia County, Oregon." And the only voters' pamphlet argument in favor of Initiative 5-278, which the Ordinance codifies, argued that the initiative would shield Columbia County residents from state firearms laws, not only stop county enforcement of those laws.

Oregon courts interpret statutes and ordinances by examining the text of the statute in context. *State v. Gaines*, 346 Or 160, 171 (2009); *see also City of Eugene v. Comcast of Oregon II, Inc.*, 359 Or 528, 540–41 (2016) (applying these standards to local ordinances). Legislative "history may be used to confirm seemingly plain meaning and even illuminate it…." *Gaines*, 346 Or at 172.

Beginning with the text, Section 4 of the Ordinance reads:

> "All local, state, and federal acts, laws, rules or regulations, originating from jurisdictions outside of Columbia County, which restrict or affect an individual person's general right to keep and bear arms, including firearms, firearm accessories or ammunition are for all purposes under this ordinance defined as Extraterritorial Acts. Such Extraterritorial Acts shall not be enforced by Columbia County agents, employees, or officers and are specifically rejected

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> by the voters of this county, *and shall be* treated as if they are null, void and of no effect *in* Columbia County, Oregon."

Petition for Validation, Exh. 1 at 8 (emphasis added; words of Measure 5-278 deleted by Ordinance 2021-1 omitted).

These two sentences establish two separate requirements. The first sentence defines firearm regulations ("acts, laws, rules, or regulations") originating from local, state, or federal governments outside Columbia County as "Extraterritorial Acts." *Id.* The second sentence is a compound sentence (one subject and two dependent clauses separated by a comma and an "and". "Extraterritorial Acts" are the subject of both dependent clauses. *Id.* The first clause directs that Extraterritorial Acts, "shall not be enforced by Columbia County agents …." The sentence continues in a second dependent clause separated by a comma and an "and." The second clause directs that Extraterritorial Acts "shall be treated as if they are null, void and of no effect in Columbia County, Oregon." *Id.* The first sentence's definition of Extraterritorial Acts is incorporated in both parts of the second sentence to define firearm regulations ("acts, laws, rules, or regulations") originating from local, state, or federal governments outside Columbia County as "Extraterritorial Acts." *Id.* Neither dependent clause can stand alone without the subject of Extraterritorial Acts that both clauses are dependent upon. *See* Jane Straus & Lester Kaufman, *The Bluebook of Grammar and Punctuation*, at 7 (11th ed. 2014, Online edition).

Taken together, the sentence declares that all local, state, and federal acts, laws, rules, and regulations are (i) not to be enforced by Columbia County officers, agents, or employees, *and* (ii) to be "null, void, and of no effect in Columbia County." The word "in," is employed exactly as the dictionary defines it: "used as a function word to indicate inclusion, location, or position within limits." "In." *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/in (accessed June 30, 2021); *accord Collins Dictionary*, https://www.collinsdictionary.com/us/dictionary/english/in (accessed July 7, 2021) ("In: position or movement. If something happens **in** a place, it happens there.") The second directive's plain

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meaning is to nullify all federal and state firearms-related laws within the geographic boundaries of Columbia County.

The text of Section 3 of the Ordinance is more context that shows the Ordinance, if valid, would nullify and void all federal and state firearms-related law within the geographic area of Columbia County. Like Section 4, Section 3 (PROHIBITIONS) has distinct parts which separately address limitations on Columbia County's own enforcement of state and federal law. Sub-section 3(A) prohibits the use of county funds to enforce state and federal firearms laws and outlines the bounds of this prohibition. But Section 3(B) purports to prohibit all enforcement of state or federal laws throughout the geographic area of Columbia County by proclaiming:

> "While within Columbia County, this ordinance preserves the right of any person to keep and bear arms as originally understood; in self-defense and preservation, and in defense of one's community and country, and to freely manufacture, transfer, sell and buy firearms, firearm accessories and ammunition, which are designed primarily for the same purposes and protects [sic] ancillary rights that are closely related to the right to keep and bear arms protected by the 2nd amendment; including the right to manufacture, transfer, buy and sell firearms, firearm accessories, and ammunition ("ancillary firearm rights")."

Id. at 7. Sections 3(A) & 3(B) mirror Section 4: both sections prevent county staff from using county resources to enforce state and federal law, but also separately nullify state and federal regulations in the geographic area of Columbia County.

The history of the Ordinance's adoption supports this interpretation. Section 3 of Ordinance 2021-1 expressly provides that "[t]he purpose of [Ordinance 2021-1] is to implement the intent of the voters as demonstrated by the passage of Columbia County Initiative Measure[s] 5-270 … and 5-278 …." Thus, the voters' intent in enacting those initiatives is the best evidence of legislative intent of the Ordinance. *See State v. Stamper*, 197 Or App 413, 419 (2005) ("The broader context of a statute also includes prior versions of the statute and related statutes …." (citing *State v. Webb*, 324 Or 380, 390 (1996)).

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Interpreting an ordinance resulting from a ballot initiative, the court seeks to "discern the intent of the voters who adopted it." *Burke v. Dept. of Land Conservation and Dev.*, 352 Or 428, 433 (2012). When examining legislation adopted by initiative, the court discerns the "meaning understood by voters" at the time of passage. *Harisay v. Clarno*, 367 Or 116, 123–24 (2020); *see also State v. Lane*, 357 Or 619, 625 (2015). To determine the voters' intent, the court considers contemporaneous materials available to the voters, including the voters' pamphlet. *See, e.g.*, *Con-Way Inc. & Affiliates v. Dep't of Revenue*, 353 Or 616, 627–28 (2013) (noting the court considers "sources of information that were available to the voters at the time the measure was adopted and that disclose the public's understanding of the measure" including "the ballot title and arguments for and against the measure included in the voters' Pamphlet") (internal quotes omitted)).

The Oregon Firearms Federation, an Intervenor here, submitted the only argument printed in the voters' pamphlet. Marshall Decl., Exh. 1 (Columbia County Voters' Pamphlet, General Election 2020, at 13 (Measure 5-278)). That argument for the 2020 initiative suggests it will create new substantive individual rights against state firearms regulation, not restrictions on county officials:

> "*[P]oliticians in Salem* and extremists in Portland work overtime to enact new laws and rules to restrict your 2nd Amendment rights or make self defense firearms useless, if available at all. Measure 5-278 *protects Columbia County residents* from the ever expanding reach of big city radicals […] *ensure your right* and ability to defend your life […] guarantee that you and your family do not become the latest victims of the senseless violence *Oregon's elected officials* are promoting."

Id. (emphasis added).

This demonstrates the intention to shield "Columbia County residents" from firearms regulations enacted by "politicians in Salem" and "Oregon's elected officials," i.e., state law. Further, the ballot title, "Columbia County Gun Sanctuary Ordinance Limiting Firearm Regulation" does not suggest to voters that this is an initiative aimed toward limiting *Columbia*

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County's enforcement. Instead, like the text of the initiative, it focuses on stopping firearm restrictions as a whole, not only the county's enforcement. *Id*.

2. The Ordinance's nullification provision is invalid.

As the Attorney General argued in her opening brief, a county ordinance cannot nullify state and federal statutes. *See* AG's Mot. for Summary Judgment ("AG's Mot.") at 5–6. That provision of the Ordinance is therefore invalid. The Intervenors appear to agree. *See* Intervenors' Br. at 15 ("State and federal law are still supreme."). As argued below, that calls into doubt the validity of the Ordinance as a whole. *See* § II.G, below.

C. ORS 166.170 Preempts the Ordinance.

The Ordinance is also preempted by ORS 166.170, which eliminates local governments' "authority to regulate" firearms "[e]xcept as expressly authorized by state statute." *See* AG's Mot. at 4–5. Intervenors argue this statute does not apply to the Ordinance, because it merely mandates that the county not enforce state law. That argument relies on a misreading of the Ordinance. *See* § II.B.1, above. But the argument also fails because the courts have rejected the narrow understanding of "regulate" to exclude policies that merely require the government not to act:

> "We do not agree that, in order to rise to the level of a policy choice, a statute must regulate particular persons or subjects in either a positive or negative manner; it is just as much a substantive policy … if the legislature prohibits *any* regulation of particular persons or matters, or defines the extent to which they may be regulated, as if the legislature itself regulates the persons or matters in a particular manner."

deParrie v. State, 133 Or App 613, 619 (1995) (emphasis in original). Columbia County's regulation of certain subjects in a "negative manner" is still regulation, and it is therefore preempted.

Moreover, the purpose of ORS 166.170 is to "avoid[] a patchwork quilt of local government laws inconsistently regulating the use of firearms." *Oregon Firearms Educ. Found. v. Bd. Of Higher Educ.*, 245 Or App 713, 720 (2011) (emphasis omitted). That purpose is

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frustrated by a refusal of Columbia County to enforce state firearms laws. Just as a county enacting its own substantive restrictions on the possession or use of firearms, the SASO would create differences in the regulation of firearms across county lines.

Because no state statute "expressly authorize[s]" Columbia County to enact the Ordinance, it is preempted by ORS 166.170.

D. District Attorneys are State Officers Not Subject to Counties' Direction in the Prosecution of State Crimes.

The SASO does not, and a county could not, govern a district attorney's prosecution of state crimes. When district attorneys prosecute crimes on behalf of the State, they are not "agent[s], employee[s], or official[s] of Columbia County … acting in their official capacit[ies]," Ordinance § 4.A. "[T]hroughout Oregon's history, district attorneys have been regarded as *state officers* who act as prosecutors for the executive branch." *State v. Coleman*, 131 Or App 386, 390 (1994) (emphasis added). Thus, the Ordinance does not apply to the Columbia County District Attorney's state criminal prosecutions. *Contra* Intervenors' Mot. at 25.

But even if the Ordinance had been drafted to expressly apply to the District Attorney, it would be invalid under the Oregon Constitution and preempted by state statute. The Oregon Constitution of 1857 established the office of district attorney:

> "There shall be elected by districts comprised of one, or more counties, a sufficient number of prosecuting Attorneys, who shall be the law officers *of the State*, and of the counties within their respective districts, and shall perform such duties pertaining to the administration of Law, and general police *as the Legislative Assembly may direct*."

Art VII (Original), § 17 (emphasis added). Under that provision,[3] "The district attorney is the law officer *of the state*, within the limits of his district, with the powers, in the absence of statutory regulation, of the attorney general at common law." *State ex rel Thornton v. Williams*, 215 Or

[3] The provisions of the original Article VII, § 17 remain in force even after the 1910 revision of Article VII, except where modified by legislative enactment. *See State ex rel. Johnson v. Farrell*, 175 Or 87, 92 (1944).

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639, 644–45 (1959) (quoting *State v. Douglas Cty. Rd. Co.*, 10 Or 198, 201 (1882)). The statute governing district attorneys' authority incorporates that constitutional provision. *See* ORS 8.630 ("District attorneys shall … have the powers, perform the duties and be subject to the restrictions provided by the Constitution for prosecuting attorneys, and by the laws of this state.").

Exercising this authority, "[d]istrict attorneys are state officers applying statewide, not local law." *State v. Clark*, 291 Or 231, 245 (1981); *see also* ORS 8.660 ("The district attorney shall attend the terms of all courts having jurisdiction of public offenses within the district attorney's county, and, except as otherwise provided in this section, conduct, *on behalf of the state*, all prosecutions for such offenses therein." (emphasis added)). District attorneys may delegate that authority to deputy district attorneys. *See* ORS 8.780 ("A deputy district attorney …[,] subject to the direction of the district attorney, has the same functions as the district attorney."); *see also Foster v. Flaherty*, 621 F. App'x 463, 464–65 (9th Cir. 2015) (concluding that under Oregon law "DDAs are State, not County, employees"). Exercising these authorities, district attorneys and their deputies prosecute violations of the State's criminal laws. *See* ORS 8.660(1).

None of these constitutional and statutory provisions leave room for a county ordinance to limit or direct the district attorney's enforcement of state law. Put another way, the Columbia County District Attorney's statutory authority to prosecute State crimes preempts the Ordinance's directive not to enforce state laws that "restrict or affect" private ownership of firearms or their accessories. Ordinance § 3.A. Of course, district attorneys may serve as counsel to county officials: A district attorney may be called on by a "county officer" to "advise on … legal questions" and defend "any action … against any county officer or county employee for damages…." ORS 8.690. But these attorney-client relationships do not grant the county authority to direct a district attorney's state criminal prosecutions.

The voters of each county elect the district attorney to prosecute crimes in that county, but that is immaterial. Like circuit court judges and state legislators, district attorneys are elected

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by their electoral districts rather than statewide, but they are still state officials. *See* Or Const, Art IV, § 6 (establishing legislative districts); Or Const, Art VII (Amended), § 1 (providing that "[t]he judicial power of the state shall be vested … in such other courts as may … be created by law" but judges are "elected by the legal voters of the state or of their respective districts"); *see also* ORS 3.012 (establishing judicial districts of the circuit courts). And the Governor, not the county commission, fills vacancies in the office of both district attorneys and circuit judges. *See* ORS 8.640.

It follows that a county ordinance cannot direct district attorneys' prosecutions of state crimes. "[W]hatever else local government authority may entail, it does not include governing the conduct of state and federal officials." *State v. Logsdon*, 165 Or App 28, 32 (2000). This principle applies to district attorneys' prosecutions of state crimes and forecloses applying the Ordinance to the Columbia County District Attorney.

E. The Sheriff Must Enforce State Law.

1. The Ordinance prohibits the Sheriff from enforcing constitutional state laws.

The Intervenors appear to argue that the Ordinance does nothing more than to underscore the Sheriff's preexisting duty not to enforce unconstitutional statutes. *See* Intervenors' Br. at 24. That may be a fair reading of Section 3's requirement that the Sheriff determine whether a statute violates the Constitution as it applies to his own conduct. But the Ordinance goes much further than barring enforcement of laws that violate the Second Amendment. It prohibits the county's resources from "aid[ing] in the enforcement or investigation *related to* personal firearms, firearm accessories, or ammunition." SASO § 2.A.2. Similarly, the "Extraterritorial Acts" include all laws that "*restrict or affect* an individual person's general right to keep and bear arms …." *Id.* § 4.A. These provisions are not limited to laws that infringe the Second Amendment.

Many federal and state laws regulate private firearms within the bounds of the Second Amendment. For example, the Supreme Court was clear that "nothing in [*Heller*] should be taken to cast doubt on … laws imposing conditions and qualifications on the commercial sale of

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arms." *District of Columbia v. Heller*, 554 US 570, 626–27 (2008); *see also Silvester v. Harris*, 843 F3d 816, 827 (9th Cir 2016) (holding a ten-day waiting period did not violate the Second Amendment). But the Ordinance rules-out those conditions and qualifications when imposed by an "Extraterritorial Act," and would, for example, prohibit the Sheriff from arresting someone who had attempted an unlawful firearms transfer.

2. The Sheriff must enforce constitutional state criminal prohibitions.

Intervenors appear to claim in the alternative that the Ordinance may lawfully direct the Sheriff not to enforce certain state criminal laws. But state law is clear: the sheriffs have responsibility for enforcing state law within the county. *See* State's Mot. at 7 (citing ORS 206.010). And the sheriff's oath requiring adherence to state law also creates such a duty. *See id.* at 6 (citing ORS 204.020).

Intervenors' reliance on the non-commandeering principle in *Printz v. United States* is erroneous. *See* Intervenors' Br. at 21, 24 (citing 521 US 898 (1997)). That principle prohibits the federal government from requiring the State or its political subdivisions to employ their resources to enforce federal law. It does so because, in the U.S. Constitution's system of dual sovereignty, a sovereign state cannot be required to act by a separate sovereign, the federal government. *See Printz*, 521 US at 918–25. That principle does not apply to the State's relationship to counties. In fact, a political subdivision, such as a county, generally cannot assert federal rights against a state government. *See Palomar Pomerado Health Sys. v. Belshe*, 180 F3d 1104, 1108 (9th Cir 1999); *see also* Intervenors' Br. at 35 (citing authorities for the same proposition). Both rules follow from the State's status as a sovereign, which a county does not share.

Intervenors have not cited authority for the proposition that state law bars the State from imposing duties on a county official. The text of the Oregon Constitution shows that no such principle exists. Even a home rule county's "officers shall among them exercise all the powers and perform all the duties, as distributed by the county charter or by its authority, now or

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hereafter, by the Constitution or laws of this state, granted to *or imposed upon* any county officer." Or Const, Art VI, § 10 (emphasis added). This provision makes clear that the "laws of this state" may "impose upon" "duties" on "county officer[s]." Intervenors' claim—that county officials cannot be required to implement state law—cannot be squared with the plain language of the Oregon Constitution and county officials' obligations to perform state law duties is also well established in case law. *See, e.g.*, *City of Eugene v. Roberts*, 91 Or App 1, 5, *aff'd,* 305 Or 641 (1988) (holding the Secretary of State may direct a county election official not to place a measure on the ballot in violation of state law).

F. State Law Preempts the Ordinance's Penalties and Civil Remedies.

Intervenors argue that the remedies for a county official's breach of the Ordinance (§§ 5–6) adhere to state law. They do not. State law preempts these remedies for three reasons.

First, the Ordinance is expressly preempted by the state statute barring liability for performing background checks in connection with purchasing a firearm. Under the Ordinance a Columbia County official would be liable for "knowingly and willingly, participat[ing]" in "[a]ny registration and background check requirement on firearms … beyond those customarily required at the time of purchase prior to December, 2012." Ordinance § 4.A.4. In 2019, state law began to require background checks for all firearms, not only handguns. *See* Laws 2018, ch. 5 § 4. And state law creates immunity for public employees who help administer that law, including for purchases that would not have triggered a background check in 2012. *See* ORS 166.412(6) ("No public employee, official or agency shall be held criminally or civilly liable for performing the investigations required by this section provided the employee, official or agency acts in good faith and without malice."); *see also* AG's Mot. at 7.

Second, the Ordinance would make a county official liable for performing their duties under state law. *See* AG's Mot. at 6–7; § II.E, above. "[O]rdinances cannot prohibit what state law expressly permits …." *Thunderbird Mobile Club, LLC v. City of Wilsonville*, 234 Or App 457, 469 (2010). And local law is preempted when "'both [state law and local law] cannot

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operate concurrently.'" *Id.* at 471 (2010) (quoting *La Grande/Astoria*, 281 Or at 156) (brackets in original). For example, if the Sheriff or his deputies arrested an individual for possession of a concealed firearm in violation of ORS 166.250(1), the Ordinance would make them liable for enforcing a law "prohibiting … concealed carry, or the transport of lawfully acquired firearms …." § 4.A.9. State law prevails in such a conflict.

Third, the private cause of action provided by Section 6 of the Ordinance is preempted by the Oregon Tort Claims Act. Under Oregon law, "[t]he sole cause of action for a tort committed by officers, employees or agents of a public body acting within the scope of their employment or duties … is an action under 30.260 to 30.300," the OTCA. ORS 30.265(2). "The remedy provided by [the OTCA] is exclusive of any other action against any such officer, employee or agent of a public body whose act or omission within the scope of the officer's, employee's or agent's employment or duties gives rise to the action. No other form of civil action is permitted." *Id.*

Under OTCA, these claims must be asserted against the county, not against individual officers, employees, or agents. *See* ORS 30.265(1)–(2). But the Ordinance provides that "[a]ny entity, person, official, agents, or employee of Columbia County who knowingly violates the Ordinance … shall be liable to the injured party …." § 6.A. Under the OTCA's definition, this is a tort claim subject to the OTCA. *See* ORS 30.260 ("'Tort' means the breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy."); *Butterfield v. State*, 163 Or App 227, 234 (1999) (holding duty imposed by statute rather than contract is a tort under OTCA). Under the OTCA, however, only the public body (that is, the county), may be held liable for actions taken by the "officers, employees or agents of a public body acting within the scope of their employment or duties." ORS 30.265(2). The Ordinance only concerns officials' conduct when "acting in their

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official capacity." § 2.A. Because Section 6 of the Ordinance assigns liability to the individual, rather than the public body, it conflicts with state law and is preempted.

The Ordinance's private right of action is also preempted by the OTCA because the Ordinance creates liability for Columbia County officials' discretionary policy decisions. For example, under the Ordinance, a Sheriff's decision to enforce state or federal law affecting private firearms ownership would create liability. But these are precisely the type of policy decisions for which the OTCA establishes discretionary immunity. *See* ORS 30.265(6)(c); *Ramirez v. Hawaii T & S Enterprises, Inc.*, 179 Or App 416, 419 (2002). In such a case, state law would prevail and would bar the Ordinance's imposition of liability.

State law preempts the Ordinance's provisions establishing civil penalties (§ 5) and a private cause of action (§ 6). They are therefore invalid.

G. The Ordinance's Unconstitutional Provisions Cannot Be Severed.

Intervenors may argue that if the Court determines certain provisions of the Ordinance are unlawful, those portions should be severed and the remaining provisions should remain in force. But given the language of Ordinance 2021-1 and that the central provisions of the 2020 initiative it implements are unconstitutional, Intervenors cannot show that legislative intent supports continuing to enforce whatever may remain of the Ordinance.

"Whether an invalid provision is severable from the enactment of which it is a part is a question of legislative intent." *Advocs. for Effective Regul. v. City of Eugene*, 176 Or App 370, 376 (2001). The Ordinance includes a severability provision:

> "If any provision of this Ordinance, including Exhibit 'A', is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the remaining portions thereof."

Columbia County Ordinance 2021-1 § 5. The 2020 initiative included similar language. *See* Petition, Ex. 1 at 10 (Ex. A, § 6 (deleted)) ("The provisions of this act are hereby declared to be severable, and if any provision of this act or the application of such provision to any person or

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circumstance is declared invalid for any reason, such declarations shall not affect the validity of the remaining portions of this act."). But Ordinance 2021-1 also provides: "This ordinance shall be automatically repealed if Columbia County Initiative Measure 5-270, or Initiative Measure 5-278 is, for any reason, overturned or declared invalid by a court of competent jurisdiction." Columbia County Ordinance 2021-1 § 6.

Because the Ordinance has "an explicit severability clause, [the court's] role is to construe it as [it] would any other enactment, that is to say, in a manner that best reflects the intentions of the voters or the legislative entity that enacted it." *Advocs. for Effective Regul.*, 176 Or App at 376 (citing *PGE v. Bureau of Lab. and Indus.*, 317 Or 606, 610–12 (1993) for the proposition that "intent is the touchstone of statutory construction"). Applying this standard, the Court should conclude the Ordinance as a whole falls for two reasons.

First, Section 6 of Ordinance 2021-1 provides that "[t]he Ordinance shall be automatically repealed" if Initiative 5-278 is "overturned or declared invalid…." The unconstitutional provisions of the SASO detailed above were enacted in Initiative 5-278 and remain unchanged by the County Board's amendments in Ordinance 2021-1. Given that the SASO is the only operative law, the only circumstance a court could "overturn" Initiative 5-278 would be via an examination of the SASO, as here. To give effect to Section 6 of Ordinance 2021-1 as written, this Court should declare that Ordinance 2021-1 as a whole is repealed if it holds provisions of Initiative 5-278 incorporated in the Ordinance are unconstitutional. *See also* Intervenors' Br. at 9 n.13 ("Essentially, Section 6 is a non-severability clause to Section 5's severability clause, making it of little benefit once the entire Ordinance is automatically repealed if struck down in part for any reason.").

Intervenors' argument that the repeal of the Ordinance would cause Initiative 5-278 to become operative is incorrect. The SASO incorporates the Initiative 5-278. Repealing Ordinance 2021-1 includes repealing the SASO, which is Exhibit A to Ordinance 2021-1. Even if it were otherwise, the Court's judgment that provisions of the SASO are unconstitutional would apply

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equally to Initiative 5-278, and the parties to this proceeding, including the County, would be bound by that judgment.

Second, the SASO's numerous unconstitutional provisions leave the Court no basis to conclude that the County Board—or even the voters—would have adopted the SASO's remaining provisions without its unconstitutional ones. Consider two examples. As argued above (§ II.B.1), the nullification of state law was featured prominently in the voters' pamphlet argument in favor of Initiative 5-278. Given the antipathy toward "Salem politicians," it is not clear that the voters who supported the measure would favor barring only county enforcement if they believed that the alternative was the Oregon State Police filling in any gap in county law enforcement. As another example, if, as the Attorney General argues (§ II.E, above), the Sheriff cannot be bound by the Ordinance, there is no text to cleanly excise that unconstitutional feature of the Ordinance. Moreover, given the centrality of the Sheriff's role in law enforcement, it's unclear what import the Ordinance would retain if he and his deputies were not subject to its mandates.

The Court cannot conclude that the County Board or the voters would have enacted alone the few provisions of the SASO's that may pass constitutional muster remain. For that reason, the Ordinance as a whole should fall.

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III. CONCLUSION

The Court should declare the Ordinance invalid.

DATED July 8, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 8, 2021, I served the foregoing THE ATTORNEY GENERAL'S RESPONSE TO INTERVENORS' OPENING BRIEF upon the parties hereto by the method indicated below, and addressed to the following:

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