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 Judgement of the Court as to the regularity, legality, validity and effect of the Columbia County Second Amendment Sanctuary Ordinance	Case No. 21CV12796 **INTERVENORS' MOTION TO STRIKE PETITIONER'S REPLY BRIEF AND INTERVENORS' REPLY BRIEF** **INTERVENORS' REPLY TO THE ATTORNEY GENERAL** **INTERVENORS' REPLY TO THE COLUMBIA COUNTY RESIDENTS**

INTERVENORS' MOTION TO STRIKE PETITIONER'S REPLY BRIEF AND INTERVENORS' REPLY BRIEF

A. The Board's Purported "Reply" Is Entirely Improper, Only Serves to Further Reveal the Board's Ulterior Motives in this Matter, and Should Be Struck.

At the June 10, 2021 hearing before this Court, the Board did not seek to file merits briefing in this proceeding, nor has it provided any indication to Intervenors that it would do so, nor did the Board file an opening brief on June 24, 2021, as did each of the intervening groups. Rather, the Board purported to take the position of a neutral third party, innocently claiming only to be attempting to implement the will of the voters and alleging that it took no position on the merits or outcome of the case. *See* Petitioner's Response to Motion for Intervention at 4.

The jig is up. The Board apparently regrets that decision and, having reviewed Intervenors' Opening Brief, now seeks to participate as a self-interested party through the filing of what it styles a "Petitioner's Reply to Intervenors' Opening Brief" ("Board Reply"). Whereas the Petition was

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framed by the Board as merely raising dozens of "questions" it had about the Initiatives, the Board's "Reply" is an unqualified frontal attack on the Ordinance the Board itself passed, along with the Initiatives the People (the Board's constituents) enacted.

It seems axiomatic that since the Board did not seek to file briefing and failed to file an opening brief, it is not entitled to file a reply. Because the Board disclaimed (albeit disingenuously) any interest in the merits of this case, it is not entitled to now backtrack and attack Intervenors' position on the merits – particularly through a "Reply" brief. For either and both reasons, Petitioner's Reply to Intervenors' Opening Brief should be struck.

B. The Board's Late Attempt to Rebut Intervenors' Arguments Should be Rejected.

Beginning on page 8, the remainder of the Board's Reply Brief consists of direct and specific attempts to rebut Intervenors' arguments made in their Opening Brief. Of course, if the Board took a neutral position on the issues, there would be no need to rebut what Intervenors have said.[1] Notably, the Board does not take issue with a single point raised by the AG or the Columbia County residents ("CCR"). The fact that the Board felt it necessary to weigh in about several of Intervenors' arguments should tell this Court all it needs to know about the veracity of the Board's claims and the legitimacy of these proceedings.

For example, the Board takes issue with Intervenors' claim that the Initiatives are not preempted, claiming that "[t]his reading is inconsistent with the express language of the Ordinance." Board Reply at 8; *see also* at 9-10 (giving two additional reasons why the Board believes the Initiatives are preempted). Next, the Board argues that the Initiatives apply to the

[1] *See, e.g.*, Board Reply at 8 (arguing that "Intervenors' interpretation of the breadth and scope of the Ordinance is not consistent with its plain language.").

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cities in the County that did not vote for it, a contention that Intervenors have not contested. *Id*. at 10-12. Next, the Board claims that the Initiatives "effectively make many Oregon and Federal criminal laws inapplicable to persons while in Columbia County." *Id*. at 13. Thereafter, the Board claims that the Initiatives' use of the term "Extraterritorial Acts" is "vague" and "entirely unclear." *Id*. at 13. Finally, the Board claims that Intervenors' points about the duties of the Sheriff are "inconsistent with the plain language of the Ordinance." *Id.* at 16. None of these contentions made by the Board is framed as a "question" about the Ordinance or Initiatives. Quite to the contrary, each represents an explicit challenge to the Initiatives.

The thin veil has now been removed, and the Board's true intentions are plain as day. Whereas before the Board claimed that its motives were pure, now the Board claims that its "motivation is not relevant to whether an ordinance is subject to review…." Board Reply at 4. *See also* AG Response at 4 ("[t]he subjective intent of the county officials who enacted the SASO or initiated this proceeding is irrelevant.") On the contrary, the Board passed an Ordinance that it believed to be illegal and unconstitutional,[2] and its motive is clearly relevant to show it is attempting to misuse a validation proceeding to attack ballot measures, something it cannot do outside an action seeking a declaratory judgment action under ORS Chapter 28, brought by someone who establishes standing. The Board actions constitute a wholly illegitimate purpose underpinning this proceeding, by a Board that ostensibly is supposed to represent the voters of Columbia County, Oregon, and demonstrates that the members of the Board have each violated their oath of office by passing an Ordinance that, only one day later, they argued to be unlawful

[2] The AG remarkably claims that it is "neither surprising nor suspect that the governing body enacted the Ordinance despite questioning its constitutionality." AG Response at 4. What, then, is the point of the Board's oath to the Constitution, if not to refuse to pass ordinances it believes violate the Constitution?

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and unconstitutional. This Court should not participate in the charade, or decide what is ultimately a political question. This court should dismiss the Petition on its face or, in the alternative, should strike down the Ordinance, while making clear that the SAPO and SASO continue in full force and effect.

C. If the Ordinance Is Struck as Void, the Initiatives Continue in Force and Effect.

The Board apparently now realizes its tactical blunder. As Intervenors noted in their Opening Brief, even if the Board's Ordinance is struck down (for any reason), that would only demonstrate that it was void, never the law. Indeed, it was stayed before it went into effect. This would mean that the SAPO and SASO continue to be in full force and effect. The Board now attempts damage control, arguing that "[i]n Ordinance No. 2021-1, Columbia County amended the SASO and repealed the SAPO. With that action, there is only one Ordinance in existence,[3] that being Ordinance No. 2021-1, the Columbia County Second Amendment Ordinance, which is now properly before this Court." Board Reply at 2; *see also* at 4.[4] The CCR Response is even more direct in its misguided conclusion that "before the Court is the constitutionality of the substantive provisions of the SASO,"[5] and "because the SASO incorporated the Measures, this means as a practical matter that an order declaring the SASO invalid has the effect of declaring the Measures invalid." *Id*. at 5, 20-21. But unfortunately for the Board and its clearly ulterior motives, that is

[3] This argument conflicts with the plain language of the Ordinance itself, Section 6 of which specifically refers to and acknowledges the existence of "Initiative Measure 5-270, or Initiative Measure 5-278," which the Board now claims do not exist.

[4] The AG makes the same argument, claiming that "the initiatives as originally adopted are no longer in force. The only county ordinance that remains operative is the Columbia County Second Amendment Sanctuary Ordinance…." AG Response at 2-3.

[5] Contrast this with CCR Response at 1 ("At issue in this validation proceeding is the legality and enforceability of the … ordinance [] adopted by the Columbia County Board of Commissioners….").

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not the way the law works. Ordinance 2021-1 is the only thing before this Court. The Initiatives have not, and cannot, be challenged or adjudicated in this particular case.

First, Intervenors previously provided a laundry list of authorities explaining that the repeal of an invalid enactment (here, the Ordinance) revives the prior state of the law (here, the SAPO and SASO). Intervenors' Opening Brief at 11. The Board offers no rebuttal on this issue, nor does it attempt to address Intervenors' authorities.[6] In an admission that defeats its own position, the Board claims that it does "not seek Judicial Examination and Judgment of the Court as to the regularity, legality, validity and effect of the ordinances adopted by Initiative Measure 5-270 (SAPO) or Initiative Measure 5-278 (SASO)." Board Reply at 3.

Second, this Court has already either formally or at least conceptually foreclosed the Board's argument, having refused to stay the SAPO and SASO at the June 10, 2021 hearing on the ground that those are not before the Court. Indeed, an invalid Ordinance passed by the Board in no way can erase what the People have done in the validly enacted SAPO and SASO. If an amendment is invalid, the pre-existing provisions remain, and if a repeal is invalid, the repealed provisions are revived. *See* Intervenors' Opening Brief at 11 (string citation). As a technical distinction, SASO and SAPO are still in effect and active laws since Ordinance 2021-1 has both been stayed and not yet taken effect.

Third, as the Oregon Supreme Court has explained, "when the legislature lawfully amends a statute that was enacted by 'the people,' the parts of the amendment that constitute a change from the original statute are deemed to be new enactments by the legislature, while those that simply are copied from the original statute into the amendment remain part and parcel of that earlier,

[6] For this same reason, the Board's argument on pages 4-5 of its Reply fails, because ORS 33.710 does not permit validation proceedings to challenge initiatives. *See* Intervenors' Opening Brief at 2-3.

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voter-approved statute." *State v. Vallin*, 364 Or 295, 308, 434 P3d 413, 420 (2019). That is why, as Intervenors have noted, only the Ordinance, the "new enactment[] by the" Board, is properly before this Court. The limits established by ORS 33.710(2) dictate the same result. To the extent that the Ordinance purports to incorporate elements of the prior Initiatives, those incorporations "remain part and parcel of that earlier, voter-approved statute," and thus are not at issue in this validation proceeding.

D. The Board Claims a Statutory Right to Undermine the People it Represents.

The Board notes that the Board of County Commissioners exercises parallel legislative authority to the voters to enact measures. Board Reply at 2. The Board claims that this "authority to legislate exists regardless of whether the voters previously enacted an ordinance…" *Id*. The Board asserts that it "holds a plenary right, indeed, a responsibility, to legislate." *Id*. at 3. Of course, the Board has a "responsibility[] to legislate" lawfully and constitutionally, and it does not legitimately exercise that power when it enacts an Ordinance it believes violates federal and state statutes and constitutions, in an attempt to undermine near-contemporaneous enactments by the People. Nor does the Board attempt to wrestle with Intervenors' point about 203.035(4), which denies the Board the prerogative to legislate in a way that "limit[s]" the People's ability to legislate. Intervenors' Opening Brief at 13. *See also* Reply to CCR Response, Section A, below. Nor does the Board have the power to subvert the law and obtain review of the validity of the prior ballot measures through a validation proceeding. ORS 33.710(2). The Board likely realized that it could not legally and/or politically accomplish its ultimate goal of striking down the Peoples' Initiatives directly and thus sought to achieve the same result through the contrived enactment of the Ordinance. The validation statute does not permit this.

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E. No Justiciable Controversy Exists.

Whereas the Board's Petition initially disingenuously claimed to take no side in this litigation,[7] the Board's Reply Brief dispels that notion. But the fact that the Board now openly attacks its own Ordinance does not create a case or controversy. As the Board notes, justiciability[8] requires "present facts" and the ability to afford "meaningful relief." Board Reply at 5; *see also* CCR Response at 5.[9] Neither prerequisite is met here.

Indeed, many of the issues the Board raises are speculative in nature, involving "future events of a hypothetical issue." The fact that the Board cannot even begin to explain how the Initiatives violate 30-odd state statutes is a good example. Petition at 10-11. Rather, the Board is tilting at windmills, imagining scenarios such as if the Sheriff will desire or seek to enforce Extraterritorial Acts that the Initiatives have determined he should not enforce (Petition at 13); whether a future Board appropriation of funds may conflict with the Initiatives (Petition at 14-19); or whether the prosecution of future cases and incarceration of future convicts will conflict with the Initiatives (*id*.). The Board has offered no concrete facts that currently exist that require the Initiatives to be examined at this time.

As to the requirement that "meaningful relief" be available, the Board points to an Oregon

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[7] The CCR rely on *Teledyne Indus., Inc. v. Paulus*, 297 Or 665, 670 (1984) for the proposition that "[j]usticiability does not depend on the fortuitous appearance of an intervenor." CCR Response at 6, 7. But that case involved at least *one* party that filed litigation taking a certain position and desiring a certain outcome. By contrast, in this proceeding, the Board initially disclaimed taking any specific position on the Ordinance, or desiring any certain outcome other than to uphold the "will of the People."

[8] The Board does not specifically address ORS 33.710(4)'s prohibition that "[n]othing in this section allows a governing body to have a judicial examination and judgment of the court without a justiciable controversy." *See* Intervenors' Opening Brief at 3.

[9] Meanwhile, the AG claims only that "there is concrete, genuine adversity among the parties," each of whom "has a stake in this controversy," but cites no authorities for this being the test for establishing there to be a case or controversy in a legal proceeding. AG Response at 4-5.

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Supreme Court decision where two parties "both were interested in establishing the constitutionality of the statute," but where "[t]he intervenors … supplied the element of adverseness essential to justiciability." Board Reply at 7. That is *exactly the opposite* case as here, where the Board, AG, and CCR Intervenors all seek to establish the ***un***constitutionality of the Initiatives. Intervenors thus would be put in the Catch-22 position where, if they did not intervene, it would be far more likely that a court would strike down the Initiatives. But if they did intervene, their intervention would establish the "adverseness" necessary to strike down the Initiatives. That cannot be the law. As Intervenors have noted, any hypothetical legal question at all could magically become a justiciable one merely by participation by opposing sets of intervenors.

F. The Board's Remaining Arguments Are Unpersuasive.

As noted above, the Board's desire to now participate in briefing at this late stage is entirely improper. Since the Board has now filed an unsolicited, unscheduled, and unexpected Reply Brief, this Court should reject the brief entirely. But even so, its attempts to rebut Intervenors' Opening Brief are without merit.

First, the Board claims that "the Ordinance is not merely a regulation of the enforcement of certain firearms laws," but instead that the language "while in Columbia County" "reads to provide a right" and "operates separately from the ordinance's enforcement provisions." Board Reply at 9; *see also* CCR Response at 16 ("explicit grant of [a] right"). The Board also claims that the SASO language "shall be treated as … null, void and of no effect in Columbia County, Oregon" applies to "anyone in Columbia County," not just county officials. Board Reply at 9. Together, the Board claims that these provisions "regulate which laws are null and void in Columbia County at the same time as [they] restrict[] enforcement." *Id.* at 10. This interpretation, based on a few cherry-picked words from the SASO, flies in the face of the repeated and expressly stated intent

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of the SASO – a *sanctuary* ordinance, not a nullification ordinance – which is that "*[l]ocal governments* have the legal authority to *refuse to cooperate*," and which restricts any "agent, employee, or official *of Columbia County*." Ordinance at 7 (emphasis added). Indeed, the SASO explicitly references *Printz v. United States*, 521 US 898 (1997), which stands for the proposition that federal officials may enforce their own laws, but they cannot force state and local officials to do so. *Id*. at 6. Read in its entirety, the Initiatives discuss what the *County* shall do, how the *County* shall treat Extraterritorial Acts, and set *County* enforcement policies, rather than purporting to nullify state and federal laws. *See* Intervenors' Response Brief at 7 n.5 for examples of actual nullification statutes. It is beyond clear that the Initiatives apply to an "agent, employee, or official of Columbia County," not to any other state or local government agency or municipality.

Second, the Board claims that, under the provisions of the Initiatives, "some firearms crimes committed within the city limits cannot be enforced," because cities within Columbia County rely on county officials to help enforce the law. Board Reply at 12. But the Board does not explain why this is an inappropriate result (even if true) since, as Intervenors have explained, the Initiatives quite appropriately bind only County agents, employees, or officials.

Third, the Board claims that the provisions of the Initiatives "effectively make many Oregon and Federal criminal laws inapplicable to persons while in Columbia County." Board Reply at 13. Intervenors have dispelled this notion repeatedly. *See* Intervenors' Response Brief at 5-6. The Initiatives do not prohibit state or federal enforcement of any law.

Fourth, the Board claims that certain terms of the Initiatives are "vague" and "entirely unclear." Board Reply at 13. Intervenors have dealt with this claim. Intervenors' Opening Brief at 34-36. The Second Amendment itself is a mere 27 words, but case law has added clarity when and if needed.

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Fifth, Intervenors argued that the language "aids in the enforcement" should not be read to provide absurd results, such as the Board would like. The Board responds only that Intervenors have not engaged in definitive line drawing. Board Reply at 14. Of course, neither has the Board provided a single scenario or hypothetical situation to Intervenors or this Court (the CCR claimed that the sheriff could not reply to an "active shooter" (*see* Intervenors' Response at 15)), further evidencing that its Petition relies on "future events of a hypothetical issue" which in fact may never occur, and asks this Court to issue an advisory opinion about them.

Sixth, the Board again raises the sovereign immunity argument, with which Intervenors dealt in their Opening Brief. Board Reply at 15; Intervenors' Opening Brief at 32. The Board says that courts have no "jurisdiction over monetary claims against … the County … [i]n the absence of … statutory authorization," yet does not explain why the Initiatives cannot provide that authorization, or why the People of Columbia County cannot choose by initiative to waive immunity for those who serve them.

Seventh and finally, the Board takes issue with Intervenors' arguments about why the Sheriff's statutory and constitutional duties are not hampered by the Initiatives. Board Reply at 15-16. First, the Board makes an obtuse reference to the term "ancillary firearm rights" which appeared in the SAPO, but does not explain how that phrase has any bearing on the clear duty of the Sheriff to "determine … whether any federal, state or local regulation affecting firearms … violates" constitutional provisions. "Ancillary rights" are rights to be protected, while "regulations" are enactments which must be considered and determined not to violate those "ancillary rights." This language could not be more clear. Second, the Board takes issue with the SAPO's use of "county concern" when describing the Sheriff's duty, claiming that it is a "term of art," but does not further explain how this language is problematic. Intervenors are unable to divine

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the Board's argument that it apparently felt unnecessary to explain further. Moreover, the Board fails to provide any rationale for continuing to attack an Initiative it claims to have repealed via the Ordinance, when the Initiatives are truly not even before this Court.

G. An Award of Attorneys' Fees Is Appropriate Here.

Due to the frivolous nature of this proceeding initiated by the Board, an award of attorneys' fees to Intervenors for having to appear and defend the People's Initiatives is entirely appropriate. The Board responds that "[t]his case is not a private cause of action against the County for a violation of the Ordinance." Board Reply at 16. The Board claims that "[t]he County is in no way enforcing a firearm law or assisting with an investigation." *Id.* at 16-17. Both claims miss the mark. First, the SASO permits an award of fees in "an action at law, suit in equity, or other proper proceeding." This validation proceeding meets two of those criteria. Second, the SASO prohibits county officials (*i.e.*, the Board) from "utiliz[ing] any assets [or] county funds … to engage in activity that aids in the enforcement" of laws restricting firearms. Certainly, seeking to undermine the SAPO and SASO passed by the People of Columbia County, in order that the county can continue to enforce Extraterritorial Acts, constitutes an attempt to "aid[] in the enforcement" of those laws. The SASO provides more than enough authority for this Court to award Intervenors their attorneys' fees. Furthermore, it is wholly without merit to attempt to challenge Initiatives passed by the People through a validation proceeding made possible by an Ordinance passed by the Board, thus forcing Intervenors to appear and defend the Initiatives. ORS 20.105 provides for attorney fees in such a case.

INTERVENORS' REPLY TO THE ATTORNEY GENERAL

To the extent that arguments raised by the AG in her Response to Intervenors' Opening Brief ("AG Response") have been rebutted above in response to the Board's Reply, Intervenors

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do not repeat them here.

A. The Multnomah County Validation Proceeding Gives No Authority for What Occurred Here.

The AG, the CCR, and the Board rely on *Multnomah Cty. v. Mehrwein*, 366 Or 295, 298 (2020), claiming that what happened there is a "close analogue" to what occurred here. AG Response at 3; Board Reply at 3; CCR Response at 5. This assertion is absurd. In November of 2016, Multnomah County voters approved of Measure 26-184, which was a Charter referendum proposing amendment of the county Charter. Once the people authorized that charter amendment, the county board was then *required* to enact the Ordinance, which was required to implement the charter amendment by addition to the county code. Indeed, the Referendum explicitly *required* the board to adopt Ordinance 1243, stating in the ballot title that "[t]he measure is to be implemented by county ordinance operative not later than September 1, 2017." Thus, the history of measure 26-184 does nothing to determine whether the Board here can legitimately attempt to *invalidate*, via a validation proceeding, Initiatives (rather than a Referendum) which such as here it did not initiate, which were already effective upon passage by the People, and which did not require (much less explicitly instruct) further action by the Board to implement. Here, the Initiatives were complete and final legislative acts of the People on their own, and required no further action by the Board. Further, the court in that case neither analyzed nor opined on the legal validity of the use of that validation proceeding. Thus, there is no applicable rule of law to be distilled from measure 26-184 that can be applied here.

As a separate argument, the AG claims that an initiative enacted by the People "can be subject to a validation proceeding" under ORS 33.710(1)(e)(A)-(B). AG Response at 3-4. But as Intervenors have already pointed out, this statute deals only with a decision of the "governing

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body," which is expressly defined as "'the city council, board of commissioners, board of directors, county court or other managing board,'" and which does not include the People. Intervenors' Opening Brief at 2. *Cf.* ORS 203.035, which empowers "the governing body ***or*** the electors of a county…." Emphasis added. By its plain text, ORS 33.710 does not apply to the Initiatives, which were decisions of the People, and this fatal defect explains why the Board did not simply file a Petition seeking validation of the SASO.

B. Both the Text and Extrinsic Sources Undermine, rather than Support, the AG's Position.

The Board claims that the "text, context, and history of the Ordinance" confirms that it was designed to be a nullification measure rather than an enforcement measure. AG Response at 5. In support of this claim, the AG references the language from the Initiatives that Extraterritorial Acts "'*shall be* treated as if they are null, void and of no effect *in* Columbia County, Oregon.'" *Id.* at 6. After providing a grammar lesson, the AG argues that this language creates a "separate requirement[]" from the no enforcement provision, and "[t]aken together, the sentence declares [] all local, state, and federal acts, laws, rules, and regulations … to be 'null, void, and of no effect…..'" AG Response at 6. As Intervenors noted in their Response, the AG continues to deliberately misread the Initiatives,[10] which in no way declare Extraterritorial Acts "to be" null and void, but merely state that they "shall be treated as if they were" null and void by "Columbia

[10] Likewise, the CCR Response mischaracterizes the Initiatives, claiming that Section 4(A) "provides that Extraterritorial Acts may not be enforced in Columbia County." *Id.* at 8. On the contrary, the SASO explicitly provides that "[s]uch Extraterritorial Acts shall not be enforced ***by Columbia County agents***." Emphasis added.

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County, Oregon."[11] The Initiatives do not purport "to nullify" laws; they merely instruct county officials to treat such laws *as if they were* null and void. *Cf.* **actual** nullification statutes which, in various ways, assert that certain federal laws "must be invalid in this state." Intervenors' Response Brief at 7 n.5.[12]

Next, the AG references the "context" of the Initiatives, pointing to language about how the SASO's provisions "preserve" firearms rights in Columbia County. This, the AG argues, "purports to prohibit all enforcement" of anti-gun laws in the county. AG Response at 7. On the contrary, by prohibiting *county* enforcement, the SASO in large part "preserves the right" to keep and bear arms in a myriad of ways, since county enforcement is largely all the enforcement of a state law that a Columbia County resident will ever experience.[13] *See also* CCR Response at 16.

Finally, the AG relies on the "history of the Ordinance's adoption," pointing specifically to the "voters' pamphlet argument in favor of Initiative 5-278," which stated that the SASO was designed

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[11] The CCR claim that "there is no difference between 'treating' a law as null and void, and attempting to invalidate a law." CCR Response at 17. The CCR miss the point. Certainly, if *everyone* treated an Extraterritorial Act as if it were a nullity, then it would cease to have much practical effect. But the Initiatives do not provide that *everyone* is to treat offending laws as null and void. Rather, Extraterritorial Acts are to be treated as nullities *only from the County's point of view ("agents, employees, officials of the County")*. Meanwhile state and federal authorities remain perfectly free to enforce such laws. That hardly makes them "without binding force." *See* CCR Response at 17.

[12] The Board, the Attorney General, and the Columbia County residents all dispute the true effect of the Initiatives, wrongly claiming that they "nullify" state and federal law. Tellingly, no one disputes that the county has the authority to set its own enforcement priorities and control its own funds and employees. Thus, if the Court agrees with Intervenors' interpretation of the plain text of the Initiatives, which were specifically designed to be *unlike* other nullification enactments, then the Initiatives should be upheld.

[13] Indeed, as of 2019, the entire state of Oregon reportedly had roughly 380 state troopers to police a population of more than 4.2 million people (1:11052) in a state containing more than 98,000 square miles. Contrast this to a New England state such as Connecticut, which has roughly 940 troopers to police 3.5 million people (1:3723) in a state containing only 5,500 square miles ($1/17^{th}$ as large). Without county involvement in the enforcement of state and federal laws, it is indeed true that the right to keep and bear arms of the people of Columbia County Oregon is largely "preserved." Indeed, the AG admits "the centrality of the Sheriff's role in law enforcement…." AG Response at 18.

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to protect against "politicians in Salem," and "protects Columbia County residents" against "Oregon's elected officials." AG Response at 5, 7; *see also* CCR Response at 11.[14] This, the AG argues, shows that the SASO was designed not merely to control local enforcement, *but to control all enforcement* and therefore nullify state and federal law. *Id.* On the contrary, when the SASO was filed in the clerk's office in May of 2019, the "question" was presented as "[s]hould Columbia County officials be prevented from enforcing most state, federal, and local firearm regulations?" Reply Ex. 1[15]. Likewise, Local news reported that the SASO would "limit the ability of officials to enforce existing firearms regulations." Reply Ex. 2. Another story reported that the SASO is "intended to prevent county officials from enforcing most state, federal and local firearm regulations…." Reply Ex. 3. The same story quoted counsel for Intervenors as stating that the SASO was "inspired by 'a desire to have local control for local jurisdictions, to be able to be in charge of what firearm regulations, ammunition regulations, and magazine capacity regulations local police officers enforce or do not enforce.'" Likewise, counsel for the Board was quoted as stating that the validation proceeding involved "whether the county can actually decline to enforce certain state laws…." Reply Ex. 4. Finally, counsel for the CCR Intervenors wrote a letter to county counsel on January 21, 2021, noting that the SASO "is rooted in the flawed premise that '[l]ocal governments have the legal authority to refuse to cooperate with state and federal firearms laws . . . and to proclaim a Second Amendment Sanctuary.'" Exhibit 1 to Declaration of Stephen

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[14] *See also* CCR Response at 10 (referencing the "ballot title" as that the SASO "'would make it illegal for *Columbia County* to, in any way, limit'" the right to keep and bear arms, and the "Voters Pamphlet" which stated that "this ordinance would prevent *Columbia County and its employees*" from taking certain actions.). Emphasis added. It is unclear how either of these explanations, which *explicitly reference the county* (not state or federal authorities), could be interpreted to be wider-reaching than the local level.

[15] Intervenors include the Declaration of Tyler Smith and Exhibits 1-4 as 'Reply' exhibits here considering the Board did not file a motion or opening brief but has since filed a 'reply' making this Reply Intervenors' first chance to respond. *Heiner v. Porter*, 164 Or App 508, 513, 994 P2d 1199 ,1201 (1999).

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C. Berman in Support of the Columbia County Residents' Response to Intervenors' Motion for Summary Judgment. It would thus appear from numerous "contemporaneous materials" (AG Response at 8) that the SASO was widely considered by *literally everyone* to do exactly what it does – control county enforcement priorities. This Court should reject the AG's late attempt to recast the SASO to suit her agenda.

C. The Initiatives Are Not Preempted.

The AG claims that the Initiatives are preempted by ORS 166.170, based on the theory that the word "regulate" used in the statute applies "in either a positive or negative manner," and claims the Initiatives regulate in a "negative manner." AG Response at 9; *see also* CCR Response at 16-17 (alleging that the Initiatives "regulate" by stating that certain laws "will not be enforced" by county officials). On the contrary, the Initiatives do not regulate firearms at all, but merely take a position relating to enforcement of existing regulations. The Initiatives purport neither to regulate nor to nullify any existing regulation.[16] Neither do the Initiatives create a "patchwork quilt" of laws which apply some places and not others, because all state and federal laws continue to be in full force and effect in Columbia County. To be sure, county nonenforcement of state law may "frustrate[]" the effectiveness of "state firearms laws," but that does not, as the AG claims, "create differences in regulation of firearms across county lines" because state police are not prohibited from enforcing state laws within the County. *Id*. at 10.

[16] The CCR rely on *Or. Firearms Educ. Found. v. Bd. of Higher Educ.*, 245 Or App 713, 264 P3d 160 (2011), but that case involved a technical distinction at best – an administrative rule that did not "expressly prohibit" possession of a firearm, but merely authorized "sanctions" against anyone who did so. The Court of Appeals found this to be a distinction with a difference, as the rule obviously constituted a regulation of firearms. This case is nothing like that. Here, the Initiatives do not purport to authorize certain items or conduct, nor do they purport to prohibit certain items or conduct. Rather, they leave the state of the law untouched, but merely decline county assistance and enforcement in existing regulatory schemes. This in no way constitutes "regulat[ion] … of firearms" under ORS 166.170.

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D. The AG's Argument Undermines the Board's Petition.

Next, the AG spends several pages claiming that a county district attorney is an officer of the state when prosecuting state crimes, and thus that "a county ordinance cannot direct district attorneys' prosecutions of state crimes." AG Response at 10-12. Even if that is the case, then this argument undermines the Board's claim raised in its Petition that the Initiatives conflict with the district attorney's duties and oath. If a district attorney is not acting as a county official or employee, then his or her conduct in that capacity is not governed by the Initiatives.

E. The AG Accepts Intervenors' Reading of the Sheriff's Duties.

The AG notes Intervenors' position that "the Ordinance does nothing more than to underscore the Sheriff's preexisting duty not to enforce unconstitutional statutes" and concedes "[t]hat may be a fair reading of Section 3's requirement…." AG Response at 12. Nevertheless, the AG redirects, claiming that *other* sections of the SASO (Sections 2 and 4) "are not limited to laws that infringe the Second Amendment," and that the Sheriff would be prohibited from enforcing laws even though they do not touch on the right to keep and bear arms. *Id.* On the contrary, as Intervenors have already explained, certain persons, arms, and activities outside the scope of the right to keep and bear arms are not covered by the Initiatives. Intervenors' Opening Brief at 18-19. The clear purpose of the Initiatives was to protect the right to keep and bear arms. It would be absurd to read language designed to accomplish that end to, for example, prohibit the police from responding to an active shooter. *See* CCR Brief at 9; Intervenors' Response at 15.

Next, the AG argues that "the Sheriff must enforce constitutional[17] state criminal prohibitions," but offers no authority for this claim other than ORS 206.010 and the Sheriff's oath. AG Response

[17] Of course, the Initiatives prohibit enforcement of *un*constitutional state and federal laws, not the legitimate and constitutional arrest of lawbreakers who are "active shooters."

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at 13; *see also* CCR Response at 12 ("[t]he Sheriff … must choose between non-compliance with ORS 206.010 and violating the SASO…."). Intervenors have already dealt with this argument; ORS 206.010 creates no requirement that the Sheriff enforce every single state law in every single instance where it is broken.[18] Intervenors' Response at 6. The AG argues that the Supreme Court's decision in *Printz* does not cover "the State's relationship to counties" (*id*.), but this is a straw man, because Intervenors never said that it did. Intervenors' use of *Printz* was with respect to federal/state relations, not state/local relations. Intervenors' Opening Brief at 21, 24.[19] Oregon's own ban on unfunded mandates makes it clear that Oregon law follows the same legal paradigm. If the state were to mandate enforcement of certain laws, it would have to pay for such a program.

The AG claims that "Intervenors have not cited authority for the proposition that state law bars the State from imposing duties on a county official" (*id*.) but, again, that is not the point. Intervenors have not taken a position as to whether "the 'laws of this state' ***may*** 'impose … duties' on 'county officers,'" (*id*. at 14 (emphasis added)), but rather have explained that Oregon law ***does not impose*** such a duty. In fact, the AG later admits as much, calling "a Sheriff's decision to enforce state or federal laws" a "discretionary policy decision[]." *Id*. at 16.

F. The Initiatives' Penalties and Remedies Are Not Preempted.

The AG provides three reasons for her assertion that the Initiatives' penalties and remedies are unlawful. First, the AG points to the immunity in ORS 166.412(6), but as Intervenors have already

[18] If the contrary is true, then no doubt Columbia County jails will soon be overrun with hardened jaywalkers. *See* ORS 166.025(1)(d).

[19] The CCR also misuse *Printz*, claiming that it only applies to "affirmative orders to states to enforce federal law." CCR Response at 19. But it is circular and nonsensical – that counties must enforce federal law, unless federal law explicitly says that counties must enforce federal law. The CCR's separate contention, that the Initiatives purport to "nullify" federal law (*id.*), has been addressed numerous times.

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explained, this applies to a criminal history records check that is conducted by the Department of State Police, not the Columbia County Sheriff. Second, the AG argues that "the Ordinance would make a county official liable for performing their duties under state law" (Board Reply at 14) but, as just explained above, there is no such duty under state law. Third, the AG claims that "the Ordinance is preempted by the Oregon Tort Claims Act." *Id*. at 15; *see also* CCR Response at 13. The AG claims that "claims must be asserted against the county" while the Initiatives provide liability for any county official who violates the Ordinance. *Id*. But ORS 30.285 clearly envisions suits against individual county employees, stating that "[t]he governing body of any public body shall defend, save harmless and indemnify any of its officers, employees and agents, whether elective or appointive, against any tort claim or demand…." Finally, the AG claims that the county ultimately would "prevail" on the merits in any such action against a county official, tacitly contemplating that such a case might be litigated. But the merits of a hypothetical future case cannot be resolved in this validation proceeding, and the AG must wait until such a case is actually brought in order to make this argument.

G. The AG Cannot Rely on the Ordinance's "Repealer" Provision to Undermine the SASO's "Severability" Provision.

Predictably, the AG points to the "Repealer" provision, which Intervenors have already explained was added in an apparent effort by the Board to undermine any effect of the "Severability" provision. *See* Intervenors' Response Brief at 18. The AG claims that "the SASO is the only operative law," and thus "this Court should declare that Ordinance 2021-1 as a whole is repealed…." But the Repealer portion only applies to the Initiatives, which are not at issue here. The Ordinance itself has a severability clause.

Yet as Intervenors have noted, the invalidation of any of the Ordinance would only mean that

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the prior SAPO and SASO (which this Court has declined to enjoin) would be put back into effect with the repeal of the Ordinance. Unsurprisingly, the AG objects to this result, claiming that "[e]ven if" a repeal of the Ordinance meant that the Initiatives went back into effect, "the Court's judgment … would apply equally to Initiative 5-278,[20] and the parties to this proceeding, including the County, would be bound by that judgment." *Id*. at 17-18. But that is a *non sequitur*, because presumably the Court's judgment would be only that the *Ordinance* should not be enforced, not the *Initiatives*. And since the SAPO and SASO do not *empower* the County in any way, but rather *prohibit* certain actions by the county, the county would continue to be governed by the Initiatives enacted by the People.

INTERVENORS' REPLY TO THE COLUMBIA COUNTY RESIDENTS

To the extent that arguments raised by the Columbia County Residents in their Response to Intervenors' Motion for Summary Judgment ("CCR Response") have been rebutted above in response to the Board's Reply and AG's Response, Intervenors do not repeat them here.

A. The CCR Misunderstand the Board's Authority.

As did the Board (*see* Reply to Board Section D, above), the CCR begin with the presumption that the "[t]he voters and the Board have co-equal law-making authority." CCR Response at 2. The CCR rely on *Carson v. Kozer*, 126 Or 641, 644 (1928), a case which involved interpretation of a decades-old "not self-executing" amendment to Article IV, Section 1, and a subsequent legislative act designed to implement that amendment. *Id*. at 644. The CCR also rely on *State v. Vallin*, which involved a constitutional amendment adopted by the people in 1994, versus a bill

[20] Apparently, the AG does not believe that the SAPO, Initiative 5-270, would be affected by any judgment on the Ordinance.

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adopted by the legislature 23 years later in 2017. The present case, however, involves an enactment by the People in November of 2020 and an enactment by the Board in March of 2021 (4 months later). Indeed, as Intervenors' Opening Brief noted, the Board was plotting its action as early as November 18, 2020 (15 ***days*** after the SASO was enacted). *Id*. at 6 n.8. While the Supreme Court has held the legislature and the People to be co-equal in their legislative powers, no case authority cited by the CCR stands for the proposition that a county board can enact an ordinance designed and intended to undermine and repeal what the People have just done only months before, thwarting the People's constitutional power to enact initiative measures.[21]

Next, as the Court made clear in *Vallin*, any subsequent legislative enactment "must be done 'in a manner provided by law.'" *Id*. at 307. Yet as Intervenors have pointed out, ORS 203.035(1)[22] permits a county board to enact measures "to the fullest extent allowed by Constitutions and laws of the United States and of this state," but subsection (4) *expressly limits that power*, in that "[n]othing in this section shall be construed to limit the rights of the electors of a county to propose county ordinances through exercise of the initiative power." Since the Board's enactment deprives the People who enacted the SASO of their initiative power, it violates ORS 203.035(4), and thus was not done "in a manner provided by law." This distinction appears to be the source of the "[c]onfus[ion]" in the CCR Response. *Id*. at 4.

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[21] Confusingly, the CCR conflate Intervenors' so-called "attempts to narrow the construction of the SASO" as "inconsistent with their own briefing to this Court," on the theory that Intervenors argued that the Board had no authority to enact the Ordinance. CCR Response at 12-13. Yet the scope of the Board's authority to override the People's enactments has absolutely nothing to do with the meaning and effect of the Initiatives.

[22] Interestingly enough, the CCR rely on ORS 203.035 for the contention that "the SASO …. does not address 'matters of county concern.'" CCR Response at 20. But if the Initiatives did not address "matters of county concern," then neither did the Ordinance involve "matters of county concern," which leads to the obvious conclusion that the Ordinance must be struck down. And if the Ordinance is struck down, the Initiatives (which are not at issue in this proceeding) continue in force and effect.

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B. The CCR Misunderstand the SASO's Text.

The CCR take issue with Intervenors alleged "attempt to … refram[e] the SASO and Measures as raising only issues of resource allocation and prosecutorial discretion," whereby state and federal law is still fully applicable, just not enforceable by county officials. CCR Response at 9. Rather, the CCR claim, the "SASO … 'preserves the right of any person'" to engage in the right to keep and bear arms. But as discussed previously, this language from the SASO is fully in line with Intervenors' understanding, which is that the Initiatives "preserve" the right to keep and bear arms in Columbia County ***by*** prohibiting county enforcement of state and federal laws. *See* Section B in Reply to Attorney General, above. Indeed, without county enforcement and assistance, state and federal law are to some extent toothless prohibitions, since state and federal authorities may never even become aware of many violations. *See* fn.10, above.

C. The Sheriff Is Not a Law Enforcement Drone.

To the AG's argument (Reply to AG, Section E, above), the CCR add the claim that a sheriff has neither the responsibility *nor the authority* to "determine the constitutionality of laws," citing to *Marbury v. Madison* for the idea that only the judiciary can "say what the law is." CCR Response at 12. Tellingly, the Oregon Attorney General – the "chief law officer for the state" of Oregon (ORS 180.210) – does not make this argument. Aside from this ubiquitous quotation from *Marbury* and an op ed from a law school professor (CCR Response at 13 n.8), the CCR offer no authority for their claim that sheriffs cannot decline to enforce unconstitutional laws. Ironically, the CCR appear to believe that the Sheriff has a greater duty to federal and Oregon statutes (to which he does not swear an oath) than to the U.S. and Oregon Constitutions (to which he does swear an oath). ORS 204.020. Yet in 1926, the Oregon Supreme Court ruled that "the sheriff is not in a position to question the validity of the criminal provisions of the statute," but *only* "because

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his assistance has not been invoked to enforce such provisions." *State ex rel. Pierce v. Slusher*, 119 Or 141, 153, 248 P 358 (1926). The obvious corollary is that, if a sheriff *is* involved in enforcing a statute, then he properly *may* question its legitimacy. Indeed, as the Court more recently explained, "[s]tate and local officials, school board members, sheriffs, even judges answer to the electorate for the conduct of their offices and are nonetheless held to constitutional limits in the exercise of the discretion entrusted to them." *State v. Clark*, 291 Or 231, 245, 630 P2d 810 (1981).

CONCLUSION

For the reasons stated, the Court should deny the motions for summary judgment submitted by the Attorney General and the Columbia County Residents, and should strike the purported Reply Brief filed by the Board, which seeks no remedy from the Court. Next, the Petition in this matter should be dismissed, because the Board's passage of the Ordinance was unlawful, and its initiation of this validation proceeding was an improper vehicle to challenge the Initiatives enacted by the People. Next, the Court should strike down the parts of the Ordinance passed by the Board and, in doing so, the Court should declare that the SAPO and SASO continue to be in full force and effect. In the alternative, this Court should reject the challenges to the substance of the Initiatives, because they are both lawful and constitutional under state and federal law. Finally, this Court should award Intervenors their costs and attorneys' fees for having to defend the People of Columbia County from the Board's meritless actions.

DATED this 15th day of July, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th of July, 2021, I caused a true copy of INTERVENORS' REPLY BRIEF, DECLARATION OF TYLER SMITH and EXHIBITS 1-4 to be served upon the following named parties, or their registered agents or their attorney by first class mail as indicated below and addressed to the following:

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Mailing was done by __X_ first class mail, and by ____ certified or ____ registered mail, return receipt requested with restricted delivery, or ____ express mail, eFiling __X___, and e-mail __X__.

DATED this 15th day of July, 2021.

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