

IN THE COURT OF APPEALS OF THE STATE OF OREGON

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

Board of County Commissioners of COLUMBIA COUNTY, a political
subdivision of the State of Oregon,
Petitioner-Respondent,

v.

ELLEN ROSENBLUM, Attorney General for the State of Oregon,
Interested Party-Appellant,

and

ROBERT PILE; SHANA CAVANAUGH; BRANDEE DUDZIC; and JOE
LEWIS,
Interested Parties-Respondents,

and

RAVEN CHRIS BRUMBLES; GUN OWNERS OF AMERICA, INC.;
GUN OWNERS FOUNDATION; OREGON FIREARMS FEDERATION;
LARRY ERICKSON; KEITH FORSYTHE; and RUTH NELSON,
Intervenors-Respondents.

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Columbia County Circuit Court

21CV12796

A176726

**INTERESTED PARTIES-APPELLANTS-RESPONDENTS ROBERT
PILE, SHANA CAVANAUGH, BRANDEE DUDZIC AND JOE
LEWIS'S OPENING BRIEF AND EXCERPT OF RECORD**

December 2021

Steven C. Berman, OSB No. 951769
Lydia Anderson-Dana, OSB No.
166167
STOLL STOLL BERNE LOKTING
& SHLACHTER P.C.
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
sberman@stollberne.com
landersondana@stollberne.com

Len Kamdang (*pro hac vice*)
Mark Weiner (*pro hac vice*)
Everytown Law
450 Lexington Avenue
PO Box 4184
New York, NY 10017
Telephone: (646) 324-8115
lkamdang@everytown.org
mweiner@everytown.org

*Representing Interested Parties-
Appellants-Respondents Robert Pile,
Shana Cavanaugh, Brandee Dudzic,
and Joe Lewis*

Patricia G. Rincon, OSB No. 162336
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301
Telephone: (503) 378-4402
patty.rincon@doj.state.or.us

*Representing Interested Party
Appellant-Respondent Ellen
Rosenblum, Attorney General for the
State of Oregon*

Matthew J. Kalmanson, OSB No.
041280
HART WAGNER LLP
1000 SW Broadway, Suite 2000
Portland, OR 97205
Telephone: (503) 222-4499
mjk@hartwagner.com

Sarah Hanson, OSB No. 983618
Office of County Counsel
Columbia County Courthouse
Room 20
St. Helens, OR 97051
Telephone: (503) 397-3839
sarah.hanson@co.columbia.or.us

*Representing Petitioner Appellant-
Respondent Columbia County,
Oregon*

Tyler Smith, OSB No. 075287
Tyler Smith & Associates, P.C.
181 N. Grant Street, Suite 212
Canby, OR 97013
Telephone: (503) 266-5590
Tyler@RuralBusinessAttorneys.com

*Representing Intervenors-
Respondents Raven Chris Brumbles,
Gun Owners of America, Inc., Gun
Owners Foundation, Oregon
Firearms Federation, Larry Erickson,
Keith Forsythe, and Ruth Nelson*

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APPELLANTS' OPENING BRIEF

STATEMENT OF THE CASE

A. Nature of the Action

Columbia County initiated a validation proceeding to obtain a determination as to the legality and validity of the Columbia County Second Amendment Sanctuary Ordinance (the "SASO") enacted by the Columbia County Board of Commissioners. Interested Parties-Appellants-Respondents Robert Pile, Shana Cavanaugh, Brandee Dudzic and Joe Lewis (collectively the "Columbia County Residents") timely appeared in the validation proceeding, pursuant to ORS 33.720(2). The Columbia County Residents sought a determination from the court finding the ordinance invalid, unconstitutional and inconsistent with federal and Oregon law, and an order enjoining its enforcement.

The Attorney General also filed an appearance as an interested party, raising similar arguments to those made by the Columbia County Residents. The trial court granted supporters of the ordinance – Raven Chris Brumbles, Gun Owners of America, Inc., Gun Owners Foundation, Oregon Firearms Federation, Larry Erickson, Keith Forsythe and Ruth Nelson (collectively the "SASO Supporters") – leave to intervene. The SASO Supporters asserted that the validation proceeding should be dismissed on procedural grounds, for failure to raise a justiciable controversy. They also argued, on the merits, that

the Columbia County Second Amendment Ordinance is valid, legal and enforceable.

B. Nature of the Judgment Sought to Be Reviewed

The Columbia County Residents appeal from the trial court's judgment of dismissal. On cross-motions for summary judgment, the trial court concluded the validation proceeding does not raise a justiciable controversy and dismissed the case. The Columbia County Residents seek review and reversal of that judgment of dismissal, and a determination by this court that the Columbia County Second Amendment Sanctuary Ordinance is unconstitutional, inconsistent with federal and Oregon law, and must be enjoined from enforcement.

C. Basis for Appellate Jurisdiction

This court has jurisdiction to review the trial court's judgment of dismissal pursuant to ORS 19.205.

D. Timeliness of Appeal

This appeal is timely. The general judgment of dismissal was entered on July 29, 2021. The notice of appeal was filed and served on August 24, 2021, within thirty days of entry of the judgment, as provided in ORS 19.255.

QUESTIONS PRESENTED

1. Did the trial court err by dismissing the validation proceeding for failure to raise a justiciable controversy?

2. Is the Columbia County Second Amendment Sanctuary Ordinance unconstitutional, inconsistent with federal and Oregon law, or otherwise invalid and unenforceable?

SUMMARY OF ARGUMENT

This validation proceeding presents a live, justiciable controversy. Columbia County enacted the SASO to effectuate the will of the voters after they approved a Second Amendment Sanctuary ballot measure in November 2020. Facing the threat of litigation, Columbia County then initiated a validation proceeding, pursuant to ORS 33.710(2), seeking a “judicial examination and judgment” as to the validity of the SASO. The proceeding was properly noticed pursuant to ORS 33.720(2). The Columbia County Residents appeared in the proceeding, taking a position adverse to the County’s ordinance and arguing it was invalid. The Attorney General appeared and took a similar position. The ballot measure’s supporters also appeared, asserting that the SASO was valid. This was an entirely appropriate use of the validation proceeding contemplated by ORS 33.720. The trial court’s conclusion that the proceeding was not justiciable is inconsistent with the process the legislature created for a governing body and interested parties to obtain a determination as to the validity of an enacted ordinance and is wholly unsupported by the law. The participants in the proceeding are entitled to receive “a judicial examination

and judgment” as to the regularity and validity of the SASO. ORS 33.720(2).

The trial court failed to do that.

The Columbia County Residents respectfully request that this court do what the trial court did not and reach the merits of the underlying case. That would be the most efficient use of court and party resources, and consistent with the court’s authority on review. A determination from this court on the merits also would more quickly ensure the welfare and safety of Columbia County residents and provide meaningful guidance on an issue – the validity of local government “Second Amendment Sanctuaries” – that is arising across the state.

On the merits, the SASO fails. It is implicitly preempted by multiple state laws, ranging from state gun safety legislation (including recently enacted legislation) to the Oregon Tort Claims Act. The SASO is expressly preempted by Oregon’s Firearms Preemption Statute, ORS 166.170. It also is preempted by federal law, and therefore runs afoul of the Supremacy Clause. The SASO fails to address matters of county concern. The SASO is invalid, preempted and unconstitutional.

STATEMENT OF FACTS

This validation proceeding concerns the legality and constitutionality of the Columbia County Second Amendment Sanctuary Ordinance.¹ The SASO purports to invalidate nearly every state and federal law relating to firearms meant to ensure the safety of the public. The SASO exposes Columbia County employees and officials to liability simply for following state and federal law. As is discussed below, Columbia County does not have the authority to pass ordinances that contradict, let alone invalidate, state and federal laws. The SASO is inconsistent with Oregon law, and plainly unconstitutional under the state and federal constitutions.

A. The Columbia County Board of Commissioners Adopts a Second Amendment Sanctuary Ordinance Following Passage of Two Voter-Initiated Ballot Measures.

The SASO is Columbia County's implementation of two Columbia County voter-approved initiative measures. At the November 6, 2018 General Election, Columbia County voters passed Measure 5-270, with 13,204 "yes" votes, and 10,869 "no" votes.² Two years later, at the November 3, 2020

¹The full text of the SASO adopted by Columbia County is attached as Exhibit A to Ordinance 2021-1 and can be found at ER 31-41. References to "ER" are to the Appellants' Joint Excerpt of Record, filed by the Attorney General.

²Declaration of Steven C. Berman in Support of Columbia County Residents' Motion for Summary Judgment (filed June 6, 2021) ("Berman Decl."), Ex. 1 (Certified Final Summary Report of November 6, 2018 Columbia County Election).

General Election, Columbia County voters approved Measure 5-278, by a narrow margin of 525 votes.³

1. Columbia County Measure 5-270 (2018): The Second Amendment Preservation Measure

Measure 5-270 (2018) was entitled the “Second Amendment Preservation Ordinance.”⁴ Measure 5-270 (2018) declared:

“[A]ny regulation of the right to keep and bear arms or ancillary firearms rights that violate the Second, Ninth, or Tenth Amendments to the Constitution of the United States of America, or Article 1, sections 27 and 33 of the Constitution of the State of Oregon, as articulated herein, shall be regarded by the People on and in Columbia County as unconstitutional; a transgression of the Supreme Law of the Land and its spirit of Liberty, and therefore by necessity void ab initio.”

Measure 5-270 (2018), § 2(C) (ER 43). Measure 5-270 (2018) prohibited Columbia County from using government funds, resources, and employees “for the purpose of enforcing any element of such acts, laws, orders, mandates, rules or regulations, that infringe on the right by People to keep and bear arms.”

Measure 5-270 (2018), § 2(D)(1) (ER 43-44). That includes registration requirements, restrictions on gun possession, ownership, or usage, as well as “background check requirements beyond those customarily required at time of purchase prior to December 2012.” *Id.* Measure 5-270 (2018) imposed civil

³Berman Decl., Ex. 2 (Certified Final Summary Report of November 3, 2020 Columbia County Election).

⁴The full text of Measure 5-270 can be found at ER 42-44.

penalties up to \$2,000 for an individual and \$4,000 for a corporation for violations. *Id.*, § 3 (ER 44).

2. Columbia County Measure 5-278 (2020): The Second Amendment Sanctuary Measure

Measure 5-278 (2020) was entitled the “Second Amendment Sanctuary Ordinance.”⁵ Many of the provisions of the Measure 5-278 (2020) were similar or identical to Measure 5-270 (2018). However, Measure 5-278 (2020) included two differences that are material here. First, Measure 5-278 (2020) prohibited any “agent, employee, or official of Columbia County” from “knowingly and willingly, participating in any way in the enforcement of any” state or federal laws regulating firearms, firearm accessories or ammunition, or from using county resources to aid in the investigation or enforcement of any such laws. Measure 5-278 (2020), §§ 3(A), 4 (ER 47-49). Thus, while Measure 5-270 (2018) prohibited the “Columbia County Government” from “authoriz[ing] or appropriat[ing]” resources, Measure 5-278 (2020) swept into its scope (and created liability for) any “agent, employee or official” who participated in any way in the enforcement of covered state or federal laws. Second, in addition to civil penalties, Measure 5-278 (2020) created a private right of action under which an “injured party” may bring suit against “[a]ny entity, person, official, agent, or employee of the Columbia County who

⁵ The full text of Measure 5-278 can be found at ER 45-49.

knowingly violates this ordinance, while acting under the color of any state or federal law,” and allowed for recovery of attorney fees. Measure 5-278 (2020), § 5 (ER 49).

3. Columbia County Ordinance No. 2021-1

Following Columbia County voters’ approval of Measure 5-278 (2020), the Columbia County Board of Commissioners reconciled the inconsistencies between the two measures, and then incorporated them into the Columbia County Code, as the “Columbia County Second Amendment Sanctuary Ordinance” or “SASO.”

On March 31, 2021, the Columbia County Board of Commissioners adopted Ordinance No. 2021-1. ER 31-33.⁶ As explained in the ordinance:

“The purpose of this Ordinance is to implement the intent of the voters as demonstrated by the passage of Columbia County Initiative Measure 5-270 entitled ‘Second Amendment Preservation Ordinance,’ on November 6, 2018, and Initiative Measure 5-278, entitled ‘Second Amendment Sanctuary Ordinance,’ on November 3, 2020 * * * . This Ordinance is intended to amend the Second Amendment Sanctuary Ordinance [Measure 5-278 (2018)] to incorporate provisions of the Second Amendment Preservation Ordinance [Measure 5-270 (2020)] where it differs from the Second Amendment Sanctuary Ordinance, to format the Ordinance consistent with County practice and to correct scrivener errors in the Acts while preserving the intent of the voters.”

⁶Ordinance 2021-1 and the SASO became effective on June 29, 2021, 90 days after passage. ORS 203.045(9).

Ordinance No. 2021-1 at 1-2 (ER 31-32). The SASO was then adopted by the Columbia County Board of Commissioners, as Exhibit A to Ordinance No. 2021-1. Except for correcting grammatical and formatting issues, the SASO is a verbatim enactment of Measure 5-270 (2018) as modified by Measure 5-278 (2020). Upon enacting the SASO, the Board of Commissioners repealed Measure 5-270 (2018) and Measure 5-278 (2020). Ordinance No. 2021-1, §§ 3, 4 (ER 31-32). Accordingly, the SASO adopted by the Board of Commissioners, Exhibit A to Ordinance No. 2021-01, is the only extant legislation in Columbia County addressing “Second Amendment Preservation” and a “Second Amendment Sanctuary.”

B. The Second Amendment Sanctuary Ordinance

The SASO is rooted in the flawed premise underlying Measure 5-278 (2020), that local governments can ignore and disregard state and federal gun safety legislation. The SASO explicitly provides:

“Local governments have the legal authority to refuse to cooperate with state and federal firearms laws * * * and to proclaim a Second Amendment sanctuary.”

SASO, § 1(K) (ER 37).

From that premise, the SASO contains two broad operative provisions. Specifically, section 2(A) sets prohibitions on the conduct of government actors and agents. It provides:

“No agent, employee, or official of Columbia County * * * while acting in their official capacity, shall:

“1) Knowingly and willingly, participate in any way in the enforcement of any Extraterritorial Act, as defined herein; or

“2) Utilize any assets, county funds, or funds allocated by any entity to the county, in whole or in part, to engage in activity that aids in the enforcement or investigation related to personal firearms, firearm accessories, or ammunition.”

ER 37. The two provisions differ in their scope.

The prohibition on “Extraterritorial Acts” in subsection 2(A)(1) is sweeping. “Extraterritorial Acts” are defined as including any federal, state or local law, rule or regulation “originating from jurisdictions 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.” SASO, § 4(A) (ER 38). The SASO declares those federal, state and local gun safety laws “are null, void and of no effect.” *Id.* The SASO goes on to provide a non-exclusive list of “void” Extraterritorial Acts, including:

- “Any registering or tracking of firearms, firearm accessories, or ammunition.”
- “Any registration and background check requirements on firearms, firearm accessories, or ammunition for citizens, beyond those customarily required at time of purchase prior to December, 2012.”
- “Any prohibitions, regulations, and/or use restrictions related to ownership of non-fully automatic firearms.”

Id., §§ 4(A)(2), (4), (7) (ER 38-40).

Subsection 2(A)(2) is not limited to “Extraterritorial Acts.” Rather, it prohibits any county agent or official from using any county assets to engage in any activity that aids in “the enforcement or investigation related to personal firearms, firearm accessories, or ammunition.” SASO, § 2(A)(2) (ER 37). In other words, this subsection purports to ban the investigation of any violation of law involving a firearm whatsoever, presumably including even an active shooting.

The SASO also purports to make Columbia County a jurisdiction where state and federal laws restricting the production and sale of firearms do not apply. Specifically, subsection 2(B) provides that “[w]hile within Columbia County,” “any person” has “the right to manufacture, transfer, buy and sell firearms, firearm accessories and ammunition.” ER 37. This provision purports to give anyone in Columbia County the authority to make and sell assault weapons, regardless of any state or federal laws, free from repercussions from law enforcement.

The SASO provides the sheriff with sole authority to determine whether any federal, state or local laws “affecting firearms, firearms accessories and ammunition” are inconsistent with the United States or Oregon Constitutions. SASO, § 3 (ER 37-38).

Violation of the SASO is punishable by fines up to \$4,000. SASO, § 5 (ER 40).

The SASO also creates a unique private right of action. Any “injured party” may pursue a claim “for redress” against any person who knowingly violates the SASO. SASO, § 6(A) (ER 40). The prevailing party is entitled to recover its attorneys’ fees. *Id.*, § 6(B) (ER 40). In any such claim against an agent, official or employee of Columbia County, sovereign immunity is not available as a defense, leaving county employees acting within the scope and course of their employment personally liable. *Id.*, § 6.

C. Procedural History

The County enacted the SASO on March 31, 2021. ER 31-33. The following day, the County filed a validation proceeding pursuant to ORS 33.710, seeking a determination as to the legality and validity of the SASO. ER 5-30. On April 29, 2021, the Columbia County Residents timely appeared as interested parties, pursuant to ORS 33.720(3). ER 50-54. The Attorney General also filed a timely appearance as an interested party. ER 55-57. The trial court granted the SASO Supporters leave to intervene and set a briefing schedule for dispositive motions. ER 58-69. The parties filed cross-motions for summary judgment. The trial court held a hearing on the motions on July 21, 2021. The following week, on July 29, 2021, the trial court issued a short letter opinion. ER 75-76. The court determined that the validation proceeding

did not raise a justiciable controversy and dismissed the petition. The court entered a general judgment of dismissal that same day. ER 77.

FIRST ASSIGNMENT OF ERROR

The trial court erred in dismissing the validation proceeding as nonjusticiable. ER 75-76; ER 77.

A. Preservation of Error

In their motion for Summary Judgment, the SASO Supporters argued that the validation proceeding does not raise a justiciable controversy. Intervenors' Opening Brief (filed June 24, 2021) at 3-8. In their response, the Columbia County Residents disputed Intervenors' argument, setting forth why the case unequivocally raises a justiciable controversy. The Columbia County Residents' Response to Intervenors' Motion for Summary Judgment (filed June 24, 2021) at 6-11. Columbia County, and the Attorney General, similarly argued that the validation proceeding raises a justiciable controversy. Petitioner's Response to Opening Brief (filed July 8, 2021) at 5-8; The Attorney General's Response to Intervenors' Opening Brief (filed July 8, 2021) at 3-5.

B. Standard of Review

On appeal from a trial court's judgment on a validation proceeding brought pursuant to ORS 33.720, "we review de novo." *Bd. of Klamath Cty. Comm'rs v. Select Cty. Emps.*, 148 Or App 48, 53, 939 P2d 80, *rev den*, 326 Or 57 (1997).

The doctrine of justiciability embraces standing, mootness, ripeness and other limitations on judicial power. *Couey v. Atkins*, 357 Or 460, 517, 355 P3d 866 (2015). An analysis of the “justiciability limitations on the exercise of judicial power” is a question of law. *See generally Couey*, 357 Or at 520 (addressing legal issue of limitations the state constitution imposes on exercise of judicial power).

ARGUMENT ON FIRST ASSIGNMENT OF ERROR

A. A Governing Body and Interested Parties May Obtain a Judicial Determination as to the Validity of a Recently Enacted Ordinance in a Validation Proceeding.

The trial court erred by dismissing the validation proceeding for lack of justiciability. The trial court’s decision is inconsistent with the underlying purpose of a validation proceeding. Accordingly, the trial court’s dismissal should be set aside.

ORS 33.710(2) provides that a governing body may initiate a validation proceeding for multiple reasons, three of which explicitly apply here. A

“governing body”:

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

“* * * * *

“(e) Any decision of the governing body that raises novel or important legal issues that would be efficiently and

effectively resolved by a proceeding before the decision becomes effective, when the decision will:

- “(A) Require a significant expenditure of public funds;
 - “(B) Significantly affect the lives or businesses of a significant number of persons within the boundaries of the governing body; or
 - “(C) Indirectly impose a significant financial burden on the cost of conducting business within the boundaries of the governing body.
- “(f) The authority of the governing body to enact any ordinance, resolution or regulation.
- “(g) Any ordinance, resolution or regulation enacted by the governing body, including the constitutionality of the ordinance, resolution or regulation.”

ORS 33.710.

Columbia County filed its validation proceeding seeking a determination as to the regularity and validity of the SASO pursuant to ORS 33.710(2)(e), (f) and (g). ER 5-30. The County properly invoked the trial court’s jurisdiction. The Columbia County Residents (along with the Attorney General) then became parties pursuant to ORS 33.720(3).

Under ORS 33.710 and ORS 33.720, once a governing body files a validation proceeding, “any person interested” may appear as a party in the case to “contest the validity of such proceeding, or of any of the acts or things therein enumerated.” ORS 33.720(3); *see also Multnomah Cty. v. Mehrwein*, 366 Or 295, 298-99, 462 P3d 706 (2020) (noting that ORS 33.720(3) “permit[s]

interested parties to appear in the validation proceeding”). Such interested parties include, but are not limited to, “electors, freeholders, [and] taxpayers.” See ORS 33.720(2) (requiring notice to be given to “electors, freeholders, taxpayers and other interested persons”); see also *Sch. 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); *Petition of Port of St. Helens of Columbia Cty.*, 19 Or App 87, 89, 526 P2d 626 (1974) (district freeholder permitted to participate in validation proceeding and to appeal trial court ruling). In enacting the statutes that provide for validation proceedings, the Oregon legislature gave interested persons the right and authority to join in and fully participate in a validation proceeding. The Columbia County Residents are such parties. See Declarations of Joe Lewis, Shana Cavanaugh, Robert Pile and Brandee Dudzic in Support of Columbia County Residents’ Motion for Summary Judgment (all filed June 24, 2021) (setting forth Columbia County Residents’ status as interested parties).

The validation proceeding below raised a justiciable controversy. “Justiciability is a vague standard but entails several definite considerations. A controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between parties having adverse legal interests.” *Brown v. Or. State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982). If a dispute will result

in a binding determination on the parties, it is justiciable. *See Brown*, 293 Or at 449 (“A justiciable controversy results in specific relief through a binding decree as opposed to an advisory opinion which is binding on no one.”). Here, there is “an actual and substantial controversy between parties having adverse legal interests” because the Columbia County Residents dispute the legality and constitutionality of the SASO. The Attorney General also disputes the legality and constitutionality of the SASO. The SASO Supporters, in contrast, dispute the legality of the Board’s actions adopting the SASO but assert that the SASO and underlying measures are legal and constitutional.

The trial court’s decision is inconsistent with the purpose of the validation proceeding statute. ORS 33.710 exists so that a governing body can ask a court to determine whether enacted legislation, including a governing body’s adoption of a voter-approved initiative, is “regular and legal.” After Columbia County voters approved Measure 5-270 (2018) and 5-278 (2020), the County was faced with voter-approved measures that suffered from significant legal infirmities. The County was threatened with litigation if it did not obtain a determination as to the validity of those measures. ER 1-4. The County appropriately turned to the courts, as the legislature envisioned, to obtain resolution of those issues. The trial court’s “justiciability” analysis undermines the legislature’s intent behind enacting ORS 33.710.

The trial court’s decision also cannot be reconciled with *Couey*. In *Couey*, the Supreme Court rejected the argument that a statute allowing judicial review of moot cases capable of repetition yet evading review violates Article VII, section 1 of the Oregon Constitution. The Court determined that the Oregon Constitution does not impose a “justiciability” requirement in “public actions” or “cases involving matters of public interest” or “public importance.” 357 Or at 510-521. As the Supreme Court explained, “such proceedings include those challenging the lawfulness of an action, policy, or practice of a public body.” *Id.* at 522. *See also id.* at 521-522 (discussing cases that fall within matters of “public action” and “public importance”). The validity of county ordinances easily falls within that category of cases. As with the statute at issue in *Couey*, ORS 33.710 provides a mechanism for judicial review of an action by a public body. The statute was designed to provide Columbia County, as well as interested parties, the ability to obtain a legal determination as to the validity of a controversial policy approved by Columbia County voters and then adopted by the Columbia County Board of Commissioners.⁷

⁷The trial court’s decision also is inconsistent with the Supreme Court’s recent decision in *Mehrwein*. In that case, Multnomah County filed a validation proceeding, seeking a determination as to whether its campaign finance ordinances were legal. As with this case, interested parties and intervenors appeared, with one set asserting that the ordinances were unconstitutional and another set asserting that they were constitutional and valid. *Mehrwein*, 366 Or at 298–99. The Supreme Court addressed the merits of the case. *Id.* Justiciability was not an issue. If the matter had been non-justiciable, the

The trial court appears to have misread or misapplied ORS 33.710(4). *See* ER 75 (trial court citing “ORS 33.710(4)” as basis for denying jurisdiction). That subsection provides: “Nothing in this section allows a governing body to have a judicial examination and judgment of the court without a justiciable controversy.” The trial court appeared to believe that because Columbia County initiated the proceeding, but had not yet sought to enforce the SASO, ORS 33.170(4) barred the proceeding. However, that is flatly inconsistent with the text of the statute. Subsection (4) serves as a prohibition on validation proceedings for matters not listed in subsection (2), or for advisory opinions on matters for which the governing body does not intend to take action. It is not a prohibition on validation proceedings where, as here, the governing body seeks a determination as to the legality of an ordinance enacted by the governing body that raises novel or legal issues. *See* ORS 33.710(2)(e), (f), (g) (setting forth bases for validation proceeding).

The trial court also appears to have been operating under the mistaken belief that a justiciable controversy could not exist because when Columbia County initiated the proceeding, it was the only party. In its letter opinion, the trial court cited, and quoted, *Teledyne Industries v. Paulus*, 297 Or 665, 687

Supreme Court would have had to dismiss it on its own motion. *See, e.g. Barcik v. Kubizczyk*, 321 Or 174, 186, 895 P2d 765 (1995) (“justiciability may not be conferred by stipulation or consent of the parties”).

P2d 1077 (1984), for the proposition that the presence of intervenors does not create a justiciable controversy. ER 75. The trial court's analysis is flawed, for two reasons. First, ORS 33.710 does not require an opposing party at the time a validation proceeding is filed. To the contrary, the statute provides that at the outset the only party to the proceeding is the governing body that files it. See ORS 33.710(2) (setting forth procedure for initiating validation proceeding). Interested parties are then allowed to appear in the proceeding, and to contest "the validity * * * of any of the acts or things therein enumerated." ORS 33.720(2). The statutes anticipate and allow for parties to come in, adverse to the governing body, to contest the governing body's action.

The trial court also misread and misapplied *Teledyne Industries*. At issue in *Teledyne Industries* was whether a lawsuit brought against the Secretary of State, when she did not appear to defend, raised a justiciable controversy. The Supreme Court held that it did. 297 Or at 670-671. As the Court explained "[m]any justiciable controversies go by default or without opposition." *Id.* at 671. Accordingly, the presence of an intervenor did not change the analysis. *Id.* *Teledyne Industries* does not stand for, or support, the proposition that the presence of an intervenor cannot create justiciability where none previously existed. Rather, in *Teledyne Industries*, as here, an intervenor was unnecessary, because even without one, the case raised a justiciable controversy.

But justiciability is even further from dispute here than it was in *Teledyne Industries*. In a validation proceeding, interested parties may join the case within the time set forth in ORS 33.720(3) “to contest the validity” of the decision made or ordinance adopted by the governing body that the governing body brought into issue through the validation proceeding. That is precisely what the Columbia County Residents and the Attorney General did below, asserting that the SASO is illegal, unconstitutional, and that its operation should be enjoined. The Columbia County Residents and the Attorney General are directly adverse to the County, challenging its recently enacted legislation. Their appearance and presence in the case removes any ambiguity that the validation proceeding is a live, justiciable controversy. The SASO Supporters also intervened, taking a position contrary to that asserted by the Columbia County Residents and the Attorney General, further amplifying the existence of an active, multi-party dispute.

This proceeding is justiciable. It involves contested questions about the constitutionality and legality of the SASO and will result in a binding decree. *See* ORS 33.720(6) (“Upon conclusion of a proceeding authorized by ORS 33.710(2)(b), including any appeal of a judgment, the judgment entered in the proceeding is binding upon the parties and all other persons.”). The proceeding is explicitly authorized by ORS 33.710 and 33.720, and the County seeks a determination as to the legality and validity of the SASO pursuant to that

statutory authority. The Columbia County Residents and the Attorney General assert that the SASO is invalid and must be enjoined. The SASO Supporters argue that the SASO is a valid exercise of county lawmaking authority and wholly enforceable. This dispute is live and ripe for determination. The trial court erred when it held otherwise.

SECOND ASSIGNMENT OF ERROR

The trial court erred by failing to conduct a judicial examination of the SASO and failing to issue a judgment that the SASO is illegal, invalid and unconstitutional. ER 75-76; ER 77.

A. Preservation of Error

Columbia County filed a Petition for Validation of Local Government Action pursuant to ORS 33.710(2), seeking a judicial examination and judgment as to the regularity and validity of the SASO. ER 5-30. The Columbia County Residents timely appeared as interested parties. ER 50-54. In their motion for summary judgment, the Columbia County Residents requested that the trial court declare the SASO unconstitutional and inconsistent with Oregon and federal law and enjoin its enforcement. Columbia County Residents' Motion for Summary Judgment (filed June 24, 2021) at 7-16; Columbia County Residents' Response to Intervenors' Motion for Summary Judgment (filed July 8, 2021) at 8-21; Columbia County Residents' Reply in Support of Motion for Summary Judgment (filed July 15, 2021) at 4-11. The

Attorney General also appeared as an interested party, asserting that the SASO should be declared invalid as inconsistent with Oregon law. ER 55-57. She also moved for summary judgment on that basis. *See, e.g.*, The Attorney General’s Motion for Summary Judgment (filed June 24, 2021) at 2-9 (so arguing).

B. Standard of Review

This court reviews a trial court’s judgment on a validation proceeding *de novo*. *Bd. of Klamath Cty. Comm’rs*, 148 Or App at 53.

ARGUMENT ON SECOND ASSIGNMENT OF ERROR

The SASO is inconsistent with, and preempted by, Oregon and federal law. It should have been enjoined from going into effect by the trial court. However, the trial court improperly declined to deliver the “judicial examination and judgment” sought by Columbia County when it filed the case (and the interested parties when they joined the case). ORS 33.170(2). This court should now provide that “examination and judgment,” declare the SASO invalid and direct the trial court to permanently enjoin the SASO’s operation.

A. The Court of Appeals Should Reach the Merits.

Because the validation proceeding raises a justiciable controversy, the trial court erred by failing to address the underlying issue, the legality of the SASO. The Columbia County Residents respectfully submit that the Court of Appeals should address that issue now, rather than remanding this case to the

trial court for further proceedings on the merits. A determination of the legality and validity of the SASO would be consistent with the applicable law regarding validation proceedings, constitute the most efficient use of court and party resources, provide needed guidance to other jurisdictions in the state that are considering or have passed similar ordinances, and more quickly restore public safety protections to the residents of Columbia County.

This court unequivocally has authority to reach the merits. Under ORS 33.720(4), on appeal from a judgment rendered in a validation proceeding:

“The court, in inquiring into the regularity, legality or correctness of any proceeding of the municipal corporation or its governing body shall disregard any error, irregularity or omission which does not affect the substantial rights of the parties to the special proceeding, and may approve the proceedings in part and may disapprove and declare illegal or invalid in part other or subsequent proceedings, or may approve or disapprove the proceedings, or may approve the proceedings in part and disapprove the remainder thereof.”

The statute provides the Court of Appeals with extensive authority on review.

Moreover, by not explicitly providing for remand on the merits following appellate review, the statute strongly implies that the reviewing court should resolve the substantive issues regardless of “any error, irregularity or omission” in the proceedings below.

The inference that the court should reach the merits is further reinforced by ORS 33.720(6). That subsection gives any final appellate judgment broad preclusive effect. *See* ORS 33.720(6) (providing that “claim preclusion and

issue preclusion apply to all matters adjudicated in the proceeding” and the judgment “is binding on the parties *and all other persons*”) (emphasis added). The only reasonable inference is that the appellate courts should provide a binding, conclusive determination.

It would be a significantly more efficient use of judicial and party resources if the court were to reach the merits here. The issues were fully briefed below by all parties on cross-motions for summary judgment. There are no significant factual disputes and no additional factual issues to be developed. The case raises only questions of law. Gun safety legislation, and the obligation of local governments to comply with state and federal laws, are issues about which people have strong feelings, and issues that draw the interest and participation of local and national advocacy groups. Given the strong commitment and engagement of the public and advocacy organizations in this case, if it were remanded to the trial court for a determination on the merits, that determination almost certainly would be appealed. Finally, because this court’s review is *de novo*, the court ultimately will make its determination anew, without deference to any decision from the trial court. This court has determined that it should reach the merits under similar circumstances, after reversing a dismissal on procedural grounds. *See, e.g., Cascadia Wildlands v. Or. Dept. of State Lands*, 293 Or App 127, 139, 427 P3d 1091 (2018), *aff’d*, 365 Or 750 (2019). The merits of the SASO eventually will be decided by the

Oregon appellate courts. It would be most efficient for all involved in this case if that decision came now, rather than have the issue bounce between the trial and appellate courts unnecessarily for years to come.

Resolution on the merits here also would provide needed, meaningful guidance. In the past year, at least three other Oregon counties have passed Second Amendment Sanctuary Ordinances similar to Columbia County's SASO. At the November 3, 2020 election, voters in Umatilla County approved Measure 30-145, a Second Amendment Sanctuary Ordinance.⁸ On April 1, 2021, Yamhill County enacted Ordinance No 913, a Second Amendment Sanctuary Ordinance, which became effective on June 30, 2021.⁹ Similarly, on June 2, 2021, Harney County enacted Ordinance No 2021-01, a Second Amendment Sanctuary Ordinance.¹⁰ All three ordinances are nearly identical to

⁸See Summary Results Report, Umatilla County November 2020 General Election (Nov 19, 2020) at 18 (available at https://www.co.umatilla.or.us/fileadmin/user_upload/Elections/Results/14th_day_report_with_write_ins.pdf) (accessed Dec 20, 2021).

⁹Yamhill County Ordinance 913 is available on the Yamhill County website, at <https://www.co.yamhill.or.us/commissioners/ordinances/ORD913.PDF> (accessed Dec 20, 2021).

¹⁰Harney County Ordinance 2021-01 is available at https://www.co.harney.or.us/PDF_Files/County%20Court/public%20notices/2021/2021-01%20Declaring%20a%20Second%20Amendment%20Sanctuary%20in%20Harney%20County.pdf (accessed Dec 20, 2021). At the time of the filing of this brief, Harney County is in the process of repealing Ordinance No 2021-01 after being sued by the Attorney General. See Harney County Ordinance No 2021-04 (repealing Ordinance No 2021-001) (available at

Columbia County Measure 5-278 (2020) (which was incorporated into the SASO subsequently enacted by the Columbia County Board of Commissioners), except that the Yamhill County and Harney County ordinances apply only to laws that become effective after February 2021. Ordinance No 913, § 2.06; Ordinance No 2021-01, § 2.06. Currently, there is an untenable patchwork across the state, with vast areas of Oregon claiming “sanctuary” from valid, enforceable gun safety legislation. This court should take the opportunity, now, to provide clarity as to what local jurisdictions may, and may not, do.

Finally, a ruling from this court on the merits would protect the public. The trial court’s failure to prevent the SASO from going into effect poses a danger to the residents of Columbia County, as well as Oregonians who live outside Columbia County. The federal government and the Oregon Legislature enacted gun safety legislation out of concern for the health and well-being of the public at large, including residents of Columbia County. Yet, residents of Columbia County no longer receive benefit from the protections of those laws. Columbia County, as a result of a slim majority of the voters having cast their ballots in support of rejecting federal and state gun safety legislation, is now a

https://www.co.harney.or.us/PDF_Files/County%20Court/public%20notices/2021/SASO%20PLD%20Petition%20Files/Ordinance%202021-04.pdf (accessed Dec 20, 2021).

lawless county when it comes to gun safety. The longer the SASO remains in place, the greater the risk posed to the public.

B. The Second Amendment Sanctuary Ordinance Is Invalid and May Not Be Enforced.

The SASO is unconstitutional and invalid for a variety of reasons. It is implicitly preempted by a slew of state statutes it seeks to invalidate, and explicitly preempted by Oregon’s firearms preemption statute, ORS 166.170. It also is preempted by federal law pursuant to the Supremacy Clause of the United States Constitution. Finally, because it is outside of the scope of the County’s powers to enact (or its voters to pass) such a law, the SASO does not address “matters of county concern.”

1. The SASO Is Preempted by Oregon Law.

Local ordinances which are preempted by state law are unconstitutional. *City of Corvallis v. Pi Kappa Phi*, 293 Or App 319, 331, 428 P3d 905 (2018); *Allison v. Washington Cty.*, 24 Or App 571, 581, 548 P2d 188 (1976) (“General grants of power to counties convey exactly that broad grant articulated therein, except that which is preempted by state law.”); *see also* ORS 203.060 (“Ordinances adopted under ORS 203.030 to 203.075 shall be subject to judicial review and invalidation on account of unreasonableness, procedural error in adoption, or conflict with paramount state law or constitutional provision.”). As the Oregon Supreme Court explained in *City of La Grande v. Public Employees Retirement Board*, 281 Or 137, 148, 576 P2d 1204, *on reh’g*,

284 Or 173, 586 P2d 765 (1978), “when a local enactment is found incompatible with a state law in an area of substantive law, the state law will displace the local rule.” A local enactment is incompatible with state law if “the two cannot operate concurrently or [] the legislature intended the state law to be exclusive.” *State v. Tyler*, 168 Or App 600, 603-04, 7 P3d 624 (2000); *see also AT&T Commc’ns of the Pac. Nw., Inc. v. City of Eugene*, 177 Or App 379, 395, 35 P3d 1029 (2001), *rev den*, 334 Or 491 (2002) (“[L]ocal government authority may be preempted in either of two ways: It may be preempted expressly, or it may be preempted implicitly, by virtue of the fact that it cannot operate concurrently with state or federal law.”); *Ashland Drilling, Inc. v. Jackson Cty.*, 168 Or App 624, 634, 4 P3d 748, *rev den*, 331 Or 429 (2000) (local county enactments are invalid if the “local regulation conflicts with state law or is clearly intended to be preempted”).

a. The SASO Is Implicitly Preempted by Oregon Law.

The SASO is implicitly preempted because it purports to invalidate numerous state laws and punish local enforcement of those laws. The very purpose of the SASO is to conflict with state law. *See, e.g.*, SASO, § 4(A) (ER 38-39) (declaring all state laws regulating firearms, firearm accessories and ammunition “extraterritorial acts” that “shall be treated as null, void and of no effect in Columbia County, Oregon”). The SASO cannot operate concurrently

with the very laws it declares invalid. Rather, the operation of the SASO, by its very nature, “makes it impossible to comply with” numerous state statutes.

Thunderbird Mobile Club, LLC v. City of Wilsonville, 234 Or App 457, 474, 228 P3d 650, *rev den*, 348 Or 524 (2010).

The SASO prohibits any “agent, employee, or official of Columbia County * * * while acting in their official capacity” from “[k]nowingly and willingly, participat[ing] in any way in the enforcement of any Extraterritorial Act, as defined herein.” SASO § 2(A)(1) (ER 37). The expansive definition of “Extraterritorial Act” – basically any federal, state or local law that implicates firearms, firearm accessories or ammunition – is broad enough to encompass numerous state laws. SASO § 4(A) (ER 38-39). A non-exhaustive discussion of some of those laws follows.

The SASO is inconsistent with ORS 166.435, Oregon’s firearms background check statute. That statute requires a background check for most private gun sales before a transferor who is not a gun dealer or licensed manufacturer may transfer a firearm to a potential purchaser. If such a transferor sells a firearm without conducting a background check through a licensed gun dealer, they commit a crime. ORS 166.435(5)(a)-(b). That provision was enacted in 2015. Or Laws 2015, ch 50. The background check statute, like all state criminal statutes, provides for enforcement by county law

enforcement. In fact, it is the statutory *duty* of the sheriff “to arrest and commit * * * all persons guilty of public offenses.” ORS 206.010.

The SASO prohibits any county agent, employee or official from enforcing ORS 166.435. The SASO includes in its definition of “void” Extraterritorial Acts any “background check requirement on firearms * * * beyond those customarily required at time of purchase prior to December, 2012.” SASO § 4(A)(4) (ER 38). The sheriff is a county officer. ORS 204.005. Accordingly, under the SASO, the sheriff is prohibited from enforcing the state background check law, including investigating or arresting a transferor who violated the statute by selling a firearm without a background check, even though the sheriff has an obligation to do so under state law. If the sheriff (or any other County official) followed or enforced state law, they would face fines and even a lawsuit for damages by the individual who violated state law.

Even more broadly, the SASO prohibits the sheriff or any other Columbia County official from utilizing any assets of the County “in whole or in part, to engage in activity that aids in the enforcement or investigation related to personal firearms, firearm accessories or ammunition.” SASO, § 2(A)(2) (ER 37). Given that section 2(A)(2) is not limited to Extraterritorial Acts, county officials cannot use county assets to investigate *anything* related to firearms. Under the plain wording of section 2(A)(2), it appears that Columbia

County officials could not even use county assets to investigate an active shooting, if the shooting involved “personal firearms, firearm accessories or ammunition,” as such situations invariably do. *Id.* This conflicts with several state statutes that forbid the shooting of others. *See, e.g.*, ORS 166.220 (unlawful use of weapon); 166.190 (pointing firearm at another).

The SASO also conflicts with multiple provisions of the Cindy Yuille and Steve Forsyth Act, passed by the Oregon Legislature in 2021. Or Laws, 2021, ch 146. The act is named in memory of two people killed at a horrific mass shooting at Clackamas Town Center by an assailant with a stolen assault weapon. It is the most significant piece of gun safety legislation enacted in Oregon in years. The act mandates safe storage and transfer of firearms, and adult supervision of a minor’s use of a firearm. Or Laws 2021, ch 146, §§ 3, 4, 6. It requires any person who loses a firearm, or has a firearm stolen, to report the loss or theft to “a law enforcement agency in the jurisdiction in which the loss or theft occurred.” *Id.*, § 5(1). The local law enforcement agency must then report the lost or stolen firearm into a state-approved database. *Id.*, § 5(3). The act also allows local community colleges and schools to prohibit concealed handguns on school property. *Id.*, § 8(1).

The SASO is preempted by the Cindy Yuille and Steve Forsythe Act in numerous ways. The SASO prohibits county officers from “[a]ny registering or tracking of firearms, firearm accessories, or ammunition,” directly contravening

the act's mandate that local law enforcement – in Columbia County, the sheriff's office – receive and enter reports of any lost or stolen guns. SASO, § 4(A)(2) (ER 38); Or Laws, 2021, § 5(b). In addition, the SASO prohibits county law enforcement from enforcing a concealed handgun restriction adopted by a local community college or school district pursuant to the act, or possibly even responding to a threat on any such campus involving use of a handgun. SASO, § 4(A)(9) (ER 39) (including within the definition of "Extraterritorial Act" any restrictions "prohibiting the possession of open carry or concealed carry, or the transport of lawfully acquired firearms"). The SASO similarly prevents Columbia County law enforcement or any person working for Columbia County from taking a report of (or responding to) any allegation of an improperly stored or transferred handgun. *See* SASO, § 2(B) (ER 37) (stating that "within Columbia County" "any person" may "freely manufacture, transfer, sell and buy firearms, firearm accessories and ammunition"). That is flatly inconsistent with the objectives and purposes of the Cindy Yuille and Steve Forsythe Act. Columbia County cannot make itself a sanctuary from that law and cannot shield Columbia County residents from prosecution for violating that law.

The penalty and private right of action provisions of the SASO are equally problematic. First, those provisions are inconsistent with the Oregon Tort Claims Act, ORS 30.260 to ORS 30.300 (the "OTCA"). The SASO

creates a private right of action brought against a county employee, official, or agent for alleged violations of the SASO. SASO, § 6 (ER 40). However, the OTCA is “[t]he sole cause of action for a tort committed by officers, employees or agents of a public body acting within the scope of their employment or duties * * *.” ORS 30.265(2). The remedy provided in the OTCA

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

ORS 30.265(2) (emphasis added). County employees enforcing state laws they are sworn to uphold clearly falls within the scope of those employees’ employment or duties. The inclusion of the private right of action in the SASO directly conflicts with the OTCA and accordingly, is preempted by the OTCA.

The SASO also removes sovereign immunity as a defense in any private right of action for violation of the SASO brought against a public official. SASO, § 6(C) (ER 40). However, the OTCA extends immunity to “officers, employees and agents acting within the scope of their employment or duties” for, among other things, “[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 abused.” ORS 30.265(5)(c). Because the legislature has granted immunity to county officers, employees and agents, Columbia County is preempted from further regulating the scope of that immunity.

The foregoing discussion highlights just a handful of Oregon laws that implicitly preempt the SASO. The SASO conflicts with at least 30 firearms-related laws throughout Oregon statutes. These include prohibitions on concealed carry without a license and possession of firearms by felons or persons adjudicated mentally unfit to have a firearm, as well as various location restrictions on firearms, such as carrying firearms in county courthouses, hospitals and schools. ORS 166.250; ORS 166.370.¹¹ Enforcement of any of these laws would run afoul of the SASO and expose Columbia County officials, including law enforcement, to liability.

A slew of state laws implicitly preempt the SASO. The SASO cannot “operate concurrently” with the state laws it declares void. *AT&T Commc’ns*, 177 Or App at 395. For that reason, the SASO is invalid and unconstitutional.

b. The SASO Is Expressly Preempted by Oregon’s Firearms Preemption Statute.

The SASO also is expressly preempted by state law. ORS 166.170 (the “Firearms Preemption Statute”), provides:

“(1) Except as expressly authorized by state statute, the authority to regulate in any matter whatsoever the sale, acquisition, transfer,

¹¹A list of firearms-related statutes that implicitly preempt the SASO was included with the Columbia County Residents’ Motion for Summary Judgment (filed June 24, 2021), as Table A. A list of 17 additional non-firearms related statutes that implicitly preempt the SASO was included with that motion as Table B.

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.”

The SASO regulates the sale, transfer, ownership and possession of firearms by purporting to set the boundaries in Columbia County of what behavior is legal and what is unlawful. For example, the SASO purports to invalidate “[a]ny prohibitions, regulations, and/or use restrictions related to ownership of non-fully automatic firearms.” SASO, § 4(A)(7) (ER 38-39). The SASO also seeks to nullify and abrogate Oregon gun safety laws. It prohibits the enforcement of “Extraterritorial Acts,” including state legislation relating to firearms, firearms accessories and ammunition. SASO, § 2(A)(1) (ER 37). It declares all state firearms regulations “null, void and of no effect in Columbia County.” SASO, § 4(A) (ER 38). And it establishes Columbia County as a lawless jurisdiction, where any person within Columbia County’s borders may “freely manufacture, transfer, buy and sell firearms, firearm accessories and ammunition” without regard to state law. SASO, § 2(B) (ER 37).

Such provisions unequivocally regulate firearm usage and ownership in Columbia County. The Firearms Preemption Statute is explicit that attempts at

such regulation are “clearly intended to be preempted” by the legislature. *Ashland Drilling, Inc.*, 168 Or App at 634. *See also Or. Firearms Found. v. Bd. of Higher Educ.*, 245 Or App 713, 719, 264 P3d 160 (2011) (striking down State Board of Higher Education’s prohibition on possession of firearms on university campuses as preempted). The SASO is explicitly preempted by the Firearms Preemption Statute. It is invalid for that reason as well.

2. The SASO Is Preempted by Federal Law.

The SASO also is preempted by federal law. Pursuant to the Supremacy Clause of the United States Constitution, Columbia County cannot contravene federal law. *See City of La Grande*, 281 Or at 143 (“[T]he validity of local action depends * * * on whether it contravenes state or federal law”); *AT&T Commc’ns*, 177 Or App at 401 (“The Supremacy Clause of the United States Constitution, Article VI, clause 2, invalidates state or local laws interfering with, and being contrary to, federal law.”). The SASO does exactly that.

“[F]undamentally, a municipality is merely a political subdivision of the State from which its authority derives.” *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) (quoting *United Building & Constr. Trades v. Mayor*, 465 US 208, 215 (1984)). Therefore, “what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State.” *Kramer*, 365 Or

at 449 (quoting *United Building*, 465 US at 215). In other words, local ordinances cannot contravene federal law. *See Burbank v. Lockheed Air Terminal, Inc.*, 411 US 624, 625 (1973) (city's ordinance which made it unlawful for jet aircraft to take off from local airport during certain hours was preempted by the Federal Aviation Act pursuant to the Supremacy Clause).

As it does with Oregon laws, the SASO directly conflicts with multiple federal firearms statutes meant to protect the public and law enforcement. Again, that is its intended purpose. For example, federal law prohibits the possession of a firearm by a person with a previous conviction of a misdemeanor crime of domestic violence. 18 USC § 922(g)(9). Yet the SASO prohibits county officials from participating in any way in the enforcement of “[a]ny Extraterritorial Act forbidding the possession * * * of any firearm, firearm accessory, or ammunition by citizens of the legal age of eighteen and over.” SASO § 4(A)(5) (ER 38). This is but one of several federal laws Congress enacted to ensure the safety of the public that the SASO invalidates. *See, e.g.*, 18 USC § 922(g)(3) & (8) (prohibiting possession of firearms by persons addicted to controlled substances and individuals subject to intimate partner restraining orders); 18 USC § 922(i) and (j) (prohibiting sale or possession of stolen firearms); 18 USC § 922(k) (prohibiting possession of firearms with obliterated serial numbers); 18 USC § 922(a)(8) (prohibiting sale

of armor-piercing ammunition).¹² The SASO effectively would prevent local law enforcement from investigating any action that could implicate federal law – such as possession of a firearm by a person with a misdemeanor domestic violence conviction or the sale of armor piercing bullets – and subject local law enforcement to liability if they do so.

Because the SASO conflicts with federal law, it is preempted. “Under the Supremacy Clause, a local law is nullified to the extent that it actually conflicts with federal law by standing as an obstacle to the accomplishment and execution of the full purposes of Congress.” *City of Auburn v. Qwest Corp.*, 260 F3d 1160, 1180 (9th Cir 2001), *overruled on other grounds by Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F3d 571 (9th Cir 2008). The SASO is clearly intended to stand as an obstacle to the enforcement of federal firearms and gun safety laws. That is made explicit in the ordinance’s findings. *See, e.g.*, SASO, § 1(K) (ER 37) (“[l]ocal governments have the legal authority to refuse to cooperate with state and federal firearm laws * * *”). That intent to frustrate federal laws is accomplished through the SASO’s declaration that all federal laws regulating firearms, firearm accessories and ammunition are “null, void and of no effect in Columbia County, Oregon.” SASO, § 4(A) (ER 38). It

¹²A list of federal laws that preempt the SASO was attached to the Columbia County Residents’ Motion for Summary Judgment (filed June 24, 2021), as Table C.

is further effected by the ordinance's restriction on using any resources to enforce federal firearms laws, and the creation of penalties and private rights of action (with waiver of sovereign immunity) for violations. *Id.*, §§ 2(A)(1), 4, 5, 6 (ER 37-40). Because the SASO runs afoul of the Supremacy Clause, it is unconstitutional, preempted and invalid.

3. The SASO Does Not Address “Matters of County Concern.”

The SASO is not a proper exercise of county lawmaking authority, because it does not address or involve matters of county concern. It is established law that “the validity of local action depends, first, on whether it is authorized by the local charter or by a statute, * * * second, on whether it contravenes state or federal law.” *City of La Grande*, 281 Or at 142. Columbia County is a general law county. The County's power to enact ordinances is derived from ORS 203.035, which allows counties authority “over matters of county concern.” *See Allison*, 24 Or App at 581 (“General law counties derive their legislative power from specific statutory grants and from the broad general statutory grant in ORS 203.035 of authority ‘over matters of county concern.’”). When state law has preempted a county's authority to legislate or regulate a particular matter, the matter is not a “matter of county concern.” *Id.* at 581.

As is discussed above, the SASO is preempted by state law and federal law. Accordingly, it is not a matter of county concern, and is invalid and unconstitutional for that additional reason.

4. The SASO is Inseverable.

The illegal, unenforceable and unconstitutional provisions of the SASO render the SASO invalid in its entirety. ORS 174.040 describes when a statute should be considered severable or inseverable:

“It shall be considered that it is the legislative intent, in the enactment of any statute, that if any part of the statute is held unconstitutional, the remaining parts shall remain in force unless:

“(1) The statute provides otherwise;

“(2) The remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the remaining parts would not have been enacted without the unconstitutional part; or

“(3) The remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the legislative intent.”

ORS 174.040 applies to ordinances. *City of Portland v. Dollarhide*, 300 Or 490, 504, 714 P2d 220 (1986).

The SASO is inseverable for two reasons. First, the SASO was improperly adopted because it is preempted by state and law and does not address “matters of county concern.” An improperly adopted ordinance is wholly invalid and the severability analysis does not apply. *See Lane Transit Dist. v. Lane Cty.*, 327 Or 161, 169-70, 957 P2d 1217 (1998) (where an

ordinance “suffers from a defect that makes the very act of submitting it to a vote legally inappropriate,” severability is of no import). A severability clause in an improperly adopted measure or ordinance cannot save the legislation. *See Lane Transit Dist.*, 327 Or at 170 (“Here * * * the proposed initiative measure suffers from a defect that makes the very act of submitting it to a vote legally inappropriate. The severability clause thus is inapplicable.”). Accordingly, the severability clause in the SASO does not save it.

Second, the “statutory presumption of severability” only applies “to statutes that contain an ‘unconstitutional part’ and ‘remaining parts.’” *State v. Borowski*, 231 Or App 511, 526, 220 P3d 100 (2009). “[A]t bottom, whether an unconstitutional legislative provision should be severed is a matter of the legislative intent of the enacting body.” *Clear Channel Outdoor, Inc. v. City of Portland*, 243 Or App 133, 147, 262 P3d 782 (2011); *see Borowski*, 231 Or App at 526 (where a “critical component” of a statute violated the Equal Protection Clause, determining severability “rest[s] on a determination of which option the legislature that enacted the statute would have preferred.”).

Here, Columbia County made clear that its legislative intent was to enact an ordinance that directly conflicts with state and federal law. The SASO is rooted in the premise that “[l]ocal governments have the legal authority to refuse to cooperate with state and federal firearm laws that violate those rights and to proclaim a Second Amendment sanctuary for law[-]abiding citizens in

their cities and counties.” SASO, § 1(K) (ER 37). The SASO goes on to declare all state and federal laws that regulate firearms, firearm accessories and ammunition “null, void and of no effect in Columbia County.” SASO, § 4(A) (ER 38). This defiance is underscored in the operative provisions in the SASO, which prohibit Columbia County agents, employees, and officials from enforcing “Extraterritorial Acts” or using county assets “to engage in any activity that aids in the enforcement or investigation relating to personal firearms, firearm accessories, or ammunition.” SASO, § 2(A) (ER 37). The unconstitutional purpose is further emphasized by the SASO’s explicit statement that any person in Columbia County may “manufacture, transfer, buy and sell firearms, firearm accessories and ammunition” regardless of state and federal laws restricting or prohibiting such conduct. SASO, § 2(B) (ER 37). Given that entire SASO conforms to and incorporates this unconstitutional intent, there is no plausible way to sever this unconstitutional intent from the underlying legislation.

CONCLUSION

The trial court erred by dismissing the validation proceeding as nonjusticiable. The Columbia County Second Amendment Sanctuary Ordinance is inconsistent with, and preempted by, Oregon and federal law. The court should vacate the trial court’s judgment of dismissal, declare that the SASO is invalid and unconstitutional, and must be enjoined from enforcement,

and remand to the trial court for entry of a judgment in the Columbia County Residents' favor.

DATED this 21st day of December, 2021.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

By: s/ Steven C. Berman
Steven C. Berman, OSB No. 951769
Lydia Anderson-Dana, OSB No. 166167

209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600
Facsimile: (503) 227-6840
Email: sberman@stollberne.com
landersondana@stollberne.com

and

Len Kamdang (*pro hac vice* admission)
Mark Weiner (*pro hac vice* admission)
EVERYTOWN LAW
450 Lexington Avenue
P.O. Box 4184
New York, NY 10017
Telephone: 646-324-8115
Email: lkamdang@everytown.org
mweiner@everytown.org

*Attorneys for Interested Parties Appellants-
Respondents Robert Pile, Shana Cavanaugh,
Brandee Dudzic, and Joe Lewis*

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DATED this 21st day of December, 2021.

STOLL STOLL BERNE LOKTING &
SHLACHTER P.C.

By: s/ Steven C. Berman
Steven C. Berman, OSB No. 951769
Lydia Anderson-Dana, OSB No. 166167

209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone:(503) 227-1600
Facsimile: (503) 227-6840
Email: sberman@stollberne.com
landersondana@stollberne.com

and

Len Kamdang (*pro hac vice* admission)
Mark Weiner (*pro hac vice* admission)
EVERYTOWN LAW
450 Lexington Avenue
P.O. Box 4184
New York, NY 10017
Telephone: 646-324-8115
Email: lkamdang@everytown.org
mweiner@everytown.org

*Attorneys for Interested Parties Appellants-
Respondents Robert Pile, Shana Cavanaugh,
Brandee Dudzic, and Joe Lewis*