IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF COLUMBIA COUNTY

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 REPLY IN SUPPORT OF THE ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT **ORS 20.140 - State fees deferred at filing** **Hearing Date: July 21, 2021 – 10:30am**

MEMORANDUM OF LAW

I. INTRODUCTION

The Columbia County Second Amendment Sanctuary Ordinance ("SASO" or "Ordinance"), as amended by Columbia County Ordinance 2021-1, is invalid. Once the Court disposes of Intervenors' procedural objections (§ II.A, below), only three disputed questions remain:

- whether the Ordinance purports to nullify state and federal law (it does, see § II.B);
- whether a county may instruct its officers and employees not to enforce state firearms laws and provide for civil liability if they do so (it cannot, see § II.C); and
- whether the unconstitutional parts of the Ordinance may be severed from its remaining provisions (they cannot be, see § II.D).

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The Court should therefore enter a judgment declaring the Ordinance is invalid.

II. ARGUMENT

A. This Court Has Jurisdiction to Adjudicate the Validity of the Ordinance and Consider the Parties' Arguments.

Intervenors are correct that this proceeding concerns the SASO as amended by Ordinance 2021-1, not the version of the SASO adopted by Initiative 5-258. But that does not immunize the language originally enacted by initiative and incorporated into Ordinance 2021-1 from scrutiny. The SASO (as amended) is Exhibit A to Ordinance 2021-1, and thus the Court may determine its "legality," ORS 33.710(2), "including the constitutionality of the ordinance," ORS 33.710(2)(g). *See* AG's Resp. at 2–3.

Intervenors argue that the Court "should not consider new arguments raised by … the Attorney General that were not raised in the Board's Petition." Resp. at 3. It is unclear which of the Attorney General's arguments Intervenors contend were not included in the petition. In any event, the petition does not limit the arguments of other parties to this case. Once the county initiated this validation proceeding, "[a]ny person interested" could appear. ORS 33.720(1). The Attorney General did so. Like any other case, each party may raise its own arguments for or against the relief sought: a declaratory judgment that the Ordinance is invalid. *See* ORS 33.720(1) (providing ordinary civil procedure governs this action). Given that "the judgment entered in [this] proceeding is binding upon the parties and all other persons," ORS 33.720(6), it necessarily follows that each party may raise any argument for the relief it seeks.

B. The Ordinance's Attempt to Nullify State and Federal Law is Invalid.

1. The Ordinance purports to nullify state law.

The Ordinance provides that nearly all state and federal firearms laws "shall be treated as if they are null, void and of no effect in Columbia County, Oregon." SASO at 8 (§ 4). The

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Ordinance means what it says: that within Columbia County's geographic territory, the Ordinance purports to nullify state and federal laws. *See* AG's Resp. at 5–9.

Intervenors' contrary interpretation seeks to read the words "in Columbia County, Oregon" out of the Ordinance. Intervenors appear to claim that "in Columbia County" means by the Columbia County government, but they provide no support for that implausible reading. Intervenors' interpretation apparently hinges on the claim that "shall be treated as if they are" means the Ordinance only constrains the county government. But that sentence ends with "in Columbia County, Oregon," not "by the Columbia County government." The Ordinance's wordiness does not narrow its scope.

"The best evidence of the voters' intent is the text of the provision itself." *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559 (1994). For that reason, the Ordinance's plain language that federal and state laws "shall be treated as if they are null, void and of no effect in Columbia County, Oregon" is enough to determine its meaning.

If that were not enough, the only argument that appeared in the Voters' Pamphlet, filed by an Intervenor here, supports this interpretation. It contended that the provisions of Initiative 5-278, which have now been incorporated in the Ordinance, would "protect[] Columbia County residents from the ever expanding reach of big city radicals…." Marshall Decl., Ex. A at 3. That argument eschews the narrow interpretation of the Ordinance that Intervenors advance here. Instead, Intervenor Oregon Firearms Federation argued to Columbia County's voters that the Ordinance would "ensure your right and ability to defend your life" and shield Columbia County from "politicians in Salem [who] work overtime to enact new laws and rules to restrict your 2nd Amendment rights …." *Id.* These claims that the Ordinance would "ensur[e]" Second Amendment rights are free from interference from "politicians in Salem" conflict with Intervenors' interpretation of the Ordinance here.

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2. Nullification is unconstitutional.

It is undisputed that a county lacks the authority to nullify state and federal law. *See* Intervenors' Opening Br. at 15 ("State and federal law are still supreme."). Accordingly, this provision of the Ordinance is invalid. The question remaining for the Court is whether it can be severed from the remaining provisions of the Ordinance. Because Ordinance 2021-1 provides for SASO's repeal if Measure 5-278 is invalid, and the nullification provision is at the core of the SASO, it cannot be severed. *See* § II.D, below.

C. The Ordinance Cannot Bar County Officials From Enforcing State Law.

1. The State may require a county to enforce state law.

As the Attorney General's prior briefs explain, Intervenors' reliance on the non-commandeering principle of *Printz v. United States* ignores that counties are instrumentalities of the State, not separate sovereigns. *See* AG's Resp. at 13. Thus, the principle that the federal government cannot require a state to enforce federal law does not apply to a state's relationship to a county.

Intervenors cite *Burks v. Lane County* to contend that the Oregon Constitution nevertheless bars the State from requiring a county to enforce state law, but that case supports the State's position: "the sheriff has law enforcement duties that are defined by statute and that the county has a statutory responsibility to provide funds for the sheriff's performance of his duties." 72 Or App 257, 262 (1985). *Burks* also held that "when a state statute mandates a service and requires counties to provide funding for it but does not specify a service level, an amount of funding or an alternative method for determining the amount of funding, the statute necessarily leaves *at least* the *budgetary* decision over the amount of funding to the county governing bodies." *Id.* at 263. But the Ordinance does not dictate a budgetary decision. Instead, it prohibits the Sheriff from enforcing state law, in direct conflict with his state statutory duty to enforce those same laws. And *Burks* only held that the State had not dictated by statute the level of

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funding a county must provide, not that the Oregon Constitution *forbids* the State from imposing such a requirement.

Intervenors also invoke Article XI, Section 15(1), of the Oregon Constitution:

> "Except as provided in subsection (7) of this section, when the Legislative Assembly or any state agency requires any local government to establish a new program or provide an increased level of service for an existing program, the State of Oregon shall appropriate and allocate to the local government moneys sufficient to pay the ongoing, usual and reasonable costs of performing the mandated service or activity."

"Program" is a defined term:

> "'Program' means a program or project imposed by enactment of the Legislative Assembly or by rule or order of a state agency under which a local government must provide administrative, financial, social, health or other specified services to persons, government agencies or to the public generally."

Or Const Art XI, § 15(2)(b). Most importantly for this case, however, Article XI, Section 15 does not apply to criminal statutes. *Id.* Art XI, § 15(7)(b) (excluding "[a]ny costs resulting from a law creating or changing the definition of a crime …."). The provision also excludes local government's non-programmatic responsibilities under state law and all laws enacted before 1997. *See also Linn Cty. v. Brown*, 366 Or 334, 349 (2020) ("Where the term 'responsibilities,' then, refers to any obligation, the terms 'program' and 'project' mean something more specific."); Or Const Art XI, § 15(7)(d) (excluding any program "enacted by legislation prior to January 1, 1997").

The structure of Article XI, Section 15 highlights that "a 'county' is not an independent governmental entity — [it] is not even a corporation in the same sense that municipalities are corporations. It is a [q]uasi corporation created by legislative fiat for governmental purposes and subject to the legislative will in all matters not prohibited by some constitutional restriction." *State Highway Com. v. Clackamas W. Dist.*, 247 Or 216, 219 (1967) (quoting *In MacKenzie v. Douglas Cnty.*, 91 Or 375, 379–80 (1919)) (internal quotation marks omitted). Outside the

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circumstances where a new or expanded *program* requires county expenditures, the background rule still applies: "the state may impose certain obligations on the counties …." *Gleason v. Thornton*, 210 Or 666, 677 (1957) (collecting cases) (noting state law "may require the counties to levy taxes for particular purposes, notwithstanding the provisions of the local budget law"); *accord Mackenzie v. Douglas Cty.*, 81 Or 442, 444 (1916), *aff'd*, 91 Or 375 (1919) ("Where a state by enactment, in furtherance of its governmental purposes, imposes an obligation upon a county not in conflict with the Constitution of the state, that obligation becomes one which the county must fairly meet."). Article XI, Section 15 creates a specific exception to the general rule that the county must implement state mandates: when the State requires a local government to create or expand a "program" but does not provide funding to do so, the local government need not carry out that responsibility.

Article XI, Section 15 shows that outside that narrow circumstance, the county must comply with state mandates. Given the sheriff's express statutory obligation to enforce criminal law, and the express exclusion of criminal enforcement from the scope of Article XI, Section 15, there is no doubt the county must enforce state criminal statutes.

2. The Ordinance conflicts with state statutes.

a. County Officers' state law duties preempt the Ordinance.

By statute, a sheriff has a duty to make arrests for public offenses, that is, violations of the State's criminal laws. *See* ORS 206.010 (general duties of sheriff); AG's Mot. at 6–7; AG's Resp. at 13–14. Intervenors point out that law enforcement officials necessarily exercise discretion to prioritize among their duties (Resp. at 6), but the Ordinance is not a valid exercise of discretion for two reasons.

First, the Ordinance removes all discretion by barring enforcement of an entire class of offenses. Enforcing those laws are among a sheriff's "law enforcement duties that are defined by

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statute ….” *Burks*, 72 Or App at 262. Requiring the Sheriff not to enforce those laws contravenes that statutory command.

Second, state law assigns the responsibility to enforce state statutes to the sheriff, not the county as a whole. Columbia County has not adopted a home rule charter. Thus, its officers' duties are defined by state law.[1] The Sheriff has the duty to enforce state criminal law, not the Commission or the electorate.

Even if Columbia County could reallocate the duties of its officers, *some* county official must fulfill the county's duties under state law. *See* Or Const Art V, § 10 (“Such [county] 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 hereafter, *by the* Constitution or *laws of this state*, granted to or *imposed upon any county officer*.” (emphasis added)). Under this provision, a county charter can reallocate county officers' responsibilities without state interference, but the county as a whole cannot abdicate its responsibilities. *See City of La Grande v. Public Emp. Ret. Bd. (“LaGrande/Astoria”)*, 281 Or 137, 156 n.31 (1978) (“general regulatory laws[’]” infringements on the “*allocation*” of county officers' duties “are probably rare” (emphasis added)); *contra* Intervenors' Resp. at 6 n.3. That is the extent of “[t]he local community's freedom to choose its own political form,” *LaGrande/Astoria*, 281 Or at 156: a local government retains authority to choose its own decisionmakers, not authority to ignore state mandates. *See* § II.C.1, above.

b. ORS 166.170 preempts the Ordinance.

The general prohibition on counties enacting their own firearm ordinances preempts the Ordinance. *See* ORS 166.170. The Attorney General's response addresses Intervenors' contrary arguments. *See* AG's Resp. at 9–10. In short, with a handful of express exceptions, ORS 166.170 bars local governments from establishing their own legal framework governing firearms to avoid

[1] ORS 203.035(3) allows a county to change, by popular vote, “the number or mode of selection of elective county officers,” but it does not encompass reallocation of their duties.

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a "patchwork quilt of local government laws inconsistently regulating the use of firearms." *See Oregon Firearms Educ. Found. v. Bd. of Higher Educ.*, 245 Or App 713, 720 (2011). None of those statutory exceptions allowing counties to enact their own ordinances apply here. Thus, ORS 166.170 expressly preempts the Ordinance.

c. State statute preempts the Ordinance's liability provisions.

The Oregon Tort Claims Act preempts the Ordinance's liability provisions. *See* AG's Resp. at 15–16. That statute requires an individual allegedly aggrieved by a public employee to sue the government, not the individual employee, directly contrary to the Ordinance's imposition of personal liability. The Ordinance also requires the Sheriff not to enforce state law. How the Sheriff fulfills his state law duties is a policy decision that falls within the discretionary function exclusion from liability. It is therefore preempted by state law.

The state statute shielding public employees from liability related to their duties to implement the State's background check requirement, ORS 166.412, also preempts the Ordinance. *See* AG's Resp. at 14. Intervenors correctly point out that the Oregon State Police have principal responsibility for conducting background checks in Oregon. Resp. at 7. However, sheriffs are not absent from that process: the State Police must notify the sheriff when a background check reveals an attempted illegal purchase. *See* ORS 166.412(7)(c). The statute shields the sheriff from liability for enforcing these purchase prohibitions, in direct conflict to the Ordinance's imposition of liability for implementing this "extraterritorial law."[2]

D. The Ordinance Is Not Severable.

The Ordinance's unconstitutional provisions are not severable from the other parts of the Ordinance. Intervenors claim that "if the Court finds the Ordinance invalid, the Initiatives still stand." Resp. at 18. This is incorrect. The initiatives no longer have the force of law: Ordinance

[2] Intervenors' claim that "ORS 166.412 existed in substantially its current form since at least 2001," and thus is excluded from the Ordinance, is not accurate. *See* Intervenors' Resp. at 7. In 2019, background checks were expanded from handguns to all firearms. *See* AG's Resp. at 14 (citing Law 2018, ch. 5 § 4).

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2021-1 repealed Initiative 5-270 and amended Initiative 5-278. *See* Ordinance 2021-1, § 4. What remains of the initiatives is the SASO, Exhibit A of Ordinance 2021-1, the validity of which is at issue in this proceeding.

If the Court "declare[s] invalid" the parts of the SASO that were originally enacted in Initiative 5-278, Section 6 of Ordinance 2021-1 requires that the SASO as a whole be "automatically repealed." *See also* AG's Resp. at 17. Accordingly, all of Exhibit A (the SASO) would be repealed. *See* ORS 184.040(1) (a statute is inseverable if the statute so provides); *cf. Hazell v. Brown*, 352 Or 455, 470 (2012) (holding that the specified conditions for a statute to become operative were not met). In addition, given the centrality of the unconstitutional provisions to the Ordinance as a whole, there is no basis for the Court to conclude that the County Commissioners, or even the voters, would have adopted the Ordinance absent its unconstitutional provisions. *See* AG's Resp. at 18; *cf.* ORS 174.040(2) (providing a statute is inseverable when "[t]he remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part").

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III. CONCLUSION

The Court should grant the Attorney General's motion for summary judgment and enter a judgment declaring that the Ordinance is invalid.

DATED July 15, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 15, 2021, I served the foregoing REPLY IN SUPPORT OF THE ATTORNEY GENERAL'S MOTION FOR SUMMARY JUDGMENT upon the parties hereto by the method indicated below, and addressed to the following:

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