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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

Hon. Ted E. Grove

**THE COLUMBIA COUNTY
RESIDENTS' RESPONSE TO
INTERVENORS' MOTION FOR
SUMMARY JUDGMENT**

Fee Statute: ORS 21.200(1)(a)

Hearing Date: July 21, 2021 – 10:30am

**THE COLUMBIA COUNTY RESIDENTS' RESPONSE TO INTERVENORS'
MOTION FOR SUMMARY JUDGMENT**

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1 **INTRODUCTION**

2 At issue in this validation proceeding is the legality and enforceability of the Columbia
3 County Second Amendment Sanctuary Ordinance (the “SASO”). That ordinance was adopted
4 by the Columbia County Board of Commissioners (the “Board”) following the passage of
5 Measure 5-270 at the November 6, 2018 General Election and Measure 5-278 at the November
6 3, 2020 General Election (the “Measures”).

7 In their cross-motion for summary judgment (“Intervenors’ Motion”), Intervenors first
8 seek to avoid the merits by raising baseless objections to the procedures Columbia County used
9 to incorporate the Measures into the county code and to request a judicial examination and
10 judgment of the legality and constitutionality of the SASO. For the reasons discussed below,
11 those objections fail. Intervenors then miscast the reach of the SASO. Intervenors argue that the
12 SASO is narrowly tailored, akin to giving Columbia County officials, agents and employees
13 prosecutorial discretion over local enforcement of firearms safety laws and regulations.
14 However, the SASO is sweeping legislation that declares “null and void” almost all state and
15 federal firearms safety laws. The SASO also subjects any County employee, agent or official
16 who complies with, enforces, or even investigates violations of those state and federal laws to
17 fines and civil suit and strips them of legal protections. And even under Intervenors’ truncated
18 reading of the SASO, it is preempted, illegal and unenforceable.

19 Columbia County Residents Robert Pile, Shana Cavanaugh, Brandee Dudzic, and Joe
20 Lewis (the “Columbia County Residents”) joined this proceeding as parties to present to the
21 Court why Initiative Measures 5-270 and 5-278, as codified by the SASO,¹ are unconstitutional
22 and inconsistent with Oregon and federal law. The Columbia County Residents urge the Court

23 _____
24 ¹ The SASO is attached as Exhibit A to Ordinance 2021-1. As in the Columbia County
25 Residents’ Motion for Summary Judgment, because the SASO combines, amends and
26 incorporates the Measures, for simplicity the remainder of this brief refers to the “SASO.”
However, all arguments apply to the Measures themselves as well. The full text of the SASO
can be found as Exhibit A to Exhibit 1 of the Petition for Validation of Local Government
Action (the “Petition”).

1 to reject Intervenor’s inaccurate characterizations of the wording and breadth of the SASO, find
2 the SASO unconstitutional as preempted by Oregon and federal law, and deny Intervenor’s
3 Motion for Summary Judgment.

4 **POINTS AND AUTHORITIES**

5 **I. The County Properly Adopted Ordinance 2021-1 and Appropriately Brought this**
6 **Proceeding Under ORS 33.710.**

7 **A. Intervenor’s Misconstrue the Board’s Law-Making Authority.**

8 The Board adopted Ordinance 2021-1 and the SASO, on March 31, 2021. Except for
9 correcting grammatical and formatting issues, the SASO is a verbatim enactment of Measure 5-
10 270, as modified by Measure 5-278. Despite the regularity of the Board’s law-making actions in
11 adopting the SASO, Intervenor’s argue throughout their motion that the Court is prohibited from
12 conducting the analysis required by ORS 33.710 because the Board either did not have the power
13 to adopt the SASO or because it was unnecessary to do so. *See* Intervenor’s Motion at 4–8.
14 Intervenor’s are mistaken.

15 In adopting Ordinance 2021-1 and the SASO, the Board was acting well within its law-
16 making capacity to adopt, amend, and repeal Measures previously approved by the electors of
17 Columbia County. The voters and the Board have co-equal law-making authority. The power of
18 the voters of Oregon’s counties to enact laws through voter initiatives derives from the Oregon
19 Constitution. *See* Or Const, art IV, § 1(5) (“The initiative and referendum powers reserved to the
20 people * * * are further reserved to the qualified voters of each municipality and district * * *”).
21 The people’s lawmaking power through the initiative is neither greater nor lesser than the
22 governing body’s lawmaking power. As the Oregon Supreme Court explained almost a century
23 ago:

24 “By this reservation of the legislative power in the people themselves by means of
25 the initiative, the people may propose and enact any law, and by means of the
26 referendum may repeal any law passed by the Legislative Assembly, and at the
same time the Legislative Assembly, when convened, may amend or repeal a law
passed by the people. Under this dual system of legislation, we have now two
law-making bodies, the Legislative Assembly, on the one hand, and the people,

1 on the other, which in the exercise of the legislative powers are coequal and co-
2 ordinate.”

3 *Carson v. Kozer*, 126 Or 641, 644, 270 P 513 (1928). *See also* 39 Or Op Att’y Gen. 81 (1978)
4 (“[A]n ordinance adopted by initiative would have the same effect as an ordinance adopted by
5 the governing body.”).

6 Because the initiative power of the voters and the lawmaking authority of the Board are
7 co-equal, the Board may adopt, amend or modify any ordinance passed by citizen initiative. As
8 the Oregon Supreme Court recently reiterated:

9 “One strand of law that is relevant concerns the legislative powers of the
10 legislature vis-à-vis those of ‘the people.’ From the time that the people’s
11 initiative and referendum powers were first enshrined in Oregon’s Constitution in
12 1902, this court has recognized that the legislature and ‘the people’ are coequal
13 and coordinate legislative bodies, ‘either of which in a manner provided by law
14 may undo the work of the other.’ *Kiernan v. Portland*, 57 Or 454, 480, 112 P 402
15 (1910); *see also State ex rel. Carson v. Kozer*, 126 Or 641, 644, 270 P 513 (1928)
(while ‘the people’ may use the referendum process set out in Article IV, section
1, to amend or repeal any law enacted by the legislature, the legislature may
conversely amend or repeal any law enacted by the people). **That means that
any statute that originally was enacted by the people can later be repealed or
amended by the legislature * * * .”**

16 *State v. Vallin*, 364 Or 295, 307, 434 P3d 413 (emphasis added), *opinion adhered to as modified*
17 *on reconsideration*, 437 P3d 231 (2019). And in adopting an initiative, the electors of Columbia
18 County cannot bind the *prospective* lawmaking authority of the Board. *Johnson v. City of*
19 *Pendleton*, 131 Or 46, 55–56, 280 P 873 (1929); *see also Campbell v. Aldrich*, 159 Or 208, 219,
20 79 P2d 257 (1938) (“The exercise of such power at one time does not mean that future
21 Legislatures may not, in the light of experience, declare a different policy.”); *Portland Van &*
22 *Storage Co. v. Hoss*, 139 Or 434, 445, 9 P2d 122 (1932) (“The preamble cannot legislate away
23 the powers of the Legislature nor bind its future course so as to impair its continuing power to
24 legislate.”); 82 C.J.S. Statutes § 11 (“Generally, one legislature cannot bind a succeeding
25 legislature, restricting or limiting future legislation. Implicit in the plenary power of each
26

1 legislature is the principle that one legislature cannot enact a statute that prevents a future
2 legislature from exercising its lawmaking power.”).

3 Confusingly, Intervenors elsewhere acknowledge the Board’s authority to adopt, repeal
4 or amend the Measures. In a footnote, Intervenors cite to *Vallin*, recognizing that “the legislature
5 may [] amend or repeal any law enacted by the people.” Intervenors’ Motion at 7 n. 9 (quoting
6 *Vallin*, 364 Or at 307). Intervenors later concede that, as to the Measures, “the county always
7 has the right to change its mind, or to enact its own regulations in the future.” Intervenors’
8 Motion at 16. As Intervenors repeatedly seem to admit, the Board acted well within its authority
9 when it passed Ordinance 2021-1, incorporated the 2018 and 2020 Measures (with slight
10 modifications to account for inconsistencies between the two measures) into the SASO, and
11 repealed the 2018 Measure. Intervenors’ dislike of the Board’s actions do not make those
12 actions improper or unconstitutional.

13 **B. Intervenors Misconstrue the Validation Proceeding.**

14 This validation proceeding is properly before the Court. ORS 33.710(2) provides that a
15 “governing body”²:

16 “may commence a proceeding in the circuit court of the county in which the
17 municipal corporation or the greater part thereof is located, for the purpose of
18 having a judicial examination and judgment of the court as to the regularity and
19 legality of”:

19 “* * * * *

20 “(e) Any decision of the governing body that raises novel or important legal
21 issues that would be efficiently and effectively resolved by a proceeding
22 before the decision becomes effective, when the decision will:

22 “(A) Require a significant expenditure of public funds;

23 “(B) Significantly affect the lives or businesses of a significant number
24 of persons within the boundaries of the governing body; or

25 “(C) Indirectly impose a significant financial burden on the cost of
26 conducting business within the boundaries of the governing body.

26 ² “Governing body” is defined to include “any county.” ORS 33.710(1)(a).

1 “(f) The authority of the governing body to enact any ordinance, resolution or
2 regulation.

3 “(g) Any ordinance, resolution or regulation enacted by the governing body,
4 including the constitutionality of the ordinance, resolution or regulation.”

5 ORS 33.710.

6 Intervenor argue that the Board improperly brought this proceeding because the
7 Measures were passed by voters and not the Board. But Intervenor fail to understand that, as
8 discussed above, the Board may adopt, amend, or repeal initiatives passed by the voters as part
9 of its regular law-making duties. That is what the Board did here and what is before the Court:
10 the Measures, as modified by the Board and set forth in the SASO, which is Exhibit A to
11 Ordinance 2021-1. Such an ordinance is properly before this court under ORS 33.710. And,
12 because the SASO incorporated the Measures, this means as a practical matter that an order
13 declaring the SASO invalid has the effect of declaring the Measures invalid.

14 The procedure here is entirely consistent with practice and procedure in Oregon. The
15 Oregon Supreme Court and other courts in this state have reviewed voter-passed laws and
16 subsequent adoptions or amendments by the governing body of a county under ORS 33.710.
17 *See, e.g., Multnomah County v. Mehrwein*, 366 Or 295, 298, 462 P3d 706 (2020) (“In the
18 November 2016 election, Multnomah County voters approved Measure 26-184, an amendment
19 to the Multnomah County Home Rule Charter containing campaign finance provisions.
20 Multnomah County then adopted new ordinances, Multnomah County Code (MCC) §§ 5.200-
21 203, mirroring and implementing those charter provisions.”). This proceeding is properly before
22 the Court.

23 **C. There is a Justiciable Controversy in this Case.**

24 Intervenor make the misplaced argument that this case does not present a justiciable
25 controversy. Intervenor’s Motion at 3. “Justiciability is a vague standard but entails several
26 definite considerations. A controversy is justiciable, as opposed to abstract, where there is an
actual and substantial controversy between parties having adverse legal interests.” *Brown v. Or.*

1 *State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982). “A justiciable controversy results in specific
2 relief through a binding decree as opposed to an advisory opinion which is binding on no one.”
3 *Id.* However, “[j]usticiability does not depend on the fortuitous appearance of an intervenor.”
4 *Teledyne Indus., Inc. v. Paulus*, 297 Or 665, 670, 687 P2d 1077 (1984). For example, “[m]any
5 justiciable controversies go by default or without opposition. That does not mean the plaintiff in
6 a civil case always receives the prayer of the complaint. Instead, the case is submitted to the
7 court without benefit of the defendant’s appearance or opposition, yet the court enters judgment
8 only for the proper award.” *Id.* at 670–71.

9 This proceeding is justiciable. It involves contested questions about the constitutionality
10 and legality of the SASO and will result in a binding decree. *See* ORS 33.720(6) (“Upon
11 conclusion of a proceeding authorized by ORS 33.710(2)(b), including any appeal of a judgment,
12 the judgment entered in the proceeding is binding upon the parties and all other persons.”). The
13 proceeding is explicitly authorized by ORS 33.710 and 33.720, and the County seeks a
14 determination as to the legality and validity of the Measures (as incorporated into the SASO)
15 pursuant to that statutory authority. *See, e.g., Cole v. Baker*, 82 Or App 108, 110 n. 1, 727 P2d
16 171 (1986) (rejecting argument that trial court lacked jurisdiction to determine validation
17 proceeding, because “the purpose of that statute is to allow the legality of contemplated
18 governmental actions to be determined before they are undertaken”), *review denied*, 302 Or 614
19 (1987). There is “an actual and substantial controversy between parties having adverse legal
20 interests” because the Columbia County Residents dispute the legality and constitutionality of
21 the SASO.³ The Attorney General also disputes the legality and constitutionality of the SASO.
22 Intervenors, in contrast, dispute the legality of the Board’s actions adopting the SASO but assert
23 that the SASO and underlying measures are legal and constitutional.

24 _____
25 ³ The Columbia County Residents’ counsel placed the County on notice of potential claims in a
26 January 21, 2021 letter to County counsel. A copy of that letter is attached to the Declaration of
Steven C. Berman in Support of the Columbia County Residents’ Response to Intervenors’
Motion for Summary Judgment, as Exhibit 1.

1 **D. The Columbia County Residents and the Attorney General Are Parties.**

2 As part of their argument that this case lacks a justiciable controversy, Intervenors
3 incorrectly state “this matter involves only one ‘party’ in a validation proceeding.” Intervenors’
4 Motion at 3–4. Intervenors misunderstand the nature of validation proceedings: the Columbia
5 County Residents and the Attorney General are also parties to this action. Under ORS 33.710
6 and ORS 33.720, once a governing body files a validation proceeding, “any person interested”
7 may appear as a party in the case to “contest the validity of such proceeding, or of any of the acts
8 or things therein enumerated.” ORS 33.720(3); *see also Mehrwein*, 366 Or at 298–99 (noting
9 that ORS 33.720(3) “permit[s] interested parties to appear in the validation proceeding”). Such
10 interested persons include, but are not limited to, “electors, freeholders, [and] taxpayers.” *See*
11 ORS 33.720(2) (requiring notice to be given to “electors, freeholders, taxpayers and other
12 interested persons”); *see also School Dist. No. 17 of Sherman County v. Powell*, 203 Or 168, 279
13 P2d 492 (1955) (district voter, property owner and taxpayer allowed to participate in validation
14 proceeding brought pursuant to ORS 33.710, and to appeal); *Petition of Port of St. Helens of*
15 *Columbia County*, 19 Or App 87, 89, 526 P2d 626 (1974) (district freeholder permitted to
16 participate in validation proceeding and to appeal trial court ruling). In enacting the statutes that
17 provide for validation proceedings, the Oregon legislature gave interested persons – including
18 electors, property owners and taxpayers – the right and authority to join in and fully participate
19 in a validation proceeding. The Columbia County Residents and the Attorney General are such
20 parties. Although their presence may not be necessary to create a justiciable controversy, *see*
21 *Teledyne*, 297 Or at 670–71, it certainly is sufficient to do so.

22 **II. The SASO Is Unconstitutional and Invalid.**

23 Intervenors seek to construe the SASO as a narrowly crafted ordinance that only limits
24 the use of county resources. *See, e.g.*, Intervenors’ Motion at 19–20 (“Rather, [the Measures]
25 simply determine how the County’s resources will be allocated and used, and exercise
26 prosecutorial discretion at a county level that certain Extraterritorial Acts are not to be enforced

1 by county officials.”). This is a misreading of the SASO. As discussed in the Columbia County
2 Residents’ Motion for Summary Judgment (the “Columbia County Residents’ Motion”), the
3 SASO is much broader and more far-reaching than that. Columbia County Residents’ Motion at
4 4–5, 8–10.

5 The SASO defines as “Extraterritorial Acts”

6 “[a]ll local, state and federal acts, laws, rules or regulations, originating from
7 jurisdictions outside of Columbia County, which restrict or affect an individual
8 person’s general right to keep and bear arms, including firearms, firearm
accessories or ammunition.”

9 SASO, § 4(A). The SASO then provides that Extraterritorial Acts may not be enforced in
10 Columbia County and “shall be treated as if they are null, void and of no effect in Columbia
11 County, Oregon.” SASO, § 4(A). Going even further, the SASO also prohibits the use of county
12 resources “to engage in activity that aids in the enforcement or investigation related to personal
13 firearms, firearm accessories, or ammunition,” and enacts civil penalties and a private right of
14 action against any Columbia County agents, employees, or officers who violate the SASO. *Id.*,
15 §§ 2(A)(2), 5, 6. In other words, county law enforcement could not use one of its vehicles to
16 investigate the illegal use of a personal firearm – even an active shooting – without running afoul
17 of the SASO. Moreover, even under Intervenor’s narrow and inaccurate reading of the SASO, it
18 is preempted by Oregon and federal law. *See AT&T Commc’ns of the Pac. Nw., Inc. v. City of*
19 *Eugene*, 177 Or App 379, 395, 35 P3d 1029 (2001) (“[L]ocal government authority may be
20 preempted in either of two ways: It may be preempted expressly, or it may be preempted
21 implicitly, by virtue of the fact that it cannot operate concurrently with state or federal law.”).

22 **A. The SASO Is Implicitly Preempted by Numerous Oregon Laws.**

23 As described in detail in the Columbia County Residents’ Motion, the SASO is implicitly
24 preempted by a number of Oregon laws that directly address firearms regulation or otherwise.
25 Columbia County Residents’ Motion at 8–10; *see AT&T Commc’ns*, 177 Or App at 389 (“The
26 organization and powers of such local governments may be limited—‘preempted’—by state or

1 federal statute or constitution. A local law will be considered preempted if it is ‘incompatible’
2 with legislative policy, that is to say, if local and state or federal law cannot operate concurrently
3 or if the state legislature or Congress intended to preempt the local enactment.” (citations
4 omitted)).

5 **1. Intervenor’s Erroneously Attempt to Narrow the Scope of the SASO to
6 Escape Preemption Issues.**

7 Intervenor’s attempt to circumvent the conflict issues with state law by reframing the
8 SASO and Measures as raising only issues of resource allocation and prosecutorial discretion.
9 According to Intervenor’s, the Measures “do not overlap with or conflict with the list of state laws
10 provided by the Board, because they neither authorize nor prohibit anything”; instead, they
11 “simply determine how the County’s resources will be allocated and used, and exercise
12 prosecutorial discretion at a county level that certain Extraterritorial Acts are not to be enforced
13 by county officials.” Intervenor’s Motion at 19–20. In other words, Intervenor’s argue, “the
14 exercise of prosecutorial discretion does not render the state law invalid or unenforceable in any
15 way, and all state laws continue to be fully operational and enforceable just as they were before
16 enactment of the [Measures].” *Id.* at 20.

17 As discussed above, Intervenor’s construction of the SASO directly contradicts the text
18 of the SASO and Measures themselves. The SASO does far more than address resource
19 allocation and prosecutorial discretion. It “preserves the right of any person * * * to freely
20 manufacture, transfer, sell and buy firearms, firearm accessories and ammunition”; requires
21 Columbia County employees, agents, and officials to disregard violations of state and federal
22 law; and punishes anyone who violates that directive via civil penalties and the creation of a
23 private right of action. SASO, §§ 2(B), 4(A), 5, 6.

24 Intervenor’s construction also contradicts the Measures’ relevant history. *See State v.*
25 *Sagdal*, 356 Or 639, 642–43, 343 P3d 226 (2015) (“caution must be used before ending the
26 analysis * * * without considering the history” of the measure) (internal quotation marks
omitted; citations omitted). Relevant history includes the ballot title for any voter-approved

1 measure as well as statements contained in the Voters’ Pamphlet. *Sagdal*, 356 Or at 642–43.
2 The summary for the ballot title for Measure 5-270, found in the November 6, 2018 Voters’
3 Pamphlet, described the chief purpose of Measure 5-270 as addressing the following question:⁴
4 “Shall Columbia County enact an ordinance that prohibits any infringement of the right to keep
5 and bear arms?” Official Columbia County Voters’ Pamphlet, General Election, Nov. 6, 2018
6 (“Nov. 6, 2018 Voters’ Pamphlet”), at 17.⁵ Measure 5-270’s ballot title summarized⁶ the
7 Measure as having the following effect: “This ordinance would make it illegal for Columbia
8 County to, in any way, limit the rights granted under the United States and Oregon Constitutions.
9 Specifically, registration, use, ownership of firearms, including semi-automatic firearms, shall
10 not be restricted.” Nov. 6, 2018 Voters’ Pamphlet at 17. Similarly, the ballot title for Measure
11 5-278, found in the November 3, 2020 Voters’ Pamphlet, described the subject of the Measure as
12 “limiting firearm regulation” and noted that “[t]his ordinance would prevent Columbia County
13 and its employees from devoting resources or participating in any way in the enforcement of any
14 law or regulation that affected an individual’s right to keep and bear arms, firearm accessories, or
15 ammunition.” Official Columbia County Voters’ Pamphlet, General Election, Nov. 3, 2020
16 (“Nov. 3, 2020 Voters’ Pamphlet”), at 13.⁷ Clearly, voters were told that the Measures would
17 have broad, far-reaching effects that would “limit[] firearm regulation” and “prohibit[] any
18 infringement of the right to keep and bear arms.” *See* Nov. 3, 2020 Voters’ Pamphlet at 13; Nov.

19
20

21 ⁴ *See* ORS 250.035(1)(b) (requiring ballot titles for county measures to include “[a] question of
22 not more than 20 words which plainly phrases the chief purpose of the measure so that an
affirmative response to the question corresponds to an affirmative vote on the measure”).

23 ⁵ The November 6, 2018 Voters’ Pamphlet may be found at
http://columbiacountyoregon.org/files/elections/ColumbiaGenVP2018_FINAL.pdf.

24 ⁶ *See* ORS 250.035(1)(c) (requiring ballot titles for measures other than state measures to include
25 “[a] concise and impartial statement of not more than 175 words summarizing the measure and
its major effect”).

26 ⁷ The November 3, 2020 Voters’ Pamphlet may be found at
https://www.columbiacountyor.gov/media/Election/11-3_VOTERS_PAMPHLET.pdf.

1 6, 2018 Voters’ Pamphlet at 17. Such wide-ranging effects are plainly preempted by the very
2 state laws the SASO purports to “limit” and invalidate.

3 Intervenor’s efforts to now narrowly construe the Measures and the SASO also directly
4 contradict what Intervenor themselves told voters prior to the November 3, 2020 election. For
5 example, the Voters’ Pamphlet statement submitted by Intervenor the Oregon Firearms
6 Federation in support of Measure 5-278 provided:

7 “Year after year, politicians in Salem and extremists in Portland work overtime to
8 enact new laws and rules to restrict your 2nd Amendment rights or make self
defense firearms useless, if available at all.

9 “Measure 5-278 protects Columbia County residents from the ever expanding
10 reach of big city radicals * * *.”

11 “* * * * *

12 “Measure 5-278 is a simple, common sense measure to guarantee that you and
13 your family do not become the latest victims of the senseless violence Oregon’s
elected officials are promoting. * * *.”

14 Nov. 3, 2020 Voters’ Pamphlet at 13. The SASO’s proponents were unequivocal – and told all
15 Columbia County residents – that the purpose of the underlying Measures was to evade state
16 firearms regulation.

17 Intervenor’s attempts to narrow the construction of the SASO are also inconsistent with
18 their own briefing to this Court. For example, in both their Motion to Intervene, and elsewhere
19 in this Motion, Intervenor argue that the County lacked authority to adopt Ordinance 2021-1
20 after the Measures were adopted by voters. *See* Motion to Intervene at 2 (filed May 24, 2021)
21 (arguing that “the filing of the petition in this matter is a violation by the county of both the
22 Initiatives and of that very Ordinance it enacted, both of which prohibit county ‘officials’ from
23 using county funds and resources ‘for the purpose of enforcing any element of such acts, laws,
24 orders, mandates, rules or regulations, that infringe on the right by People to keep and bear arms
25 * * *.’”); Intervenor’s Motion at 12 (“Thus, to the extent that the Ordinance purports to ‘amend’
26 the SASO and ‘repeal’ the SAPO, such action by the Board is not ‘allowed by Constitution[]]…

1 of this state,' and thus ORS 203.035 provides no authority for the Board's actions.'").
2 Intervenor believe that the Measures are so sweeping that they strip the Board of authority to
3 pass future legislation.

4 **2. Under Any Construction, the SASO Is Implicitly Preempted by State**
5 **Law.**

6 For the reasons described above and in the Columbia County Residents' Motion, the
7 SASO's broad language implicitly is preempted by a number of state laws. But even if the Court
8 were to adopt Intervenor's narrow and incorrect version of the SASO, it is still preempted. For
9 example, consider the situation if the Columbia County Sheriff becomes aware that an individual
10 in Columbia County who is not a gun dealer or licensed manufacturer sold a firearm without
11 conducting a background check through a licensed gun dealer, thereby committing a crime by
12 violating ORS 166.435, the State Background Check Statute. The Sheriff, who is charged under
13 ORS 206.010 "to arrest and commit * * * all persons guilty of public offenses," must choose
14 between non-compliance with ORS 206.010 and violating the SASO, which includes in its
15 definition of "void" Extraterritorial Acts any "background check requirement on firearms" such
16 as the State Background Check Statute. This is a clear example of preemption: the SASO cannot
17 operate concurrently with ORS 166.435 and ORS 206.010. *See AT&T Commc'ns*, 177 Or App
18 at 395.

19 Indeed, at the core of Intervenor's argument is the legally untenable assertion that "the
20 Sheriff already has a duty, pursuant to his oath of office, to determine the constitutionality of *all*
21 the laws he enforces and has a duty *not to enforce* ones which violate state or federal
22 constitutional provisions." Intervenor's Brief at 30 (emphasis in original). Intervenor provide
23 no citation for the proposition that Sheriffs can determine the constitutionality of laws, and that is
24 not how the law works in Oregon or anywhere in the United States. As Chief Justice Marshall
25 wrote in *Marbury v. Madison*, 5 US (1 Cranch) 137, 177, 2 L Ed 60 (1803), "[i]t is emphatically
26 the province and duty of the judicial department to say what the law is." That authority is not

1 delegated to the Sheriff.⁸ The Oregon Legislature has made explicit what is implicit in all
2 American law enforcement – that it is the duty of the Sheriff to “arrest * * * all persons guilty of
3 public offenses.” ORS 206.010. Nowhere does the law provide that the Sheriff can decide
4 whether laws are constitutional or not.

5 The SASO also cannot operate concurrently with the Oregon Tort Claims Act, ORS
6 30.260 to ORS 30.300 (the “OTCA”). The SASO creates a private right of action brought
7 against a County employee, official, or agent for alleged violations of the SASO. SASO, § 6.
8 However, the OTCA is “[t]he sole cause of action for a tort committed by officers, employees or
9 agents of a public body acting within the scope of their employment or duties * * *.” ORS
10 30.265(2). And, the remedy provided in the OTCA

11 “is exclusive of any other action against any such officer, employee or agent of a
12 public body whose act or omission within the scope of the officer’s, employee’s
13 or agent’s employment or duties gives rise to the action. **No other remedy is
permitted.**”

14 ORS 30.265(2) (emphasis added). Clearly, acts enforcing state laws that County employees are
15 sworn to uphold are within the scope of such employees’ employment or duties. The inclusion
16 of the private right of action in the SASO directly conflicts with the OTCA and accordingly, is
17 preempted by the OTCA.

18

19

20 ⁸ Intervenors are most likely relying on an ahistorical belief known as the “Constitutional
21 Sheriff” or “sheriff supremacy.” As one law professor wrote about this erroneous belief, and the
movement that it supports,

22 “It has been made up by stitching together random references to sheriffs and
23 militias in our political and legal texts. It relies on a highly selective reading of
24 history, pretending that the high sheriff of the English shire was transplanted to
colonial America, and then somehow emerged in the present day untouched by
25 legal developments over the past 200 years * * * Despite the ‘constitutional’
26 label, sheriff supremacy makes mincemeat out of the framers’ constitutional
design.”

27 Robert Tsai, “The Troubling Sheriffs’ Movement that Joe Arpaio Supports,” Politico, Sept. 1,
2017, available at [https://www.politico.com/magazine/story/2017/09/01/joe-arpaio-pardon-
sheriffs-movement-215566/](https://www.politico.com/magazine/story/2017/09/01/joe-arpaio-pardon-sheriffs-movement-215566/).

1 The SASO also would remove sovereign immunity as a defense in any private right of
2 action brought against a public official for allegedly violating the SASO. However, the OTCA
3 extends immunity to “officers, employees and agents acting within the scope of their
4 employment or duties” for, among other things, “[a]ny claim based upon the performance of or
5 the failure to exercise or perform a discretionary function or duty, whether or not the discretion is
6 abused.” ORS 30.265(5)(c). Because the legislature has granted immunity to county officers,
7 employees and agents, the County is preempted from further regulating the scope of that
8 immunity.

9 Intervenors also argue that because ORS 166.170 (the “Firearms Preemption Statute”)
10 explicitly preempts local regulation of firearms, accessories and ammunition, other Oregon
11 statutes may not implicitly preempt the SASO. *See* Intervenors’ Motion at 19 (“[I]t is hard to see
12 how the legislature could have passed a preemption statute (specifically delineating which areas
13 of state law it meant ‘to be exclusive’) while simultaneously intending that other unspecified
14 state laws also be considered ‘exclusive.’”). Intervenors misunderstand implicit preemption.
15 The term “exclusive” as it relates to preemption means whether a source of law (*i.e.* federal,
16 state, or local) is intended to be the only “source of regulation” on a subject, or whether different
17 authorities have concurrent jurisdiction over a subject. *See State v. Lopez-Vega*, 111 Or App
18 252, 255, 826 P2d 48 (1992) (“The questions are whether the differences in what the statutes and
19 ordinance regulate render the state and local provisions inconsistent and, if they do not, whether
20 the legislature intended state law to be the exclusive source of regulation of the subject.”).
21 Furthermore, there is no conflict between the Firearms Preemption Statute and other state
22 firearms laws; the Firearms Preemption Statute reserves to the Oregon legislature “the authority
23 to regulate in any matter whatsoever the sale, acquisition, transfer, ownership, possession,
24 storage, transportation or use of firearms or any element relating to firearms and components
25 thereof, including ammunition.” ORS 166.170(1). The firearms statutes passed by the Oregon
26

1 legislature, as listed in the Petition and in the Columbia County Residents’ Motion, fall within
2 that authority.

3 For these reasons, and the reasons discussed in the Columbia County Residents’ Motion,
4 the SASO is implicitly preempted by numerous state laws, and is unconstitutional and invalid.

5 **B. The SASO Also Is Expressly Preempted by State Law.**

6 The SASO also is explicitly preempted by Oregon’s Firearms Preemption Statute.

7 Intervenors’ arguments to the contrary fall short. *See* Intervenors’ Motion at 14–16 (so arguing).

8 The Firearms Preemption Statute provides:

9 “(1) Except as expressly authorized by state statute, the authority to regulate in
10 any matter whatsoever the sale, acquisition, transfer, ownership, possession,
11 storage, transportation or use of firearms or any element relating to firearms and
12 components thereof, including ammunition, is vested solely in the Legislative
13 Assembly.

14 “(2) Except as expressly authorized by state statute, no county, city or other
15 municipal corporation or district may enact civil or criminal ordinances, including
16 but not limited to zoning ordinances, to regulate, restrict or prohibit the sale,
17 acquisition, transfer, ownership, possession, storage, transportation or use of
18 firearms or any element relating to firearms and components thereof, including
19 ammunition. Ordinances that are contrary to this subsection are void.

20 ORS 166.170. Where the state indicates that the exclusive power to regulate an area is vested in
21 a state authority, local governments may not legislate in that area. *See generally* Columbia
22 County Residents’ Motion at 7–8 (discussing preemption).⁹ ORS 166.170 has vested the
23 authority to regulate “the sale, acquisition, transfer, ownership, possession, storage,
24 transportation or use of firearms or any element relating to firearms and components thereof,
25 including ammunition” in the Oregon legislature, with limited exceptions that the parties agree
26 do not apply here. As discussed in the Columbia County Residents’ Motion, the SASO plainly
contradicts ORS 166.170’s prohibition on local regulation of firearms and is preempted by it.

24 ⁹ *See also Fischer v. Miller*, 228 Or 54, 58, 363 P2d 1109 (1961) (striking down a county
25 ordinance prohibiting the hunting of migratory birds as preempted where it was “clear” from
26 various statutes “that power to regulate the hunting and taking of migratory water fowl vested in
the game commission was intended to be exclusive and that, therefore, Linn [C]ounty had no
authority to enact the questioned ordinance.”).

1 Intervenors argue that “[t]he Initiatives decidedly do not have a thing to say (either more
2 or less restrictive than state law) about ‘the sale, acquisition, transfer, ownership, possession,
3 storage, transportation or use of firearms ... and components thereof.’” Intervenors’ Motion at
4 14; *see also id.* at 14–15 (“By its plain language, ORS 166.170 does not apply to the Initiatives,
5 because the Initiatives do not ‘regulate, restrict or prohibit’ any activities related to firearms or
6 ammunition.”). As an initial matter, Intervenors misconstrue the plain language of the SASO.
7 The SASO *does* address the sale, ownership, and possession of firearms. Under a section
8 entitled “Prohibitions,” the SASO states:

9 **“While within Columbia County, this Ordinance preserves the right of any**
10 **person** to keep and bear arms as originally understood; in self-defense and
11 **preservation, and in defense of one’s community and country, and to freely**
12 **manufacture, transfer, sell and buy firearms, firearm accessories and**
13 **ammunition,** which are designed primarily for the same purposes and protects
ancillary rights that are closely related to the right to keep and bear arms protected
by the Second Amendment; including the right to manufacture, transfer, buy and
sell firearms, firearm accessories and ammunition (‘ancillary firearm rights’).”

14 SASO, § 2(B) (emphasis added). Given this explicit grant of the right of Columbia County
15 residents to “freely manufacture, transfer, sell and buy firearms, firearm accessories and
16 ammunition,” the SASO unequivocally regulates “the sale, acquisition, transfer, ownership,
17 possession, storage, transportation or use of firearms or any element relating to firearms and
18 components thereof, including ammunition.” ORS 166.170.

19 Other provisions of the SASO also explicitly regulate activities related to firearms and
20 ammunition. In the context of ORS 166.170, to “regulate” means “to govern or direct according
21 to rule * * *; *usu:* to bring under the control of law or constituted authority: make regulations for
22 or concerning <~the industries of a country>.” *Doe v. Medford Sch. Dist. 549C*, 232 Or App 38,
23 53, 221 P3d 787 (2009) (quoting *Webster’s Third New Int’l Dictionary* 1913 (unabridged ed.
24 1993)). Here, the SASO sets forth authoritative law for how the sale, transfer, and possession of
25 firearms will be treated in Columbia County. It provides, for example, that: state and federal
26 laws relating to registering firearms, accessories and ammunition will not be enforced; state and

1 federal limits on assault-weapons will not be enforced; state and federal restrictions on open or
2 concealed carry will not be enforced; state and federal restrictions on magazine or clip capacity
3 will not be enforced; and background check requirements enacted after December 2012 will not
4 be enforced. SASO, §§ 2, 4. The SASO clearly regulates firearms, firearm accessories and
5 ammunition.

6 Finally, Intervenors argue that the SASO is not preempted by ORS 166.170, because the
7 SASO provides that “offending laws ‘*shall be treated as if they are* null, void and of no effect in
8 Columbia County, Oregon.’” Intervenors’ Motion at 15. Despite the “null, void and of no
9 effect” language, Intervenors posit that somehow under the SASO, these laws are still considered
10 valid within Columbia County. They argue:

11 “neither the SAPO nor the SASO declare any federal or state law to be null and
12 void, neither has any effect on the validity of state or federal law, and neither
13 takes any position on the enforcement of state or federal law – as long as such
enforcement is not furthered or participated in by county officials.”

14 Intervenors’ Motion at 15. That argument fails for at least two reasons. First, there is no
15 difference between “treating” a law as null and void, and attempting to invalidate a law. *See,*
16 *e.g., Black’s Law Dictionary* (11th ed. 2019) (defining null as “[h]aving no legal effect;
17 without binding force; VOID <the contract was declared null and void>”). Second, the SASO
18 punishes any participation in enforcement via civil penalties and a private right of action, going
19 beyond merely prohibiting the participation of county officials.

20 The Oregon courts have not confined their understanding of ORS 166.170 to Intervenors’
21 narrow reading. For example, in *Oregon Firearms Educational Foundation v. Board of Higher*
22 *Education*, 245 Or App 713, 264 P3d 160 (2011), the Oregon Court of Appeals addressed
23 whether an administrative rule created by Oregon State Board of Higher Education and the
24 Oregon University System, OAR 580–022–0045(3), violated the Firearms Preemption Statute.
25 That rule stated:

26

1 “Procedures to impose applicable sanctions may be instituted against any
2 person engaged in any of the following proscribed conduct:

3 “ * * * * *

4 “(3) Possession or use of firearms, explosives, dangerous chemicals, or other
5 dangerous weapons or instrumentalities on institutionally owned or controlled
6 property, unless expressly authorized by law, Board, or institutional rules (for
7 purposes of this section, absence of criminal penalties shall not be considered
8 express authorization)[.]”

9 245 Or App at 716. Although the rule did not expressly prohibit the possession or use of
10 firearms, but rather allowed for the creation of procedures to implement sanctions, the Court
11 concluded that the regulation was preempted by ORS 166.170:

12 “[N]o argument can be reasonably made that OAR 580–022–0045(3)—which
13 regulates the very subject expressly preempted by ORS 166.170(1)—was
14 ‘expressly authorized’ by the Legislative Assembly. See ORS 166.170(1).
15 Therefore, we conclude that OAR 580–022–0045(3) is an exercise of an
16 ‘authority to regulate’ firearms that is not expressly authorized by the Legislative
17 Assembly, and that it is preempted by ORS 166.170(1).¹ Accordingly, the rule
18 exceeds the agency’s authority, ORS 183.400(4)(b), and is invalid.”

19 *Or. Firearms Educ. Found*, 245 Or App at 723. Similarly, the SASO conflicts with ORS
20 166.170 by regulating and punishing the enforcement of applicable state and federal firearms
21 laws.

22 For these reasons, and the reasons discussed in the Columbia County Residents’ Motion,
23 the SASO is expressly preempted by ORS 166.170, and is therefore unconstitutional and invalid.

24 **C. The SASO Is Preempted by Federal Law.**

25 “The Supremacy Clause of the United States Constitution, Article VI, clause 2,
26 invalidates state or local laws interfering with, and being contrary to, federal law.” *AT&T
Commc’ns*, 177 Or App at 401. The SASO directly conflicts with numerous federal firearms
statutes meant to protect the public and law enforcement. Intervenors attempt to avoid this
federal preemption problem by arguing that the anti-commandeering principles found in *Printz v.
United States*, 521 US 898 (1997) permit local governments to legislate in violation of federal
law. *Printz* is inapplicable here, for two reasons.

1 First, *Printz* involved the constitutionality of federal laws containing affirmative orders to
2 states to enforce federal law. See *Printz*, 521 US at 935 (“The Federal Government may neither
3 issue directives requiring the States to address particular problems, nor command the States’
4 officers, or those of their political subdivisions, to administer or enforce a federal regulatory
5 program.”). Here, the question before the Court is the constitutionality of a local ordinance that
6 directly contradicts federal law. Furthermore, the SASO does not just preclude Columbia
7 County officials from enforcing federal law. The SASO expressly states that federal laws “shall
8 be treated as if they are null, void and of no effect in Columbia County, Oregon” and penalizes
9 enforcement of federal law by imposing civil penalties and a private right of action. While
10 *Printz* may prohibit federal statutes from commandeering local resources, it nowhere provides a
11 basis for localities to render null federal law. To the contrary, it is black letter law that, “[u]nder
12 the Supremacy Clause, a local law is nullified to the extent that it actually conflicts with federal
13 law by standing as an obstacle to the accomplishment and execution of the full purpose of
14 Congress.” *City of Auburn v. Qwest Corp.*, 260 F3d 1160, 1180 (9th Cir 2001); *City of La*
15 *Grande v. Pub. Emps.’ Ret. Bd.*, 281 Or 137, 143, 576 P2d 1204, *on reh’g*, 284 Or 173, 586 P2d
16 765 (1978) (“The validity of local action depends * * * on whether it contravenes state or federal
17 law.”). Accordingly, state and local laws such as the SASO that seek to remove firearms and
18 ammunition from federal regulation – including background checks – are preempted by federal
19 law. See, e.g., *Montana Shooting Sports Ass’n v. Holder*, 727 F3d 975, 982–83 (9th Cir 2013)
20 (holding as preempted a Montana law declaring that firearms and ammunition manufactured
21 within the state are not subject to federal regulation).

22 For these reasons, and the reasons discussed in the Columbia County Residents’ Motion,
23 the SASO is also preempted by federal law, and is therefore unconstitutional and invalid.

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1 **D. The SASO Does Not Address “Matters of County Concern.”**

2 The “validity of local action depends” in part “on whether it is authorized by the local
3 charter or by a statute.” *City of La Grande*, 281 Or at 142. Columbia County’s power to enact
4 ordinances is derived from ORS 203.035, which allows counties authority “over matters of
5 county concern.” Without analysis, Intervenor declare “[i]t seems clear that both the Initiatives
6 and the Ordinance involve ‘matters of County concern.’” Intervenor’s Motion at 11. But for the
7 reasons discussed in this Response and in the Columbia County Residents’ Motion, the SASO is
8 preempted by state and federal law and therefore does not address “matters of county concern.”¹⁰
9 *See* Columbia County Residents’ Motion at 13–15. And as discussed in the Columbia County
10 Residents’ Motion, because the SASO does not address “matters of county concern,” the
11 Measures were improperly submitted to a vote. *See Lane Transit Dist. v. Lane Cty.*, 327 Or 161,
12 170, 957 P2d 1217 (1998) (“Here * * * the proposed initiative measure suffers from a defect that
13 makes the very act of submitting it to a vote legally inappropriate. The severability clause thus is
14 inapplicable.”).

15 **E. The SASO Is Inseverable.**

16 For the reasons outlined in the Columbia County Residents’ Motion, the SASO’s illegal
17 and unconstitutional provisions render it invalid in its entirety. *See* Columbia County Residents’
18 Motion at 14–15. Intervenor do not appear to contest this point; however, Intervenor make two
19 other points that relate to severability. First, Intervenor argue that “all but the first of the
20 questions the Board asks this Court to answer involve provisions of the SAPO and SASO, rather
21 than language from the Ordinance, even though the lawfulness of the Ordinance is the only
22 legitimate subject of this proceeding.” Intervenor’s Motion at 9. That is incorrect. Ordinance
23 2021-1 adopted and implemented the Measures in the SASO, and therefore the issue before the

24 ¹⁰ Intervenor also argue that the Board lacked the power to enact Ordinance 2021-1 “because it
25 conflicts with the People’s constitutional Initiative power.” Intervenor’s Motion at 12. For the
26 reasons discussed in Section I above, this argument fails. The Board has co-equal power with
the voters of Columbia County to legislate; passing a subsequent ordinance that adopts, amends
or repeals the Measure does not improperly interfere with the initiative power.

1 Court is the constitutionality of the substantive provisions of the SASO. Second, Intervenor
2 also argue that if the Court strikes down the SASO, the 2018 and 2020 Measures remain in
3 effect. Again, this is incorrect. Should the Court conclude the SASO is unconstitutional, the
4 severability clause of Ordinance 2021-1 holds that the rest of Ordinance 2021-1 is still in effect.
5 Petition, Ex. 1, § 5. In other words, the 2018 Measure will remain repealed, and the 2020
6 Measure, as adopted via the SASO, will be struck down.

7 **F. Intervenor’s Other Arguments Also Fail**

8 Intervenor’s address a series of additional issues raised in the County’s petition. The
9 SASO is also unlawful for each of these reasons:

- 10 • The SASO conflicts with the duties, powers, and oaths of office of County
11 employees, agents, and officers;
- 12 • The SASO conflicts with various budgetary statutes;
- 13 • The SASO does not apply within incorporated cities in Columbia County due to ORS
14 203.040;
- 15 • The SASO’s attorneys’ fees provision conflicts with Oregon law; and
- 16 • The SASO is void for vagueness.

17 *See also* Columbia County Residents’ Motion at 14. For brevity’s sake, the Columbia County
18 Residents do not address these issues further at this time, but will provide the Court with further
19 briefing as needed or if requested.

20 **CONCLUSION**

21 For the reasons above, and the reasons discussed in the Columbia County Residents’
22 Motion for Summary Judgment, the Columbia County Residents urge the Court to reject
23 Intervenor’s inaccurate characterizations of the wording and breadth of the SASO, find the
24 SASO unconstitutional as preempted by Oregon and federal law, and deny Intervenor’s Motion
25 for Summary Judgment.

1 DATED this 8th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **THE COLUMBIA COUNTY RESIDENTS’ RESPONSE TO INTERVENORS’ MOTION FOR SUMMARY JUDGMENT** on the following person by electronic service via the Oregon Judicial Department electronic filing system at the person’s email address as recorded on the date of service in the electronic filing system or by the alternative means of service indicated below, by serving a true copy, hereby certified as such, with applicable email address or facsimile telephone number at which the party was served, and, upon any mailing, by placing the copy in a sealed envelope, with postage prepaid, addressed to such person at the address stated below and deposited in the mails of the United States Postal Service in Portland, Oregon, on this date:

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