IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF COLUMBIA

IN THE MATTER OF THE PETITION of the Board of County Commissioners of COLUMBIA COUNTY, a political subdivision of the State of Oregon, Petitioner For a Judicial Examination and Judgment of the Court as to the Regularity, Legality, Validity and Effect of the Columbia County Second Amendment Sanctuary Ordinance	Case No. 21CV12796 Hon. Ted E. Grove **THE COLUMBIA COUNTY RESIDENTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Hearing Date: July 21, 2021 – 10:30am

INTRODUCTION

As set forth extensively in the briefing already before the Court, the Columbia County Second Amendment Sanctuary Ordinance (the "SASO") is unconstitutional and invalid because it is preempted by state and federal law. Intervenors' attempts to avoid these preemption issues by relying on procedural objections are misplaced. Intervenors' argument on the merits hinges on a narrow construction of the SASO that is belied by the text of the ordinance and the voters' intent. But even under Intervenors' narrow reading, the SASO would be unconstitutional.

For the reasons stated below and in the rest of the briefing submitted to the Court by Columbia County Residents Robert Pile, Shana Cavanaugh, Brandee Dudzic, and Joe Lewis (the "Columbia County Residents") as well as by the Attorney General, the Court should reject Intervenors' procedural and substantive arguments, find the SASO unconstitutional as preempted by Oregon and federal law, and grant the Columbia Count Residents' Motion for Summary Judgment.

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ARGUMENT

A. Intervenors Misunderstand Validation Proceedings Under ORS 33.710 and ORS 33.720.

Intervenors appear to misunderstand the procedural underpinnings of this matter in several ways. First, Intervenors continue to argue that the County had no authority to adopt the SASO and that the Court has no power to look at "the content of the Initiatives." *See* Intervenors' Response at 3. As discussed in the Columbia County Residents' Response to Intervenors' Motion for Summary Judgment (the "Columbia County Residents' Response") and elsewhere in the briefing, the voters and Board of County Commissioners of Columbia County (the "Board") have co-equal legislative power. *See, e.g.*, *Carson v. Kozer*, 126 Or 641, 644, 270 P 513 (1928). The Board appropriately exercised that power by passing Ordinance 2021-1, incorporating the 2018 and 2020 Measures (with slight modifications to account for inconsistencies between the two measures) into the SASO, and repealing the 2018 Measure. *See* Columbia County Residents' Response at 2–4; Petitioner's Reply to Intervenors' Opening Brief ("Petitioner's Reply") at 2–3; the Attorney General's Response to Intervenors' Opening Brief ("Attorney General's Response") at 2–3. The only ordinance before the Court is the SASO, which the Court may properly review under ORS 33.720.[1]

[1] Intervenors argue that "[i]nvalidating a repeal, would revive the SAPO and invalidating the amendment via Ordinance would restore the original SASO." Intervenors' Response at 2. That is incorrect. Because "the content of the Initiatives," as amended and incorporated, is precisely what is before the Court, a court order finding the SASO preempted ends the matter. It would not put into effect the very laws found preempted. *See* Petitioner's Reply at 2 ("In Ordinance No. 2021-1, Columbia County amended the SASO and repealed the SAPO. With that action, there is only one Ordinance in existence, that being Ordinance No. 2021-1, the Columbia County Second Amendment Ordinance, which is now properly before this Court.").

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Second, Intervenors argue, without citing to any authority, that the Columbia County Residents are not interested parties in this litigation.[2] *See* Intervenors' Response at 10–11. As the Columbia County Residents detailed in their response, ORS 33.720 provides "electors, freeholders, [and] taxpayers" standing to appear in validation proceedings. *See* Columbia County Residents' Response at 7 (under ORS 33.720(2), (3), interested parties, including "electors, freeholders, [and] taxpayers" are permitted as "interested parties to appear in the validation proceeding"); *see, e.g., School Dist. No. 17 of Sherman Cty. v. Powell*, 203 Or 168, 279 P2d 492 (1955) (district voter, property owner and taxpayer allowed to participate in validation proceeding brought pursuant to ORS 33.710, and to appeal). There is no requirement, as Intervenors argue without citation, that interested parties must state whether or not they voted for a measure. *See* Intervenors' Response at 10–11. As taxpayers, electors, and property owners in Columbia County, the Columbia County Residents are proper interested parties under ORS 33.720.

Third, contrary to Intervenors' assertion otherwise, *see* Intervenors' Motion at 3, 15 n. 11, once interested parties like the Columbia County Residents have entered in a validation proceeding under ORS 33.720, such interested parties may fully participate in the litigation. As parties to the proceeding, the Columbia County Residents are not limited in the arguments they may bring to specific statutes referenced in the governing body's petition. *See, e.g.*, *Multnomah Cty. v. Mehrwein*, 366 Or 295, 299–301, 314–15, 462 P3d 706 (2020) (addressing specific arguments put forth by interested parties in validation proceeding). Intervenors do not – and cannot – cite to any statute or rule that a petition submitted pursuant to ORS 33.710 and ORS 33.720 must contain all arguments a court can address. Moreover, Intervenors' concern is misplaced; none of the interested parties here put forth arguments not raised in the Petition itself,

[2] Intervenors criticize Columbia County Resident Joe Lewis, a survivor of gun violence, for opposing the SASO. Intervenors then assert that Mr. Lewis should support Intervenors' interests in possessing firearms for potential use against governmental officials and agents. Intervenors' Response at 11 n. 9. Intervenors' criticisms, and efforts to exploit Mr. Lewis's experiences to support Intervenors' cause, are highly inappropriate and merit no further mention.

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which addresses implied and express state and federal preemption, along with numerous other issues addressed by the parties. *See* Petition, ¶¶ 11–34.

B. The SASO Is Unconstitutional and Invalid Under State and Federal Law.

1. The SASO Is Impliedly Preempted by Oregon Law.

As discussed in the Columbia County Residents' Motion for Summary Judgment (the "Columbia County Residents' Motion"), the Columbia County Residents' Response, and elsewhere in the briefing, the SASO is impliedly preempted by a multitude of state laws. *See* Columbia County Residents' Motion at 8–10; the Attorney General's Motion for Summary Judgment ("Attorney General's Motion") at 5–9; Columbia County Residents' Response at 8–15; Petitioner's Reply at 12–13; Attorney General's Response at 5–16. For the sake of brevity, and because most of the arguments raised by Intervenors have already been addressed by the Columbia County Residents, the Petitioner, and the Attorney General in prior briefing, the Columbia County Residents limit their response here to two of Intervenors' implied preemption arguments not fully addressed in the prior briefing.

a. Intervenors' Argument that County Officials Need Not Follow State Law Is Misplaced.

First, Intervenors argue throughout their Response that local government officials, such as the county sheriff, need not comply with their obligations under state law. *See* Intervenors' Response at 5–6 (arguing that "county enforcement of criminal and civil statutes is entirely within 'the local community's freedom to choose its own political form'" (quoting *City of La Grande v. Pub. Emps.' Ret. Bd.*, 281 Or 137, 156, 576 P2d 1204, *on reh'g*, 284 Or 173, 586 P2d 765 (1978)))[3]; *id.* at 11 ("Of course, there is no Oregon state statute mandating local compliance

[3] In a footnote, Intervenors rely on *dicta* from *La Grande* regarding "state laws that would impose policy responsibilities or record-keeping, reporting, or negotiating requirements on persons or entities contrary to their allocation under the local charter." *See* Intervenors' Response at 6 n. 3 (quoting *La Grande*, 281 Or 156 n. 31). Columbia County is not a home-rule county, and does not have a local charter. In any event, state firearms laws do not impose "policy responsibilities or record-keeping, reporting, or negotiating requirements."; rather, they charge local law enforcement with enforcing the law.

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with and enforcement of all state laws, nor are Intervenors aware of any legal authority stating as much."); *id.* at 12 (discussing, without citations, events in Washington state). Intervenors are incorrect. As discussed elsewhere in the briefing, ORS 206.010(1) expressly charges sheriffs with "[a]rrest[ing] and commit[ing] to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses." *See* Columbia County Residents' Motion at 9 (citing ORS 206.010(1)); Attorney General's Motion at 7 (same); Columbia County Residents' Response at 12 (same); *see also* Petition, ¶ 19 (citing entire text of ORS 206.010). Intervenors do not address this statutory language, which creates a clear and obvious preemption problem – a county ordinance creating civil *penalties* for enforcing state laws obviously "cannot operate concurrently" with a statute charging sheriffs with enforcing those same laws.[4] *See AT&T Commc'ns of the Pac. Nw., Inc. v. City of Eugene*, 177 Or App 379, 35 P3d 1029 (2001) ("A local law will be considered preempted . . . if local and state or federal law cannot operate concurrently."). While it is true that sheriffs, like all law enforcement, have some quantum of discretion over whether or not to arrest particular individuals in certain circumstances, no local authority – be it sheriff, county electorate, or city council – may simply declare legal that which is illegal under state law. *See, e.g., Portland v. Jackson*, 316 Or. 143, 148 (1993) ("Local governments thus are barred from, *e.g.,* creating a 'safe haven' for outlaws by legalizing, within the boundaries of the city, that which the legislature has made criminal statewide.").

[4] In response to the Columbia County Residents' preemption argument, Intervenors assert that "county government is not merely an arm of the state tasked with doing whatever the state demands." Intervenors' Motion at 11. Intervenors are mistaken. It is well settled that counties are in fact arms of the state and county authority is limited to what it has been granted by the state. *See, e.g.*, *Nw. Ice & Cold Storage Co. v. Multnomah Cty.*, 228 Or 507, 517, 365 P2d 876, 881 (1961) ("A county being an arm of the state * * * ."); *see also Kramer v. City of Lake Oswego*, 365 Or 422, 449, 446 P3d 1, *opinion adhered to as modified on reconsideration*, 365 Or 691, 455 P3d 922 (2019) ("[F]undamentally, a municipality is merely a political subdivision of the State from which its authority derives." (quoting *United Building & Constr. Trades v. Mayor*, 465 US 208, 215 (1984))).

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Instead, Intervenors cite to a separate subsection of ORS 206.010 to argue that "the Sheriff is required to enforce only 'lawful orders or directions.'" Intervenors' Response at 6 (citing to ORS 206.010(5)). But even this argument does not help Intervenors because while that subsection – dealing with sheriff's duties to obey *court orders* – contains the qualifier "lawful," no similar language appears in the subsection at issue dealing with enforcing *state laws*. *Compare* ORS 206.010(5) ("In the execution of the office of sheriff, it is the sheriff's duty to: * * * Attend, upon call, the Supreme Court, Court of Appeals, Oregon Tax Court, circuit court, justice court or county court held within the county, and to obey its lawful orders or directions.") *with* ORS 206.010(1) ("In the execution of the office of sheriff, it is the sheriff's duty to * * * Arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses.").[5] Of course, sheriffs cannot determine which court orders are "lawful." And the fact remains that even this argument provides no support for Intervenors' core assertion that sheriffs can ignore their clear statutory duties and "determine the constitutionality of all laws he/she enforces." Intervenors' Response at 18.

Intervenors' "unfunded mandate" arguments fare no better. Intervenors rely on *Burks v. Lane County*, 72 Or App 257, 695 P2d 1373 (1985) and Article XI, section 15 of the Oregon Constitution to argue that "only when certain criteria are met can the legislature even mandate specific enforcement programs, and that same constitutional protection even authorizes local jurisdictions to refuse to comply with unfunded mandates." Intervenors' Response at 6–7. But *Burks* has nothing to do with whether or how to enforce state law[6]; rather, the court was addressing county budgetary discretion in particular circumstances. *See Burks,* 72 Or App at 263 (concluding that "when a state statute mandates a service and requires counties to provide

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[5] *See also* Attorney General's Response at 10-12 (addressing Intervenors' argument that SASO prevents the Columbia County District Attorney from enforcing state laws).

[6] In fact, in *Burks*, the Court of Appeals reaffirmed that the sheriff's law enforcement obligations are set by state statute. *See Burks*, 72 Or App at 262 ("Plaintiffs argue, correctly, that the sheriff has law enforcement duties that are defined by statute and that the county has a statutory responsibility to provide funds for the sheriff's performance of his duties.").

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funding for it but does not specify a service level, an amount of funding or an alternative method for determining the amount of funding, the statute necessarily leaves at least the budgetary decision over the amount of funding to the county governing bodies."). And Article XI, section 15 of the Oregon Constitution simply does not apply to the SASO. *See* Or Const, Art XI, § 15 ("Except as provided in subsection (7) of this section, **when the Legislative Assembly or any state agency requires any local government to establish a new program or provide an increased level of service for an existing program**, the State of Oregon shall appropriate and allocate to the local government moneys sufficient to pay the ongoing, usual and reasonable costs of performing the mandated service or activity." (emphasis added)); *Linn Cty. v. Brown*, 366 Or 334, 353, 461 P3d 966 (2020) (explaining the narrow interpretation of "program" in Or Const art XI, § 15 includes only "'specified services,' that local governments were required to 'provide.'" (citing HJR 2, para 1 § 15(2)(c))). Oregon firearms laws are not "programs" subject to the requirements of article XI, section 15 of the Oregon Constitution, as *Linn County* makes clear. Moreover, Article XI, section 15 specifically provides that it does not apply to costs "resulting from a law creating or changing the definition of a crime" and to laws enacted prior to 1997. *See* Or Const, Art XI, § 15(7)(b), (c). Accordingly, the constitutional provision is wholly inapplicable to the preemption issues presented here, where the SASO seeks to exempt Columbia County officials from enforcement of state criminal laws, including laws enacted prior to 1997.

b. Intervenors' Narrow Reading of the SASO Is Inconsistent with the Text of the SASO.

Throughout their Response, Intervenors argue that the SASO should be narrowly construed and will have limited effects only on county officials, employees and agents. *See, e.g.*, Intervenors' Response at 8 ("[T]he Initiatives do not contain any language 'purporting to permit' anything, 'purporting to nullify' anything, or 'purporting to displace' anything."); *id.* at 14–15 ("Indeed, since the Initiatives do not override or nullify existing law, county residents are still *required to comply with* all state and federal firearms laws."). Intervenors' narrow reading of the

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SASO is belied by the text of the SASO itself.[7] The SASO provides that, with limited exceptions, laws originating outside of Columbia County "which restrict or affect an individual person's general right to keep and bear arms, including firearms, firearm accessories or ammunition" may not be enforced in the County and "shall be treated as if they are null, void and of no effect in Columbia County, Oregon." SASO, § 4(A). Intervenors acknowledge that under the SASO, "county officials will not investigate, arrest, prosecute, or otherwise enforce certain laws." Intervenors' Response at 14-15. Yet Intervenors do not explain how, for example, this text does not contradict state laws passed after 2012 which require background checks. *See, e.g.*, ORS 166.435; *see also* Attorney General's Response at 11 (noting 2019 amendments to background check laws). Although Intervenors criticize the Columbia County Residents' example of an active shooting as a situation where the SASO would impede law enforcement's efforts, Intervenors do not explain how county officials could respond to such a shooting under the SASO.[8] Intervenors' Response at 15. The SASO prohibits county officials from using county resources "in whole or in part, to engage in activity that aids the enforcement or investigation related to personal firearms, firearm accessories or ammunition." SASO, § 2(A)(2). Intervenors fail to explain how law enforcement may respond given those restrictions.

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[7] Additionally, as discussed in the Columbia County Residents' Response and the Attorney General's Response, such a narrow reading contradicts the legislative history of the Measures. *See* Columbia County Residents' Response at 9–11 (discussing the ballot titles and statements contained in the relevant voters' pamphlets); Attorney General's Response at 8–9 (discussing statements contained in the relevant voters' pamphlets).

[8] Intervenors seek to narrow the breadth of the SASO by arguing that it does not declare "Extraterritorial Acts" "null, void and of no effect in Columbia County," but only that they shall be "shall be treated" as such. Intervenors' Response at 4 (quoting SASO § 4(A)). As is set forth in the Columbia County Residents' Response, that is a distinction without a difference. Columbia County Residents' Response at 17. *See also* Attorney General's Response at 4-6 (analyzing text of the SASO). Moreover, the argument entirely ignores Section 2(B) of the SASO, which expressly preserves the right of any person "while within Columbia County * * * to freely manufacture, transfer, sell and buy firearms, firearm accessories and ammunition." SASO, § 2(B).

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Intervenors' arguments fail to address the statutory reality that a county ordinance which forbids county officials from carrying out their duties under state law, and treats such state laws as null and void, is clearly preempted by those state laws. For this reason, the Court should find the SASO impliedly preempted.

2. The SASO Is Expressly Preempted by Oregon Law.

As discussed at length in prior briefing before the Court, the SASO is expressly preempted by ORS 166.170. *See* Columbia County Residents' Motion at 10–11; Attorney General's Motion at 4–5; Petitioner's Reply at 8–10; Columbia County Residents' Response at 15–18; Attorney General's Response at 9–10; *see also* Petition, ¶ 14. That statute grants sole authority to regulate "the sale, acquisition, transfer, ownership, possession, storage, transportation or use of firearms or any element relating to firearms and components thereof, including ammunition" to the Oregon legislature, with limited exceptions that the parties agree do not apply here. *See* ORS 166.170(1). Intervenors argue that the SASO does not "'regulate, restrict, [n]or prohibit' firearms in any way." Intervenors' Response at 4. But the SASO does exactly that, both via express language outlined in Section 2(B) of the SASO and because the SASO governs how the sale, transfer, and possession of firearms will be treated in Columbia County. *See* Columbia County Residents' Response at 16–17; *see also Or. Firearms Educ. Found. v. Bd. of Higher Educ.*, 245 Or App 713, 715, 264 P3d 160 (2011) (concluding that administrative rule allowing for the creation of procedures to implement sanctions against individuals possessing firearms constituted "regulation" under ORS 166.170). The Oregon courts have rejected such a narrow understanding of the term "regulate." *See deParrie v. State*, 133 Or App 613, 619, 893 P2d 541 (1995) ("We do not agree that, in order to rise to the level of a policy choice, a statute must regulate particular persons or subjects in either a positive or negative manner; it is just as much a substantive policy of the state if the legislature prohibits any regulation of particular persons or matters, or defines the extent to which they may be regulated, as if the legislature itself regulates the persons or matters in a particular manner."). *See also*

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Attorney General's Response at 9 (addressing meaning of "regulate" as used in ORS 166.170); Columbia County Residents' Response at 16 (same).

For these reasons, the Court should find the SASO expressly preempted by ORS 166.170.

3. The SASO Is Preempted by Federal Law.

For the reasons described in prior briefing before the Court, the SASO is also preempted by a number of federal laws. *See* Columbia County Residents' Motion at 11–13; Attorney General's Motion at 8–9; Petitioner's Reply at 7; Columbia County Residents' Response at 18–19; *see also* Petition, ¶¶ 17–18. Intervenors' arguments otherwise conflict with the broad language of the SASO purporting to forbid county officials from enforcing federal laws and attempting to treat such laws as "null and void," language which clearly "stand[s] as an obstacle to the accomplishment and execution of the full purposes of Congress" in passing federal firearms laws. *See City of Auburn v. Qwest Corp.*, 260 F3d 1160, 1180 (9th Cir 2001).

4. Other Issues

Given that the remaining issues before the Court have been thoroughly briefed by the parties, the Columbia County Residents address only a few additional points below:

- The SASO does not address matters of county concern. Intervenors do not appear to dispute that if the SASO is preempted, it does not address matters of county concern under ORS 203.035. *See* Intervenors' Response at 17.
- The SASO is inseverable. Intervenors argue that severability is not an issue here, because the SASO was not properly adopted. Intervenors' Response at 18. For the reasons discussed in Section II.A., as well as in other briefing before the Court, these arguments are incorrect. *See* Columbia County Residents' Motion at 14–16. Intervenors also argue that parts of the SASO, such as the private cause of action, could be severed from the rest of the ordinance. Intervenors' Response at 18. These arguments contradict the expansive intent behind the SASO, as well as the operative provisions of the SASO itself. *See* Columbia County Residents' Motion at 14–16.

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- The SASO is void for vagueness. As stated by Petitioner, "for both the persons charged with implementing and enforcing the Ordinance and the firearm laws and as for the average person trying to navigate the law, it is entirely unclear which laws apply and/or are enforceable in Columbia County." Petitioner's Reply at 13. Petitioner's discussion of the difficulties of determining whether the SASO applies within incorporated cities serves to highlight this issue. *See* Petitioner's Reply at 10–12. In their Response, Intervenors do not substantively address this argument.
- Other courts have ruled that nearly identical ordinances are unconstitutional. As discussed in the Columbia County Residents' Motion, courts in both Grant and Harney County concluded during the 2020 election cycle that petitions almost identical to the SASO were unconstitutional and ruled those initiatives could not be placed on the ballot. *See* Columbia County Resident's Motion at 6; Declaration of Steven C. Berman in Support of the Columbia County Residents' Motion for Summary Judgment, Exs. 3, 4. Intervenors' misplaced arguments about procedural issues, their own disagreement with those courts' decisions, and citations to county ordinances not at issue here do not directly address the substantive rulings in those cases. *See* Intervenors' Motion at 13–14.

CONCLUSION

For the reasons above, and the reasons discussed in the Petition, the Columbia County Residents' Motion, the Attorney General's Motion, Petitioner's Reply, the Columbia County Residents' Response, and the Attorney General's Response, the Columbia County Residents respectfully request the Court find the SASO unconstitutional as preempted by Oregon and federal law and grant the Columbia County Residents' Motion for Summary Judgment.

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DATED this 15th day of July, 2021.

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CERTIFICATE OF SERVICE

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

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