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' OPENING BRIEF**

INTERVENORS' OPENING BRIEF

Raven Chris Brumbles, a resident of Columbia County, an interested person, and the chief petitioner of both the 2018 Initiative Measure 5-270 ("SAPO") and the 2020 Initiative Measure 5-278 ("SASO"), together with Gun Owners of America, Inc., Gun Owners Foundation, Oregon Firearms Federation, Larry Erickson, Keith Forsythe, and Ruth Nelson (together "Intervenors") hereby file this, their Opening Brief in support of the SAPO and SASO, and in opposition to the Columbia County Board of County Commissioners' Ordinance 2021-1.

POINTS AND AUTHORITIES

I. The Petition Should Be Dismissed.

As a preliminary matter, Intervenors object to the validity of the Petition for Validation of Local Government Action ("Pet.") filed by the Columbia County Board ("Board"), as this is not the proper proceeding for a county board to challenge the validity of either Measure 5-270 or Measure 5-278 ("Initiatives"). Neither is this validation proceeding the proper method for the

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

Board to challenge its own Ordinance 2021-1 ("Ordinance"), which was enacted as a contrivance to undermine the legality and constitutionality of the Initiatives which were popularly enacted by the People.[1] Indeed, the Petition seeks "a judicial determination and judgment of the Court as to the regularity,[2] legality and effect" not only of "Ordinance 2021-1," *but also of* "Initiative Measures 5-270 and 5-278." Pet. at 3. The latter portion is impermissible.

a. ORS 33.710 Does Not Permit Validation Proceedings for Constitutional Initiatives.

ORS 33.710, the statutory provision on which the Board relies to bring its Petition, does not authorize a court to determine the legitimacy of an Initiative enacted by the People as an exercise of their constitutional power under Article IV, Section 1(2)(a). Rather, the purpose of ORS 33.710 is only to assess "any ordinance, resolution or regulation" passed[3] by "the governing body" – defined as "the city council, board of commissioners, board of directors, county court or other managing board." The "governing body" of a county does not include the People. [4]

This Court thus should reject the contrived situation here, where the Board has taken

---

[1] The Board puts forth no argument and makes no claim that the Initiatives were not lawfully passed. Indeed, the Oregon Constitution provides that "[t]he people reserve to themselves the Initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly." Ore. Const. Art. IV, § 1(2)(a). The Initiatives in this matter were properly included on the ballots and passed by a majority vote (*see* Exhibits "6" and "7" to the Petition). As such, they are presumptively lawful and constitutional. *See State v. Lloyd A. Fry Roofing Co*., 9 Or App 189, 196, 495 P2d 751, 754 (1972) ("[l]egislative action is always supported by a strong presumption of constitutionality….").

[2] Typically, actions by a board enjoy a presumption of regularity. *See Brandt v. Marion Cty*., 6 Or App 617, 620, 488 P2d 1391, 1393 (1971) (citation omitted) ("There is a presumption of legislative regularity which applies to the functions of the Board of Commissioners.") But such regularity cannot be assumed when a Board takes Initiatives lawfully enacted by the People, purports to adopt them by ordinance, and then immediately attacks its own Ordinance (and thereby the underlying Initiatives) through litigation.

[3] The Ordinance in this case was "adopted under the authority of ORS 203.035 through ORS 203.075. Ordinance at 1.

[4] For example, ORS 203.035(1) explicitly delineates between "the governing body **or** the electors of a county." Emphasis added.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

Initiatives enacted by the People pursuant to the Constitution, unreviewable under the plain terms of ORS 33.710, and sought to convert them through a legal fiction into an "ordinance" enacted pursuant to statute, in an effort to make the subject matter reviewable under ORS 33.710. To the extent that the Petition seeks a determination as to the validity, legality, constitutionality, or effect of the SAPO or SASO, ORS 33.710 simply provides this Court no authority to do so. In fact, *only one* of the 21 questions the Board asks this Court to answer involves the text or substance of the Ordinance that the Board enacted. Every other one of the Board's criticisms involve the language of the SAPO and SASO that the People enacted. At most, even if the Board were permitted to invalidate its own Ordinance, that would not affect the validity of the SAPO and SASO. Because validation proceedings challenging the SAPO and SASO are not authorized by ORS 33.710 and are not properly before this Court, 20 of 21 questions the Board raises cannot be resolved in this proceeding.

b. There Is No "Justiciable Controversy" in this Case.

ORS 33.710 expressly precludes an action such as the one the Board has brought here, making clear that "[n]othing in this section allows a governing body to have a judicial examination and judgment of the court without a justiciable controversy." ORS 33.710(4). Indeed, "under the Oregon Constitution, application of judicial power is limited to the resolution of justiciable controversies." *Kerr v. Bradbury*, 340 Or 241, 244, 131 P3d 737, 739 (2006). "A controversy is justiciable when there is an actual and substantial controversy between parties having adverse legal interests… The absence of such a controversy means that a decision from this court in such a case would be moot because it would no longer have some practical effect on the rights of the parties to the controversy." *Id*. (citations and punctuation omitted). There is no controversy in this case, and none has been established by any aggrieved party. Notably this matter involves only one

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

"party" in a validation proceeding, and the Board claims that it is not attempting to undermine its own Ordinance. Petitioner's Response to Motion to Intervene ("Response to Intervention") at 4. Accepting the Board's alleged position as a neutral third party means there are no "adverse legal interests" to be resolved here. In fact, there was absolutely no need for the Board to enact the Ordinance. The SAPO and SASO were (and are) effective and fully "implement[ed]" absent any action by the Board allegedly "to implement the intent of the voters…." Ordinance at 1, Pet. at 3.

First, the Ordinance claims that its enactment was necessary "to incorporate provisions of the" SAPO "where it differs from the" SASO (Ordinance at 1), but there is nothing in the SASO which conflicts with the earlier SAPO or makes it so that both Initiatives cannot exist simultaneously, and there is no indication that the interpretive principle that the "last in time" governs could not resolve any inconsistencies (even if any did exist).

Second, the Ordinance claims that it is "format[ted] … consistent with County practice" (*id.* at 1-2), but the only evidence of any formatting change is that certain numbered paragraphs were changed to lettered paragraphs, and vice versa – hardly a necessary exercise given that this in no way affects the legitimacy or effectiveness of the SAPO or SASO.

Third, the Ordinance claims to "correct scrivener errors" (actually, the correct term is "scrivener's errors") but, aside from capitalizing "Ordinance" and deleting an extraneous "the" and "he," the Ordinance fails to correct other typos in the SASO,[5] and actually *introduces error* into the SASO, such as on page 9 changing the correctly stated "*affect* in any way the prosecution" to be incorrectly stated as "*effect* in any way the prosecution." Contrary to its claim, the Ordinance clearly was not passed by the Board to correct typos in the SAPO and SASO.

[5] *See, e.g.*, Ordinance at 10 ("shall be an affirmative defense of [an] agent…."); at 7 ("infringe on the right by [the] People"); at 9 ("do not apply to person[s] who have been convicted….").

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

Further evidencing the lack of a justiciable controversy in this case, the Board claims it merely "has identified … legal questions" about the Ordinance, but allegedly takes no position on those questions, since it does not "seek[] to invalidate the Ordinance." Response to Intervention at 4.[6] The Board thus believes itself free to attack its own ordinance by identifying nearly two-dozen talking points on which it seeks this Court's advisory opinion, while claiming to be neutral as to how these issues should be resolved. This strategy seeks to impose on Intervenors the heavy burden of rebutting each of the Board's vague criticisms, without the Board ever being required to explain the reasons for or authority supporting each of the reasons why it believes its Ordinance is "likely" unconstitutional or unlawful, and obviating the need for there ever to be an aggrieved party that would have traditional legal standing. Indeed, merely citing to a particular statute and claiming by *ipse dixit* that the Ordinance is "likely" unconstitutional or unlawful provides Intervenors no reasonable way to rebut such a criticism. Instead, this proceeding contrived by the Board strips Intervenors (representing the People of Columbia County who enacted the SAPO and SASO) of their right to due process[7] and requires them to infer the reasons for the "likely" unlawfulness or unconstitutionality of the measures they fought to pass.

If this Court does not deny the Petition outright on the grounds that there is no justiciable controversy, then alternatively it should order the Board (the only "party" in this case) to brief,

---

[6] Of course, this is a charade, and not at all how the Petition reads. Rather, the Petition raises a number of questions about the constitutionality of the Ordinance and the Initiatives, and presupposes the answer to the questions by repeatedly stating over a dozen times that the "SAPO, SASO, and Ordinance No. 2021-1" "likely conflict with" Oregon laws or its Constitution. (*see* Petition pp. 8, 10, 12, 14, 15, 16, 17, 18, 19, 21, 22).

[7] "The United States Supreme Court has stated that [t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Woodroffe v. Bd. of Parole & Post-Prison Supervision*, 219 Or App 87, 96, 182 P.3d 202, 207 (2008) (internal quotations omitted) (quoting *Mathews v. Eldridge*, 424 US 319, 333, 96 S. Ct. 893, 47 L Ed 2d 18 (1976)).

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

formally take a position, and come down on one side or the other of the issues it has raised and, with specificity, explain exactly why its own Ordinance is "likely" unconstitutional and unlawful. This procedure would at least permit the intervenors on both sides to support or rebut "in a meaningful manner" the criticisms that the Board has raised.

c. Enactment of the Ordinance Was a Violation of the Board's Oaths of Office.

Prior to taking office, elected officials within Oregon counties (including a "county commissioner," *see* ORS 204.005) are required to take an oath of office "to the effect that the person will support the Constitution of the United States and of this state…." ORS 204.020(2). Each member of the Columbia County Board was required to subscribe to this oath prior to taking office.

On March 31, 2021, the three-member Board of Commissioners for Columbia County, Oregon unanimously passed the Ordinance. On the very next day, the Board then filed its Petition in this case, claiming that its Ordinance is "likely" illegal and unconstitutional. *See, e.g.*, Pet. at 22 ("likely conflict with or are inconsistent with Article IV, Section 24 of the Oregon Constitution."). The wham-bam enactment of the Ordinance and filing of this Petition demonstrates that this is not a situation where the county Board pondered the matter and had second thoughts about an ordinance it had previously passed. Rather, in a deliberate and premeditated manner, the County Board prepared both the Ordinance and the Petition and, only a day before filing the Petition, ***enacted an ordinance which the county Board believed to be "likely" unconstitutional***.[8] This is a violation of the Board's oath of office to "support" federal

[8] Indeed, documents produced by the County show that it the County attorney was planning enactment of the Ordinance and Petition from as early as November 18, 2020 (soon after passage of the SASO) (Declaration of Tyler Smith, Exhibit 1); that the Board had plans to begin this proceeding as early as February 22, 2021 (Decl. of Tyler Smith, Ex. 2.); and that the Board had prepared a draft Petition by as early as March 24, 2021, six days before the Ordinance was enacted (Declaration of Tyler Smith, Ex. 3).

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

and state constitutions.

Interestingly enough, a question also arises as to whether the Board itself has violated the SAPO and SASO prohibitions against "knowingly and willingly [] participat[ing] in any way in the enforcement of any Extraterritorial Act." Ordinance at 7. Indeed, by enacting the Ordinance and then using this validation proceeding in an attempt to challenge and undermine the Initiatives enacted by the people, the Board apparently seeks to free the County from the constraints of the Initiatives so that it may enforce gun control against its residents.

d. The Petition Improperly Seeks to Draw the Court into a Political Dispute.

There is no question that the Ordinance represents an entirely contrived attempt to challenge the SAPO and SASO. Indeed, while the Board claims to seek this Court's guidance as to the scope of *its own authority*, in reality the Board is challenging the scope of *the People's authority* to have enacted the SAPO and SASO in the first place. Making matters worse, in this case the Board apparently recognized the unfavorable optics that would occur if it were to take the bold and unprecedented step of reversing and wholesale repealing[9] an Initiative that the People enacted democratically just a few months prior. Instead, the Board seeks to enlist this Court to do its dirty work, allowing the Board to maintain the false pretense that it is not "seek[ing] to invalidate the Ordinance," thereby drawing this Court into the middle of what is essentially a political dispute between the Columbia County Board and the sovereign People it represents. This tactic by the Board would permit the Board to keep its hands clean and then later have the freedom to point its finger at this Court as "the bad guy" that undid what the People had done. This Court should not permit the judicial branch to be drawn into a political dispute between the Board and

[9] *See State v. Vallin*, 364 Or 295, 307 ("the legislature may [] amend or repeal any law enacted by the people").

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

the People of Columbia County.[10]

In sum, the Board disingenuously claims that it does not "seek[] to invalidate the Ordinance," but rather only "seeks review of the validity of the Ordinance due to legal questions it has identified as arising from it." Response to Intervention at 4. But if it is true that the Board sought through its Ordinance only "to implement the intent of the voters" (Ordinance at 1) and does not "seek[] to invalidate the Ordinance" through this proceeding (Response to Intervention at 4), then the question arises as to how there is any dispute for this Court to address.[11] Because there is no controversy presented by the Petition, this Court should summarily reject and dismiss the Petition, without necessitating any further expenditure of judicial (and Intervenor) resources in the Board's illegitimate effort to subvert the will of its citizens through this manufactured and contrived action.

II. The Initiatives Are Lawful and Constitutional.

The Board's Petition is a confetti cannon pleading, raising at least twenty-one different reasons why the Initiatives "likely" violate various provisions of federal law, numerous provisions of Oregon state law, and the state and federal constitutions. With little to no analysis, the Board alleges that numerous parts of the Initiatives are "likely" unlawful/unconstitutional. However, the

---

[10] Even had this case been brought as a formal declaratory relief action, a trial court has discretion to decline to enter a declaratory judgment when there are "valid countervailing reasons," even when the court otherwise has jurisdiction and a justiciable controversy otherwise exists. *Brown v. Oregon State Bar*, 293 Or 446, 451, 648 P2d 1289 (1982). *See also TVKO v. Howland*, 335 Or 527, 536, 73 P3d 905 (2003) ("As Brown demonstrates, Oregon courts are accorded some discretion in fashioning a judgment under the declaratory judgment statute.").

[11] The fact that multiple sets of Intervenors have appeared to argue both sides of the Board's criticisms does not magically create a case or controversy. Just about any legal question presented to a court (for example, whether pumpkin vendors at the county fair should be licensed) no doubt would draw multiple opinions from various constituencies, but that does not mean there is a "justiciable controversy" that a court should address.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

Board asks the Court to do the heavy lifting when it comes to *why* that is so, providing at best only a bare bones analysis of its various claims, and often providing no analysis at all.

Yet as noted above, all but the first of the questions the Board asks this Court to answer involve provisions of the SAPO and SASO, rather than language from the Ordinance, even though the lawfulness of the Ordinance is the only legitimate subject of this proceeding.[12] Thus, aside from the first question, none of the Board's challenges to the Initiatives are properly before this Court. But even if they were legitimately presented the Court, each of the Board's assertions that various provisions of the People's Initiatives are "likely in conflict with" federal and state law is without merit.[13]

---

[12] ORS 33.710. ORS 33.710(2) authorizes this Court to conduct a proceeding under seven specific types of matters. Only two of those matters are arguably before the Court, and those are ORS 33.710(2)(f) and (g) as follows: (f) "The authority of the governing body to enact any ordinance, resolution or regulation" or (g) "Any ordinance, resolution or regulation enacted by the governing body, including the constitutionality of the ordinance, resolution or regulation." Since the Ordinance is the only action taken by the "governing body" as defined in ORS 33.710(a) that is the only thing that can be presented before this Court that could be properly considered under ORS 33.710.

[13] Intervenors have noted that, as part of its conspiracy to adopt its own Ordinance to file the Petition seeking to overturn the People's Initiatives, the Board repealed the severability clause of the SASO. *See* Motion to Intervene at 5. In response, the Board claims that this is "inaccurate and misleading" because the severability clause itself was moved and now "is clearly set out in Section 5 of the Ordinance…." Response to Intervention at 4. But *that is not the point*, because the drafter of the Ordinance built in a poison pill. To be sure, a completely rewritten version of the SASO's "Severability" clause is now included as Section 5 of the Ordinance, stating that "[i]f any provision of this Ordinance, including Exhibit 'A', is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the remaining portions thereof." Ordinance at 2. Yet *the very next Section 6 of the Ordinance, entitled "Repealer," completely undoes Section 5*, diametrically stating that "[t]his Ordinance shall be automatically repealed if Columbia County Initiative Measure 5-270, or Initiative Measure 5-278 is, for any reason, overturned or declared invalid by a court of competent jurisdiction." Essentially, Section 6 is a non-severability clause to Section 5's severability clause, making it of little benefit once the entire Ordinance is automatically repealed if struck down in any part for any reason. Nevertheless, as noted above, invalidation of any portion of the Ordinance does not and cannot affect the validity of the Initiatives, and even the County recognizes that they are separate. Intervenors' Motion to Intervene also noted that the Ordinance repealed the penalties provision of the Initiatives. *Id.* at 5. The Board takes issue with this claim as well, alleging that the "[p]enalties contained in the SAPO and SASO are built into the Ordinance," and that "the substance of the two initiatives is intact." Response to Intervention at 4. As with the severability clause above, the relevant part is *not what is the same, but rather what has been changed.* Importantly, the penalties provision that now appears in Sections 5 and 6 deletes the SASO language that "[a]nyone within the jurisdiction of

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

Intervenors address each question the Petition raised, generally in the order in which they were raised in the Petition. In construing the provisions of the Initiatives challenged by the Petition, the Court has "an obligation to give meaning and effect … based on the assumption that the legislature always intends its enactments to be construed together as a workable whole." *State v. Stamper*, 197 Or App 413, 425, 106 P3d 172, 178 (2005). Because the people were acting in a legislative capacity when they enacted the SAPO and SASO, the same principle applies here.

Interestingly enough, Intervenors agree with the Board that the Ordinance must be struck down, because it was improperly enacted, in excess of the Board's statutory powers, and a violation of the constitutional Initiative power reserved in the People. But that conclusion can be reached without any analysis of the substance of the provisions contained in the SASO and SAPO, and without rejecting any of the language that the People enacted. To the extent that the Petition asks this Court to weigh in on the SAPO and SASO, the Court must reject the invitation. Moreover, if the Court declares the Ordinance null and void – as if it had never been enacted – it further should find and declare that the condition of county law would simply return to the status quo as it existed prior to the March 31, 2021 enactment of the Ordinance – meaning that measures 5-270 and 5-278 would be valid and in force – the SASO would no longer be "amended" and the SAPO would no longer be "repealed" because the Board's attempt to do so was invalid at the outset. A contrary

---

Columbia County Oregon accused to be in violation of this ordinance may be *made a defendant in a civil proceeding* pursuant to ORS 203.065." Emphasis added. Quite differently, the Ordinance now reads that "*[t]he County may* issue a citation for any violation of this Ordinance per ORS 203.065." Ordinance at 10 (emphasis added). Thus, where the SASO permitted a private right of action for anyone to claim a violation, the Ordinance permits only the county to bring such a claim, *but does not require it to do so*. (To be sure, the next section entitled "private cause of action" also permits civil suit, but only by an "injured party," whereas the "penalties" section of the Initiative was far broader.) The Board's change to the penalties provision thus puts the fox in charge of the hen house, and all but guarantees insulation of the County from enforcement of the Initiative *designed to restrict the County's own actions*, including the enactment of the Ordinance and Petition challenging it.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

result would essentially allow an unlawful act (the Ordinance) to erase a preexisting lawful one (the SAPO and SASO).

Invalidation of the Ordinance in this case would simply cause the law to remain as it was before the filing of the Petition. It is *a fortiori* that invalidating an "amendment" to a law leaves behind and returns the law to the original. This doctrine is most prevalent in the "repeal of an amendment," and is known as "the statutory revival rule."[14] Again, if any provision of Ordinance 2021-1 is invalid, then the original provisions of SASO or SAPO simply remain as the existing law of the land.[15]

Simplifying this issue even more is the fact that SAPO became law in 2018 and SASO became law in 2021, while the Ordinance has not yet become law. Based upon the request of

---

[14] *See* Black's Law Dictionary 737 (6th ed. 1991) (defining "nullity" as "nothing; no proceeding; an act or proceeding in a cause which the opposite party may treat as though it had not taken place, or which has absolutely no legal force or effect"); *Boeing Co. v. State*, 74 Wn2d 82, 442 P2d 970, 974 (Wash 1968) ("It is the rule that an invalid statute is a nullity. It is as inoperative as if it had never been passed. . . The natural effect of this rule is that the invalidity of a statute leaves the law as it stood prior to the enactment of the invalid statute."); *Wash. State Republican Party v. Logan*, 377 F Supp 2d 907, 931–32 (WD Wash 2005) (citing *Boeing* and holding that the invalidity of Initiative 872 means "the law as it existed before the passage of Initiative 872 . . . stands as if Initiative 872 had never been approved"), *aff'd*, 460 F3d 1108 (9th Cir 2006), *overruled on other grounds by Wash. State Grange v. Wash. State Republican Party*, 552 US 442 (2008); *People v. Jamerson*, 292 Ill App 3d 944, 947 (1997) ("If an amendatory act is held to be invalid, the pre-amended statute remains in full force."); *Wade v. Nolan*, 414 P 2d 689, 696 (Alaska 1966) (citing *Faubus v. Kinney*, 389 SW 2d 887, 891–92 (Arkansas 1965)) (noting that the Arkansas "court held that invalidation of the unconstitutional amendment brought the original provision into force."); *State ex rel. Shields v. Barker*, 50 Utah 189, 195, 167 P 262, 264-65 (1917) ("where an amendatory act repeals a former law upon the same subject and the amendatory act is held invalid on constitutional grounds, the amendatory act is impotent to repeal the old law, and that the old law remains in full force and effect as though the amendatory act had not been passed. The law with respect to the municipal court in Ogden City is therefore in force precisely as it was before the amendatory act was passed."); *People ex rel. Woodward v. Assessors Op Brooklyn* 8 Abb. Pr. (n.s.) 150 (NY 1870) ("If we assume that the legislature intended to repeal the amendment made in 1804, of section 146 of the act of 1862, the only effect of such repeal would be to restore the original act.").

[15] This point also goes to the justiciable controversy deficiency of this case. A justiciable controversy exists under Oregon law when "'the court's decision in the matter will have some practical effect on the rights of the parties to the controversy.'" *De Young v. Brown*, 297 Or App. 355, 361, 443 P3d 642, 646 (2019) *citing Barcik v. Kubiaczyk*, 321 Or 174, 182, 895 P2d 765 (1995) (*quoting Brumnett*, 315 Or at 405-06). Moreover, "an otherwise justiciable case 'becomes moot when a court's decision will no longer have a practical effect on the rights of the parties.'" *Id.*

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

Columbia County, this Court has already preliminarily stayed the Ordinance until the outcome of this case. Thus, if the Ordinance is determined to be invalid, then *it will not even become law in the first place*, and its purported amendment of SASO and repeal of SAPO will never occur.

a. Whether the Ordinance and Initiatives Exercise Authority of Matters of County Concern.

The first question raised by the Petition is whether the Ordinance and Initiatives involve a matter of County concern. It seems clear that both the Initiatives and the Ordinance involve "matters of County concern." But when it comes to the Ordinance, this is *only part of the question* that needs to be asked. While "county concern" is a *necessary* condition, it is not *sufficient* for the Ordinance to fall under the authority granted by ORS 203.035.

The Board's Petition claims that "Ordinance No. 2021-1 was adopted pursuant to the authority of ORS 203.035 to 203.075." Pet. at 3. Specifically, ORS 203.035(1) permits a county board to "by ordinance exercise authority within the county over matters of county concern, to the fullest extent allowed by Constitutions and laws of the United States *and of this state*…." Emphasis added. Interestingly enough, the Petition does not fully and accurately quote this provision, leaving off the words about the constitution "of this state." Pet. at 4. Perhaps that is because the SAPO and SASO were enacted pursuant to "the initiative power … reserve[d]" by the people "to themselves" under Article IV, Section 1(2)(a) of the Oregon Constitution. When the Oregon Constitution expressly delegates to "the people" the authority to have enacted the SAPO and SASO, it implicitly denies the Board the right to override that power. Thus, to the extent that the Ordinance purports to "amend" the SASO and "repeal" the SAPO, such action by the Board is not "allowed by Constitution[]… of this state," and thus ORS 203.035 provides no authority for the Board's actions. Indeed, ORS 203.035(4) expressly states as much, that "[n]othing in this

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

section shall be construed to limit the rights of the electors of a county to propose county ordinances through exercise of the initiative power." By enacting the Ordinance to "amend" and "repeal" what the People have done, the Board has "limit[ed]" the People's ability to legislate, something that ORS 203.035(4) prohibits.

Thus, the Ordinance fails the second prong of ORS 203.035(1), in that it is not "allowed" by the Oregon Constitution, because it conflicts with the People's constitutional Initiative power. Moreover, the Ordinance violates ORS 203.035(4), because it "limit[s]" the right of the People to have passed the SAPO and SASO. When the question is presented correctly, then, it becomes clear that the Ordinance was improperly enacted and is void on its face.

Finally, the substance of SASO and SAPO is not pre-empted because the state is forbidden from trampling on the rights of local jurisdictions to control matters of local concern and enact local legislation:

> the initiative and referendum powers reserved to the people by subsections (2) and (3) of this section [Or. Const. Art. IV Section 1] are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. The manner of exercising those powers shall be provided by general laws, but cities may provide the manner of exercising those powers as to their municipal legislation. [Or Const. Art. IV, Section 1(5)].

Local legislation, also known as "municipal legislation," is outside the authority of the reservation of rights reserved to the legislature contained in Article IV Section 1(5). *See Allison v. Washington County,* 24 Or App 571, 579-586 (1976) (explaining that the legislature has legislative power over matters of statewide concern, but not over matters of local concern). Importantly, the appropriation of county funds and establishment of county enforcement practices is quintessentially a matter of local concern. Thus, the subject matter contained the Initiatives applies and pertains exclusively

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

to Columbia County as a governing body, along with its agents or employees. The Initiatives literally have no effect on anyone else, and the legislature would be constitutionally prohibited from interfering with this local decision making. *See also* Or. Const Art. IV, Sections 2 and 23.

b. Whether the Initiatives are Preempted by ORS 166.170.

Second, the Petition asks if the operative provisions of the Initiatives are preempted (Pet. at 8) by Oregon's Firearms Preemption Statute, ORS 166.170, which provides that:

> (1) Except as expressly authorized by state statute, the authority to *regulate* in any matter whatsoever the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition, is vested solely in the Legislative Assembly.
> (2) Except as expressly authorized by state statute, no county, city or other municipal corporation or district may enact civil or criminal ordinances, including but not limited to zoning ordinances, to *regulate*, *restrict* or *prohibit* the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition. Ordinances that are contrary to this subsection are void. [Emphasis added].

By its plain language, ORS 166.170 does not apply to the Initiatives, because the Initiatives do not "regulate,[16] restrict or prohibit" any activities related to firearms or ammunition. The Petition nakedly claims that "[b]oth the SAPO, SASO, and Ordinance No. 2021-1, implementing them, regulate the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms and components thereof" (Pet. at 8), but never explain how this is so. On the contrary, as the Petition acknowledges, the Initiatives merely "prohibit the use of County resources *to enforce* certain firearms laws, and any participation in enforcement of such laws" which, in turn, "regulate, restrict or prohibit" firearms-related activities. Pet. at 5 (emphasis added). The Initiatives

[16] **Error! Main Document Only.**To "regulate" means to "fix, establish, or control." Black's Law Dictionary (4th ed.). The Initiatives do not control the right to keep and bear arms, but instead do the opposite, declining to use county resources to further firearm "regulations."

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

decidedly do not have a thing to say (either more or less restrictive than state law) about "the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms … and components thereof."

Although the Petition quotes the SASO language that offending laws "*shall be treated as if they are* null, void and of no effect in Columbia County, Oregon,"[17] that treatment only applies to how the county views and treats these laws. That is in no way equivalent to a statement that any laws *are* null and void within the County. Indeed, contrary to the implication in the Petition, neither the SAPO nor the SASO declare any federal or state law *to be* null and void, neither has any effect on the *validity* of state or federal law, and neither 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. Neither the SAPO nor the SASO represents an attempt to nullify or preempt state or federal law. State and federal law are still supreme. State and federal law still exist in Columbia County, Oregon in exactly the same status as they did prior to the SAPO and SASO – just without county involvement. Indeed, the Initiatives clearly anticipate as much, noting that possession of firearms in state and federal buildings is still off limits (Ordinance at 9), that other jurisdictions may still require "permitting, licensing, registration, or other processing of applications" related to firearms (Ordinance at 9-10), and anticipating that compliance with court orders will still occur (Ordinance at 10).

The Petition lays out the "analysis for determining if a state law preempts local regulation," as being if "'both cannot operate concurrently or because the legislature meant its law to be exclusive.'" Pet. at 7 (*citing City of LaGrande v. PERB*, 281 Or 137, 148, 576 P2d 1204, 1211

[17] Similarly, the 2018 SAPO stated that offending regulations "*shall be regarded* by the People … as unconstitutional…." Emphasis added.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

(1978)). The answer to this question is that *of course* both Oregon state firearms laws and the Initiatives can operate concurrently. As noted above, the Initiatives do not alter, affect, or even challenge the validity or effect of state law in any way. State law can operate on its own unencumbered, without participation by Columbia County. The Petition claims that the preemption statute "appears to preempt all regulation of firearms, whether more restrictive or less restrictive than Oregon law." Pet. at 8. But the Initiatives *neither preempt regulation of firearms nor regulate firearms at all*; instead, they only control the county's participation in and enforcement of other firearm regulatory schemes. Specifically, the Initiatives control the county's voluntary participation in the enforcement of laws from other jurisdictions and, of course, the county always has the right to change its mind, or to enact its own regulations in the future. Had the Initiatives stated that "machineguns are legal in Columbia County," or that "no one is required to perform a background check to purchase a firearm in Columbia County," then a preemption issue *might* arise.[18] But that is not what the Initiatives do. The Initiatives do not change the legislative policy or effect of state or federal laws in any way. State law is the same as it was before the adoption of the SAPO and SASO. Because the Initiatives do not fall under the prohibitions in the Firearm Preemption Statute, the Petition's question should be answered in the negative.

c. Whether the Initiatives Exceed the Regulatory Authority Set Forth in ORS 166.176, ORS 161.171, ORS 166.173.

The Board's second preemption-related criticism is that the Initiatives "exceed the County's regulatory authority set forth in ORS 166.176, ORS 166.171, and ORS 166.173." Pet.

[18] Even if the Initiatives directly conflicted with state law, it still would be hard to explain how conflicting laws could not operate concurrently, because no matter what Columbia County has to say about firearms regulation, state law is still binding and fully applicable across the state.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

at 9. Each of these statutes contains a limited exception to the general preemption contained in ORS 166.170. But the criticism the Board presents is a *non sequitur*, because none of these provisions are affected by the Initiatives for the same reason that ORS 166.170 is not implicated here. Neither the SAPO nor the SASO involves in any way "regulating, restricting or prohibiting the discharge of firearms" (ORS 166.176) nor does either Initiative "regulate, restrict or prohibit the possession of loaded firearms in public places" (ORS 166.173). Since the Initiatives do not violate the preemption statute itself, they need not fit within one of the exceptions to that statute. For example, regulating lemonade stands "exceed[s] the County's regulatory authority" *under the firearm preemption statutes*, but it does not follow that such regulations are therefore unlawful. Likewise, because the Initiatives do not run afoul of ORS 166.170, they need not fall under one of the exceptions to that statute in order to be valid.

Indeed, as the Board admits, ORS 166.176 "does not apply here" because none of the enactments at issue were in effect prior to November 2, 1995. Pet. at 8. Moreover, that provision applies only to certain regulations of the "discharge of firearms," as does ORS 166.171. Similarly, ORS 166.173 involves "possession of loaded firearms in public places." The Initiatives here do not "regulate" any of these activities. Nor do the Initiatives in any way impact the County's future ability to regulate under the authority of ORS 166.176, ORS 166.171, or ORS 166.173. By its very terms, the SASO applies only to "acts, laws, rules or regulations, originating from jurisdictions *outside* of Columbia County…." Ordinance at 8 (emphasis added). Indeed, the County currently prohibits loaded firearms and discharge of firearms in parks, an ordinance unaffected by the Initiatives.[19] State law allows the County to continue such regulation, but does

[19] *See* https://www.columbiacountyor.gov/media/Board/Ordinances/Book%203/Parks/89-72%20Matter%20of%20Enacting%20Rules%20and%20Regulations%20for%20the%20Use%20of%20Big%20Eddy%20County%20Park.pdf.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

not mandate that it do so. And because the Initiatives by their terms do not apply to local enactments, they in no way hamper the County's ability to exercise such statutory powers in the future.

d. Whether the Initiatives "Conflict with or are Incompatible with Oregon Criminal Firearms Laws."

The Board's next criticism is that, even if not prohibited by the preemption statute, the Initiatives "may be invalidated for unreasonableness or conflict with paramount state law or constitutional provision." Pet. at 9. The Board then provides a laundry list of no fewer than 30 Oregon state statutes that directly or tangentially regulate firearms and claims that the Initiatives "likely conflict with and are incompatible with" each of these statutes. Pet. at 10-11. The Board provides absolutely no further explanation, leaving Intervenors and the Court to guess.[20]

As a preliminary matter, it is entirely unclear how the SAPO and SASO would even implicate (much less affect) many of the statutes listed by the Board. Indeed, by the terms of the SASO, the only state laws which county authorities may not enforce are "Extraterritorial Acts," defined as those "which restrict or affect an individual person's general *right to keep and bear arms*…." Ordinance at 8 (emphasis added). The SASO then provides a non-exclusive list of examples of such Extraterritorial Acts, each of which covers various ***persons***, ***arms***, and ***activities*** that are protected by the Second Amendment and Article I, Section 27. *Id.*

By contrast, many of the state statutes listed by the Board do not involve constitutionally

[20] The Board should be required to specifically address how either the SAPO or the SASO allegedly "conflict[s] with and [is] incompatible" with any of these provisions. The Board should not be able to cite to thirty laws, then ask this Court to wade through each provision and do the Board's work for it. If there are issues to be raised, then the Board needs to address each one specifically so that this Court and Intervenors (and the citizens of Columbia County) can address each of the Board's concerns with the Initiatives.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

protected persons, arms, or activities. For example, the right to "bear arms" in no way conflicts with statutes (including but not limited to) prohibiting "negligent wounding," "pointing a firearm at another" person without a self-defense justification, or "hunting in cemeteries." Likewise, some of the statutes in the Board's list do not involve persons who are part of the "the people," including "certain persons" such as small children and illegal aliens, or "inmates of institutions" while they are incarcerated. Finally, various statutes on the Board's list do not implicate protected "arms," such as possessing "destructive devices" that do not constitute bearable arms. No court has ever held (and likely no litigant has ever even argued) that the Second Amendment or Article I, Section 27 create constitutional rights to shoot at trains.

On the other hand, some of the state statutes on the Board's list certainly would be considered Extraterritorial Acts. *Compare, e.g.,* Ordinance at 8 ("background check requirement on firearms") with ORS 166.434 ("Requirements for Criminal Background Checks").[21] But that does not mean that the Initiatives "likely conflict with and are incompatible with" those statutes. *See* Pet. at 10. As the Board has noted, the test for incompatibility is whether "'the two [enactments] cannot operate concurrently'" or if "'the legislature intended the state law to be exclusive.'" Pet. at 9 (quoting *State v. Tyler*, 168 Or App 600, 603-04, 7 P.3d 624 (2000)). First, it is hard to see how the legislature could have passed a preemption statute (specifically delineating which areas of state law it meant "to be exclusive") while simultaneously intending that other unspecified state laws also be considered "exclusive." Second, as noted above, the Initiatives do not overlap with or conflict with the list of state laws provided by the Board, because they neither authorize nor prohibit anything. Rather, they simply determine how the County's resources will

[21] The Petition quotes the incorrect statute, ORS 166.412. Pet. at 10.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

be allocated and used, and exercise prosecutorial discretion at a county level that certain Extraterritorial Acts are not to be enforced by county officials.[22] Third, there is no evidence or explanation by the Board as to how a state law (such as requiring a background check) cannot "operate concurrently" with a county ordinance that such background check requirement will not be enforced by the County. As noted above, the exercise of prosecutorial discretion does not render the state law invalid or unenforceable in any way, and all state laws continue to be fully operational and enforceable just as they were before enactment of the SAPO and SASO. In sum, none of the state laws listed by the Board is incompatible with the Initiatives at issue.

e. Whether the Initiatives Conflict with or Are Incompatible with Federal Firearms Laws.

The Petition cites the Supremacy Clause of the United States Constitution, Article VI, Clause 2, for the proposition that it "invalidates state or local laws interfering with, and being contrary to, federal law." Pet. at 11-12. The Petition then lists five federal laws with which the Initiatives "likely conflict" – the Firearms and Ammunition Excise Tax (26 USC § 4181); mailings of concealable firearms (18 USC § 1715); National Firearms Act (26 USC § 5845, et seq.); Gun Control Act of 1968 (Pub. L. 90-618, 82 Stat. 1213); Firearm Owners Protection Act of 1986 (Pub. L. No. 99-308, 100 Stat. 449); the Brady Handgun Violence Protection Act of 1993 (Pub. L. No.

[22] The Petition also cites to *City of Eugene v. Kruk*, 128 Or App 415, 417, 875 P2d 1190 (1994) for the proposition that "'[i]f the ordinance prohibits conduct that the statute permits, the laws are in conflict and the ordinance is displaced under Article XI, section 2 [of the Oregon Constitution].'" Pet. at 9. *Kruk* dealt with a person passively resisting arrest, which Oregon law expressly says is allowed (*see* ORS 162.315(2)(c)) and a City of Eugene ordinance, EC § 4.907, which expressly prohibited "'any physical act, including refusal to leave a particular area in response to a lawful order from a police officer.'" *Kruk* at 420. The facts of *Kruk* are vastly different, because in that case, it was a person's conduct that was being criminalized by activity a statute expressly made lawful. Here, the Ordinance does not criminalize any activity that is authorized by a statute or purport to legalize any criminal activity, but simply declines to participate in enforcing state law prohibitions and mandates. *See* Ordinance at 7 ("refuse to cooperate").

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

103-159, 110 Stat 3009); and the Gun-Free School Zones Act (18 USC § 922(q)). *See* Pet. at 12.

Yet none of the provisions in the SAPO and SASO are "contrary to," none "interfere with," and none are in "conflict with" these federal statutes. By its plain terms, the SASO declares only that "Columbia County agents, employees, or officers" will not enforce certain federal laws. *See* Ordinance at 8. There is absolutely nothing in the Initiatives declaring federal law to be invalid, different, altered, amended, repealed, or otherwise impeding its enforcement in Columbia County. On the contrary, the Initiatives merely fall in line with what the Supreme Court has already clearly said on the subject, which is that the federal government has absolutely no authority to compel state and local authorities to participate in the enforcement or implementation of federal law. In a case involving provisions of the Brady Handgun Violence Protection Act of 1993 – ironically, one of the acts that the Petition alleges to be in conflict with the Initiatives – the Court expressly concluded that:

> The Federal Government may neither issue directives requiring the States to address particular problems, **nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program**. … such commands are fundamentally incompatible with our constitutional system of dual sovereignty. [*Printz v. United States*, 521 US 898, 935 (1997) (emphasis added).]

The SASO makes this point and cites the *Printz* decision. Ordinance at 6. In other words, the Supreme Court has explained at great length how state and local authorities have no duty to enforce federal law, but the Board now argues that a county initiative which instructs local authorities not to enforce federal law is somehow problematic. The Board's criticism should be rejected on its face.

Ironically, not only has the Supreme Court already foreclosed the Board's line of argument, but so too has the law of this state. In Oregon and around the country, state level statutes,

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

"sanctuary" referendums and Initiatives, and other acts are not new or unheard of. In fact, Oregon has a storied history of refusing to enforce (and indeed sometimes ignoring entirely) federal law.

For example, the Initiatives are not meaningfully different from Oregon's stance on illegal immigration, as expressed in Oregon's Sanctuary Law, ORS § 181A.820, which states that "(1) No law enforcement agency of the State of Oregon or of any political subdivision of the state shall use agency moneys, equipment or personnel for the purpose of detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws." In other words, the State of Oregon has explicitly instructed its authorities not to enforce *federal immigration law*, but the Board claims that somehow the People's instructions that Columbia County officials not enforce *federal gun control law* is totally different.

Likewise, in 2014 Oregon voters passed Measure 91, which allows recreational marijuana usage in Oregon, in *direct conflict with* federal law.[23] Indeed, marijuana is still illegal under federal law, where it is classified as a Schedule I drug, defined in 21 USC § 812 as one with "a high potential for abuse[,] no currently accepted medical use in treatment in the United States[; and] a lack of accepted safety for use of the drug or other substance under medical supervision." Marijuana is illegal at the federal level, period.[24] Because it purports to legalize what federal law makes unlawful, Measure 91 thus goes far beyond the SASO and SAPO. The Initiatives in this

---

[23] https://www.oregon.gov/olcc/marijuana/Documents/Measure91.pdf.

[24] Moreover, Measure 91 plainly recognizes that marijuana is federally illegal and makes certain exceptions. https://www.oregon.gov/olcc/marijuana/Documents/Measure91.pdf, Section 12 ("Contracts. No contract shall be unenforceable on the basis that manufacturing, distributing, dispensing, possessing, or using marijuana is prohibited by federal law."); *See Mayfly Grp., Inc. v. Ruiz*, 241 Or App 77, 80, 250 P3d 360, 361 (2011) (citation omitted) ("The general rule is that an agreement may not be enforced if it is illegal.")

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

case merely set County enforcement policy, while Measure 91 expressly declares to be lawful something that federal law declares unlawful. Even more ironically, at the County level, the Board has adopted marijuana policies regarding land use and zoning, involving growing a crop that is illegal under federal law,[25] and imposing a tax on marijuana.[26] It is some wonder that the Board apparently believes these ordinances are not preempted by federal law, while SAPO and SASO violate the Supremacy Clause of the U.S. Constitution. *See* Pet. at 12.

f. Whether the Initiatives Conflict with or Are Incompatible with the Duties and Oaths of the Sheriff and District Attorney.

The Board's criticisms of the Initiatives as applied to the Sheriff and District Attorney fall on their face. The Board cites to ORS 206.010 (it is the Sheriff's "duty to … [a]rrest and commit to prison all persons who break the peace" or are "guilty of public offenses") and ORS 8.670 (the District Attorney "shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses"). Pet. at 13-14. The Board then cites to ORS 204.020(2) and notes that these officials must take an oath of office "to the effect that the person will support the Constitution of the United States and of this state, and faithfully carry out the office being assumed." *Id.*

From these various statutory provisions, the Board draws some truly bizarre conclusions. First, after citing the Sheriff's oath to uphold state and federal *constitutions*, the Board claims that "[t]he Sheriff is therefore required to follow Federal and State *laws*." Pet. at 13 (emphasis added). On the contrary, the Sheriff never swears an oath to enforce any particular statutory provision.

---

[25] https://www.columbiacountyor.gov/media/Board/Ordinances/Book%203/Medical%20Marijuana/2015-3%20Moratorium%20on%20Medical%20_%20Recreational%20Marijuana.pdf.

[26] https://www.columbiacountyor.gov/media/Board/Ordinances/Book%203/Medical%20Marijuana/2016-3%20-%20Adopt%20Tax%20on%20Retail%20Sale%20of%20Marijuana.pdf.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

Generally, he is responsible for enforcing the law,[27] but if a statute or regulation conflicts with or violates either state or federal constitution (in this case, the People have determined as much by adoption of the SAPO and SASO), the Sheriff in fact is *duty bound to disobey the unconstitutional law* in order to preserve constitutional order.[28] Second, the Board claims that the Sheriff is bound to enforce not only "State laws" but also "Federal … laws." Pet. at 13. Of course, the Supreme Court in *Printz* explicitly rejected this notion, as has this state through adoption of the Oregon Sanctuary Law and Measure 91. Third, after reciting the provisions of ORS 8.670, the Board appears to conclude that the District Attorney must enforce *every* violation of *every* law on the books – including the ones that the People who voted for him have recognized to be unenforceable through adoption of the SAPO and SASO. This is simply not the case. As the Court of Appeals has noted, while the District Attorney's "duties … include the prosecution of criminal conduct," while "deciding 'when, how, and against whom to proceed' he exercises the sort of discretion for which he is immune at common law." *Jackson v. Multnomah County*, 76 Or App 540, 545-46, 709 P2d 1153, 1156 (1985). Nearly a century ago, the Oregon Supreme Court opined that "'The district attorney is a *quasi*-judicial officer. He represents the commonwealth, and the commonwealth demands no victims. It seeks justice only, equal and impartial justice, and it is as much the duty of the district attorney to see that no innocent man suffers, as it is to see that no guilty man escapes.'" *Watts v. Gerking*, 111 Or 641, 658, 228 P. 135, 137 (1924).

---

[27] But *see, e.g.*, M. Bernstein, "Portland police to limit car searches, no longer pursue minor traffic infractions," Police1.com (June 22, 2021).

[28] Tellingly, there is *nothing unconstitutional* about federal laws which restrict immigration or prohibit marijuana usage, and yet Oregon refuses to enforce these laws. But when it comes to laws that are *actually unconstitutional* because they violate the Second Amendment and Article I, Section 27, the Board apparently believes these statutes must be enforced at any cost.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

Moreover, prosecutorial discretion is routinely exercised by District Attorneys throughout Oregon. For example, the Multnomah County's District Attorney has refused to prosecute offenders under a number of criminal statutes.[29] In response to riots within the county, the District Attorney has stated that he will not bring charges for the following crimes (unless accompanied by a charge outside of this list): Interfering with a peace officer or parole and probation officer (ORS 162.247); Disorderly conduct in the second degree (ORS 166.025); Criminal trespass in the first and second degree (ORS 164.245 & ORS 164.255); Escape in the third degree (ORS 162.145); Harassment (ORS 166.065); and Riot (166.015). If the Multnomah County's District Attorney can refuse to prosecute violent rioters, without even having received the approval of the voters, surely the Columbia County District Attorney (at the direction of voters) does not have to charge every gun owner who violates statutes originating from outside Columbia County.

Finally, the Board raises objections based on various funding statutes, alleging that the County is "required to appropriate funds to pay expenses of the County Sheriff" and is "required to provide the District Attorney and any deputies 'such office space, facilities, supplies and stenographic assistance.'" Pet. at 14-15 (citing ORS 294.338, ORS 8.850). The Board argues that the Initiatives "prohibit the Board of Commissioners from appropriating such funds…." *Id.* at 14. The Board's *non sequitur* misses the mark and is a bit like claiming the Initiatives prohibit the County from funding snow removal, on the theory that the Sheriff might then drive on the plowed roads when he is enforcing gun control laws.

First, nothing in either Initiative prohibits the Board from appropriating general expense funds for the Sheriff and District Attorney. Second, even if the Board chose to impose such a

[29] *See* https://www.koin.com/news/protests/multco-da-mike-schmidt-to-announce-new-protest-policy/.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

limitation (for example, "none of the funds herein appropriated shall be used to enforce Extraterritorial Acts as defined by the SASO"), that would not amount to a violation of either statute, because neither statute creates a blank check whereby the Board is simply required to hand over the purse strings, relinquishing any and all control over how much is spent and for what activities. Third, the Board's criticism wrongly assumes that the Sheriff and/or District Attorney will be at odds with the Board, and *will desire to enforce unconstitutional laws* that the SAPO and SASO say they may not enforce. On the contrary, as the Initiatives are now the law within Columbia County and are valid and constitutional, it must be assumed that county officials will follow the law.

g. Whether the Initiatives Require Violations of Oaths of Office.

Similar to its criticisms relating to the Sheriff and District Attorney, the Board claims that the Initiatives conflict with the oaths of office required of various county personnel, including the Columbia County Justice of the Peace (ORS 51.250; Pet. at 15) and a parole and probation officer (Pet. at 17). The Board correctly notes that the oath for the Justice of the Peace is "to the effect that the person will support the Constitution of the United States and the Constitution of Oregon and will faithfully and honestly perform the duties of the office." Pet. at 15. Next, the Board claims that a "Parole and probation officer is also required to take an oath of office to support the constitution and laws of the State of Oregon." Pet. at 17. Indeed, ORS 137.620 requires that "[e]ach parole and probation officer appointed by the court, before entering on the duties of office, shall take an oath of office." But the Board does not explain how the latter duty to "support … laws of the State" somehow trumps the duty to "support the constitution." As noted above, the primary duty of both officers is to the federal and state constitutions, and therefore they have a

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

duty not to enforce unconstitutional laws and regulations.[30] The SAPO and SASO thus do not conflict with these oaths, but rather reaffirm them.

h. Whether the Initiatives Conflict with Budget Statutes.

The Board next makes various claims that the Initiatives conflict with state budget statutes that require the county to appropriate funds for various departments. For example, the Board notes that, under ORS 294.338, the County is "required to appropriate funds for the operation of the Justice Court." Pet. at 16.[31] Next, the Board points out that, under ORS 1.185, the County is "required to provide suitable and sufficient courtrooms, offices and jury rooms for the court," and "provide maintenance and utilities for" the same. Pet. at 16. Together, the Board appears to believe that an activity like a maintenance person changing a light bulb in a courtroom where firearms cases are heard might constitute "engag[ing] in any activity that aids in the enforcement or investigation relating to firearms, accessories or ammunition." Pet. at 16; *see* Ordinance at 7.

This is a truly bizarre reading of the Initiatives and, taken to its absurd logical conclusion, would mean that the County would be unable to perform the most basic functions of government, because such provision of any service could somehow be seen to "aid[] in the enforcement" of Extraterritorial Acts. On the contrary, it is axiomatic that "[s]tatutes should be interpreted to avoid absurd results." *State v. Annen*, 12 Or App 203, 209, 504 P.2d 1400, 1403 (1973). *See also State v. Person*, 316 Or 585, 602, 853 P2d 813, 822 (1993) ("a statute should not be construed so as to ascribe to the legislature the intent to produce an unreasonable or absurd result."). Yet under the

[30] For example, the Fugitive Slave Act of 1850 (Pub. L. 31-60) required those in free states to capture and return escaped slaves to slave states.

[31] The Board also asks whether the Initiatives violate "other municipal budget law" (Pet. at 16), but provides no insight into this open-ended assertion, apparently asking Intervenors and this Court to make the Board's case for it.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

Board's position, the County would be prohibited from performing maintenance on its roads, because a federal agency like the ATF might then drive its vehicles on county roads in order to conduct an investigation or serve a warrant. No, the Initiatives do not require the County to "blow the bridges."

The Board also claims that, under ORS 419A.020 and ORS 294.338, the Initiatives "prohibit the County from appropriating County or other funds to … the Juvenile Department [or] Department of Community Justice-Adult … to aid in the enforcement of firearms regulations…." Pet. at 17, 19. This argument fails for the same reason it does as for Sheriffs, because it wrongly assumes that these departments will seek to enforce Extraterritorial Acts in violation of the SAPO and SASO. Second, when it comes to the Juvenile Department, children under a certain age are not part of "the people" who currently possess a right to keep and bear arms (until their maturity). Additionally, the Initiatives plainly exempt "[a]ctions in compliance with a judgment or order of a District or Circuit court…." Ordinance at 10. This no doubt includes actions of parole and probation officers which, under the statute, are done pursuant to orders "by the judge of any court," "by any court," and as "required by any court." *See* Pet. at 17-18 (quoting ORS 137.630). Nothing in the Initiatives conflict with these statutes.

i. Whether the Initiatives Conflict with Various Statutory Duties and Powers.

The Board argues that the Initiatives conflict with various statutory duties and powers to enforce the law. First, the Board claims that "the Columbia County Justice of the Peace is required to hear and rule on [] firearms crimes" under ORS 51.050. Pet. at 15. The Board is trying to create a conflict where none exists. To be sure, ORS 51.050 sets the jurisdiction for the Justice of the Peace, but ORS 51.020 permits the County Board to establish or modify the boundaries of that jurisdiction. The state legislature is specifically prohibited from passing laws regulating the

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

jurisdiction and duties of Columbia County justices of the peace. Or Const Art IV, Section 23. Therefore, the County and its people are in charge of such local matters. Other statutes give the Board additional authorities over the office. *See* ORS 51.025, 51.028.

On the contrary, it is unlikely that a problem will ever arise, because if the Sheriff and District Attorney do not bring misdemeanor charges or cases, the Justice of the Peace will not be required to rule on such a case. Additionally, the Justice of the Peace is an office elected by and works for the voters in a county – the same voters who enacted the SAPO and SASO. Lastly, it is worth noting that Justice Courts have jurisdiction "concurrent with any jurisdiction that may be exercised by a circuit court or municipal court."

Second, the Board claims that the "Columbia County Department of Criminal Justice-Juvenile Division … has authority to enforce firearms offenses as to any child, ward, youth or youth offender committed to its care" under ORS 419A.016. Pet. at 17. Additionally, the Board notes that, "[p]ursuant to ORS 137.620, all parole and probation officers have 'the powers of peace officers'…." Pet. at 17. Of course, as noted above, certain young people have not yet obtained certain constitutional rights including the right to keep and bear arms. Moreover, having the "power of a peace officer as to any child committed to the care of the director or counselor" (ORS 419A.016), and "the powers of peace officers in the execution of their duties" (ORS 137.620), these officials are bound to the same oath to uphold the federal and state constitutions as is the Sheriff (discussed above). Additionally, as noted above, the Initiatives permit compliance with court orders, which would include monitoring youth and paroled offenders. Ordinance at 10. Finally, the Initiatives "do not apply to person[s] who have been convicted of felony crimes." *Id.*

j. Whether Ordinance No. 2021-1 Applies within the Incorporated Cities of the County.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

The Petition next asks whether, under ORS 203.030, the Ordinance applies to incorporated cities within the County. Pet. at 19. The Petition lists the incorrect statute. The correct statute is ORS 203.040 and it states, "[e]xcept by consent of the governing body or the electors of a city and except in cities not regularly operating as such through elected governmental officials, ordinances adopted under ORS 203.030 to 203.075 in exercise of the police power shall not apply inside an incorporated city." The plain text of the Ordinance and SASO and SAPO demonstrate that they apply to the County, its agents, officers and employees. For instance, the SASO clearly states that "[n]o agent, employee, or official of Columbia County, a political subdivision of the State of Oregon, while acting in their official capacity shall…." Ordinance at 7. This language applies to Columbia County personnel no matter where their actions occur, but clearly does not apply to a city or state police officer, agent, employee or official.

k. Whether the Columbia County Sheriff has Authority to Determine the Constitutionality of the Laws He Enforces.

Next, the Petition questions certain language from the SAPO which requires the Sheriff to "'determine as a matter of internal policy and county concern per ORS 203.035'" whether various statutes and regulations which are "'enforceable within his/her jurisdiction'" violate federal or state constitutional rights. Pet. at 20. This language, the Petition argues, means that SAPO has "give[n] the Sheriff authority to legislate the constitutionality of firearms laws as a matter of county concern," contrary to ORS 203.035, which provides that "the governing body or the electors of a county may by ordinance exercise authority within the county over matters of county concern."

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

First, as noted above, the Sheriff[32] already has a duty, pursuant to his oath of office, to determine the constitutionality of *all* the laws he enforces, and has a duty *not to enforce* ones which violate state or federal constitutional provisions. The SAPO thus merely reiterates a duty which already exists by virtue of the Sheriff being the County's chief law enforcement officer. Second, nothing in the Ordinance states that the Sheriff's determination is binding on anyone outside his own office. Indeed, the SAPO specifically explains that the Sheriff's determination to setting "a matter of internal policy" and dealing with matters that are "enforceable within his/her jurisdiction." Third, the SAPO language "county concern per ORS 203.035" simply delineates the scope of the Sheriff's duty to matters that involve "county concern," meaning the Sheriff does need to determine the constitutionality of a Florida statute that has no effect in the county. Fourth, the SAPO does not permit the Sheriff to "legislate" (to make law), but rather to interpret the law that he is tasked with enforcing – again, a duty that both constitution and statute already impose on him, aside from the language in the SAPO. Finally, ORS 203.035 and Or Const. Art IV, Section (1)(5) permit the Board and the People to "exercise authority within the county over matters of county concern," but certainly they are not the only authorities within the County who do so (*see* ORS 206.010's provisions of the Sheriff's duties which certainly require him to "exercise authority over matters of county concern."). Again, the SASO in no way conflicts with ORS 203.035.

l. Whether the SAPO's Provision for Attorney's Fees Conflicts with Oregon Law.

[32] A sheriff is a constitutional officer. "A sheriff shall be elected in each County for the term of Two years, who shall be the ministerial officer of the Circuit, and County Courts, and shall perform such other duties as may be prescribed by law." Or Const. Art. VII, § 16. *See also* Or Const. Art. VI, § 6 ("There shall be elected in each county by the qualified electors thereof at the time of holding general elections, a county clerk, treasurer and sheriff who shall severally hold their offices for the term of four years.").

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

Language in the SASO creates a private cause of action for injured parties to challenge the actions of Columbia County personnel who violate its terms.[33] Ordinance at 10. The SASO then provides that "the court shall award the prevailing party, other than the government of Columbia County or any political subdivision of the county, reasonable attorney fees." *Id.* This attorney's fees provision, the Board asserts, "establish[es] that only one party is eligible for an award of attorney fees," and "likely conflict[s] with Oregon law." Pet. at 21. Of course, the SASO provision does not, as the Board claims, "establish that only one party is eligible," but instead that "the prevailing party" is eligible for fees, unless that is the Columbia County government. It is also entirely unclear with what "Oregon law" the SASO is alleged to be in conflict. The Board correctly points out that fee awards are generally "based on specific statutory authority" (Pet. at 20-21), but fails to explain how the SASO is ineligible to serve as such an authority. The Board similarly provides no explanation, no citation to statute, and no reference to any case law that prohibits an Initiative from creating an award of attorney's fees to the prevailing party in litigation.

m. Whether the SASO's Waiver of Sovereign Immunity Conflicts with Article IV, Section 24 of the Oregon Constitution or the Oregon Tort Claims Act.

The Petition next asks whether the SASO conflicts with Article IV, Section 24 of the Oregon Constitution, because it waives immunity for Columbia County personnel when suit is brought under the private cause of action. Pet. at 21; Ordinance at 10. Article IV, Section 24, in turn, provides that "[p]rovision may be made by general law, for bringing suit *against the State*, as to all liabilities originating after, or existing at the time of the adoption of this Constitution; but no special act authorizing [sic] such suit to be brought, or making compensation to any person

[33] The Board does not challenge the SASO's creation of a private cause of action.

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

claiming damages *against the State*, shall ever be passed." Or Const. Art. IV, § 24 (emphasis added). The SASO does not authorize a private cause of action "*against the State*," but against "any entity, person, official, agents, or employee of Columbia County." Ordinance at 10. To be sure, "counties share the state's sovereign immunity from suit," however "employees of governmental bodies have not been immune from suit even if the governmental bodies are themselves immune." *Gunn v. Lane County*, 173 Or App 97, 100, 20 P3d 247 (2001). Indeed, as the Oregon Supreme Court recently explained, "the state acts through its employees, who are not entitled to immunity…." *Busch v. McInnis Waste Sys.*, 366 Or 628, 637, 468 P3d 419 (2020).

The Oregon Tort Claims Act provides statutory immunity from certain torts, but not all of them. The Board cites to ORS 30.265(2) for the proposition that the Oregon Tort Claims Act is the "exclusive remedy for torts of a public entity and its officers, agents and employees." *See*. Pet. at 22. But this leaves out a crucial part of that section, which states, "acting within the scope of their employment or duties and eligible for representation and indemnification under ORS 30.285 or 30.287."[34]

The relevant portion of the Oregon Tort Claim Act in ORS 30.265 only grants immunity to public bodies, their officers, employees or agents who are acting within the scope of their employment or duties (ORS 30.265(6)) for certain types of actions, of which only two are relevant here. The first is subsection (c), which applies to "[a]ny claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is

[34] The Board's blanket proposition is incorrect, which case law demonstrates: "[n]ot every intentional tort by an employee is outside the scope of employment." *Dryden v. State Acci. Ins. Fund Corp*., 103 Or App 76, 81, 796 P2d 397, 399-400 (1990). Likewise, "a public body's act of adopting a law or rule in violation of an applicable procedural or substantive requirement is not a tort under ORS 30.260(8)." *Comcast of Ore. II, Inc. v. City of Eugene,* 346 Or 238, 250, 209 P3d 800, 807 (2009).

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

abused." This section does not apply here because the SASO eliminates the County officer, employee, or agent's discretion away when it comes to enforcement of Extraterritorial Acts, stating clearly that they are not to be enforced. The second subsection (f) applies to "[a]ny claim arising out of an act done or omitted under apparent authority of a law, resolution, rule or regulation that is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice." This provision, as well, does not apply here because SASO eliminates "apparent authority" by defining Extraterritorial Acts, enforcement of which is the only thing prohibited by SASO. At bottom, a typical violation of the SASO would by definition fall outside of the actions covered, protected, and subject to immunity under the OTCA.

Furthermore, the SASO requires "knowingly" Ordinance at 10, so "unknowingly", "accidental" or other general defenses would certainly be available under SASO, just not governmental immunity, unless the OTCA did actually apply to the facts and circumstances of an individual case. But even if there were some OTCA application to the SASO, that would only mean that a civil suit pursuant to the SASO would be subject to the procedures set out in the OTCA. It would not mean that the SASO is "superseded" or "in conflict or inconsistent with" the OTCA.

n. Whether the Initiatives are Unconstitutionally Vague.

The Board's final question is whether some of the definitions and terms in the Initiatives are unconstitutionally vague. Pet. at 22-23. For example, the Board challenges the terms "Extraterritorial Acts" and "Ancillary firearm rights" as being insufficiently defined.[35] *Id.* at 23.

[35] As with its other criticisms, the Board does not explain why these terms and their definitions are insufficiently clear. On the contrary, the Initiatives clearly demonstrate what is and is not prohibited, and

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

The Board then claims that "*a citizen* is entitled to clear notice of what conduct is prohibited by law" and argues that the Initiatives therefore violate "[t]he 'void for vagueness' doctrine embodied in the due process clause of the Fifth Amendment." *Id.* (emphasis added).[36] Of course, the Ordinance does not bind *the citizens* of Columbia County, but rather only the *County government* and those who work on its behalf. Neither the Ordinance, nor the SASO, nor the SAPO apply to an ordinary person. The Board's claim, then, is that the County has due process rights under the Fifth Amendment as against the People themselves.

It hardly seems surprising, but the U.S. Supreme Court has expressly foreclosed such an argument, holding long ago that a "City cannot invoke the protection of the Fourteenth Amendment … equal protection clause … against the State" (*Newark v. New Jersey*, 262 US 192, 196 (1923)), and that "[a] municipal [body] has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator." *Williams v. Baltimore*, 289 US 36, 40 (1933). As in those cases, the People of Columbia County, Oregon are sovereign, not the Board. The Board thus possesses no constitutional rights that can be invoked against an Initiative enacted by the People. *See also* D. Lawrence, "Judicial Doctrines That Differentiate Local Governments and Private Persons or Entities," Local Government Law Bulletin, UNC School of Government, May 2014 ("The federal constitutional protections embodied in the Contract Clause, the Due Process Clause, and the Equal Protection Clause do not extend to local

---

"A criminal statute is sufficiently definite if persons of common intelligence can understand what is prohibited; it need not define an offense with such exactitude that a person could determine in advance whether specific conduct in all possible factual circumstances will be found to be an offense." *State v. Cantwell*, 66 Or App 848, 853, 676 P2d 353, 356 (1984) (citation omitted).

[36] For whatever reason, the Petition relies only on the Fifth Amendment's due process clause (binding only the federal government) and does not mention the due process clause of the Fourteenth Amendment (which binds the states).

TYLER SMITH & ASSOCIATES, P.C.
181 N. Grant Street. Suite 212,
Canby, Oregon 97013
503-266-5590; Fax 503-212-6392

governments."). The constitution exists to protect the people from their government, not the government from the people.

CONCLUSION

The County Board improperly seeks to negate the will of Columbia County citizens who enacted the Initiatives. The Board's Petition should be denied and dismissed. Additionally, pursuant to ORS 33.720(5), the Board should be required to pay Intervenors' costs, and pursuant to the SASO, the Board should be required to pay Intervenors' attorney's fees for having forced Intervenors into court to defend the Initiatives that the People enacted against the actions of the Board taken to undermine their will.

DATED this 24th day of June, 2021.

Tyler Smith & Associates, P.C.

s/ Tyler Smith
Tyler Smith, OSB# 075287
Of Attorneys for Movants
181 N. Grant Street, Suite 212
Canby, OR 97013
Phone: 503-266-5590; Fax: 503-212-6392
Tyler@RuralBusinessAttorneys.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th of June 2021, I caused a true copy of INTERVENORS' OPENING BRIEF, DECLARATION OF TYLER SMITH and EXHIBITS 1-3 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:

Sarah Hansen
Columbia County Counsel
230 Strand St.
St. Helens OR 97051
Attorney for Petitioner

Steven Berman
209 SE Oak St. STE 500
Portland, OR 97204
Of Attorneys for Pile, Cavanaugh, Dudzic and Lewis

Brian Simmonds Marshall
Senior Assistant Attorney General
100 SW Market Street
Portland, OR 97201
Of Attorneys for Oregon Attorney General

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 24th day of June 2021.

Tyler Smith & Associates, P.C.

s/ Tyler Smith_____
Tyler Smith, OSB# 075287
Attorney for Intervenors
181 N. Grant Street, Suite 212
Canby, OR 97013
Phone: 503-266-5590; Fax: 503-212-6392
Tyler@RuralBusinessAttorneys.com